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THE  
**LAW JOURNAL REPORTS**

FOR  
THE YEAR 1848:

COMPRISING  
**REPORTS OF CASES**

IN THE COURTS OF  
**Chancery and Bankruptcy, Queen's Bench and the Bail Court,  
Common Pleas,**

*(Including Cases on APPEAL from the Decisions of Revising Barristers,)*

**Exchequer of Pleas, and Exchequer Chamber,**

FROM  
MICHAELMAS TERM 1847, TO TRINITY TERM 1848,  
BOTH INCLUSIVE;

ALSO  
*Notes of Judgments in the HOUSE of LORDS, during that Period; and a separate  
arrangement of Cases relating to the DUTIES OF MAGISTRATES, including  
CROWN CASES RESERVED.*

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EDITED BY MONTAGU CHAMBERS, OF LINCOLN'S INN, Esq.,  
ONE OF HER MAJESTY'S COUNSEL.

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MDCCCXLVIII.





**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**

**IN THE**  
**Court of Queen's Bench,**

**BY**  
**PHILIP BOCKETT BARLOW, Esq.**  
**AND**  
**HENRY JOHN HODGSON, Esq. BARRISTERS-AT-LAW.**

**AND IN THE**  
**Bail Court and Exchequer Chamber,**

**BY**  
**DAVID POWER, Esq. AND EDWARD WISE, Esq.**  
**BARRISTERS-AT-LAW.**

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**11 & 12 VICTORIÆ.**

<b>MICHAELMAS TERM . . . . .</b>	<b>1</b>
<b>HILARY TERM . . . . .</b>	<b>94</b>
<b>EASTER TERM . . . . .</b>	<b>170</b>
<b>TRINITY TERM . . . . .</b>	<b>220</b>



# CASES ARGUED AND DETERMINED

IN THE

## Court of Queen's Bench.

MICHAELMAS TERM, 11 VICTORIÆ.

1847. }  
Nov. 3. } TEW v. HARRIS.

*Agreement—Construction—Nomination of Referee—Condition Precedent.*

*Where by the terms of an agreement, dated the 25th of May, the defendant agreed to purchase certain growing crops of the plaintiff, the price to be paid on the 5th of June, the valuation to be made by the 3rd of June by two persons, one named by each party by the 31st of May; and in case either party neglected or refused to nominate a referee within the time appointed, the referee of the other party alone to make a final decision:—Held, that the word "nominate" meant not only the choice of a referee, but the communication of the appointment to the other party; and that an appointment by the plaintiff of a referee on the 31st of May, and communication of that appointment to the defendant by letter, which reached him on the 1st of June, did not entitle the plaintiff to proceed ex parte within the meaning of the agreement.*

*Assumpsit on the following memorandum of agreement, dated the 25th of May 1847, between W. Tew and J. W. Harris:—"The said W. T. agrees to sell and the said J. W. H. agrees to purchase, at a valuation to be made as hereinafter mentioned, the crops in and upon a piece of garden ground, situate, &c., the price to be paid on the*

*5th of June next; the valuation to be made by two persons, one named by each party, and if they disagree, then by a third person to be named by them before entering upon the reference or valuation. It is agreed that such valuation shall be made by the 3rd day of June next, and that each party shall by the 31st day of May inst. appoint a referee; and in case either party neglects or refuses to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. In case either party, or the referee of either party, shall neglect or omit to attend any reference, after notice in writing given to or left at the last place of abode of such party or referee, then the party or referee attending shall enter on the reference ex parte, and make a final decision."*

The first count of the declaration, after setting out the agreement and mutual promises, averred that the plaintiff within the time in that behalf appointed, viz. on the 31st of May, nominated and appointed J. Cowdery to be his referee, and then and within a reasonable time gave due notice to the defendant of such appointment and nomination; and then averred that no appointment or nomination by the defendant of any person as referee on behalf of the defendant, according to the said agreement, whereof the plaintiff had any notice, was within the time so in that behalf appointed made; and thereupon he, the plaintiff, on





1847. }  
Nov. 18. } CARRUTHERS v. WEST.

*Bill of Exchange—Acceptor—Overdue Bill—Notice to Indorsee.*

*To a declaration on a bill of exchange, drawn by A. on, and accepted by the defendant, payable to A.'s order, and by A. indorsed to B, and by B. to the plaintiff, the defendant pleaded that he accepted the bill for the accommodation of A. and B, and without consideration, &c., and on the terms that it should not be negotiated after it was due, and that it was indorsed to the plaintiff after it was due, without the defendant's privity:—Held, that the plea was ill.*

The declaration stated, that one John Sewell, on the 13th of September 1845, made his bill of exchange, in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said J. Sewell, 30*l.* value received, two months after date, &c.; and defendant then accepted the said bill, and the said J. Sewell then indorsed the same to one George Barclay, who then indorsed the same to the plaintiff, of all which the defendant then had notice, and then promised the plaintiff to pay him the amount, &c.

Plea—That the defendant accepted the said bill at the request and for the accommodation of the said J. Sewell and G. Barclay, and without any value or consideration, and there never was any value or consideration for the said indorsement to the said G. Barclay. Second, that the defendant accepted the said bill at the request and for the accommodation of the said J. Sewell and the said G. Barclay, and without any value or consideration whatever, and there never was any value or consideration for the said acceptance by the defendant, and the defendant so accepted the same upon the terms and conditions that the same might be indorsed and negotiated for the accommodation and use of the said J. Sewell and the said G. Barclay, only before the same became due and payable, and not afterwards; and defendant further says, that the said bill was indorsed to the plaintiff without the consent, privity, or default of the defendant, after the same became due and payable, and not before

that time; and that plaintiff did not become the holder of the said bill, or entitled to the same, or to any interest or property therein, until after it so became due and payable as aforesaid. Verification.

At the Summer Assizes, 1846, the jury having found a verdict for the plaintiff on the first issue, and for the defendant on the second, a rule nisi having been subsequently obtained for judgment for the plaintiff on the said issue, *non obstante veredicto*,—

*Willes* shewed cause.—Though the plaintiff may have received the bill for a person to whom it had been passed by G. Barclay after it was due, yet the plea cannot be considered bad in point of law. A party who takes a bill after it is due gets no better title than the person who pays it to him: it is true that the mere fact of the bill being an accommodation bill will not alter the right of the plaintiff if he is to be taken as a holder for value—*Sturtevant v. Fords* (1); but here there is an agreement, to which Barclay is a party, to restrain the negotiability of the bill. And the declaration shews that the plaintiff derived his title from Barclay, who could not have sued on the bill. Want of notice of the agreement, on the part of the plaintiff, should have been replied.

*Ring*, contra.—It is admitted that the plaintiff must be taken as being a holder for value; and the question is, whether the condition introduced into the second plea will deprive him of his remedy? The mere circumstance of the bill being indorsed after it was due, would not be an answer to the action, the plaintiff having given value for the bill—*Callow v. Lawrence* (2), *Hubbard v. Jackson* (3), *Chalmers v. Lanion* (4). The plea, though it states that there was an agreement that the bill should not be negotiated after it was due, does not shew any circumstance that fixes the plaintiff with notice of this—*Burrough v. Moss* (5), *White v. Walker* (6). An indorsee for value has no means of knowing any collateral circumstance to prevent the negotiability of the bill.

(1) 4 Man. & Gr. 101; s.c. 11 Law J. Rep. (N.s.) C.P. 245.

(2) 3 Mau. & Selw. 95.

(3) 4 Bing. 390; s.c. 6 Law J. Rep. C.P. 4.

(4) 1 Campb. 383.

(5) 10 B. & C. 558; s.c. 8 Law J. Rep. K.B. 287.

(6) 12 Law J. Rep. (N.s.) Exch. 28.

[WIGHTMAN, J.—The plea seems to me to be consistent with this state of facts, namely, that the plaintiff might have had the bill indorsed to him by a party who had a good title at the time he took it.]

*Charles v. Marsden* (7) and *Stein v. Iglesias* (8) shew that knowledge by the plaintiff of the circumstances which prevent the negotiability of the bill should be alleged. (He was then stopped.)

*Per Curiam*.—We think the plea bad.

*Rule absolute.*

1847. }  
Nov. 18. } BOWEN v. OWEN.

*Tender—Condition—Evidence.*

*Plaintiff being tenant to defendant at the yearly rent of 52l. sent a person to him with the following letter:—"I have sent by the bearer 26l. 5s. 7½d. to settle one year's rent. The defendant refused to take it, saying that more was due. No question was left to the jury:—Held, that the tender was sufficient.*

*Replevin. Avowry for 82l. 2s. 6d. parcel of 104l. for the rent due in respect of a farm, &c., called Nanty-foair, for the space of two years, ending the 29th of September 1845.*

*Plea, in bar, as to 55l. 10s. 4½d. parcel, &c., that no part of the said sum of 55l. 10s. 4½d. was in arrear, and as to the sum of 26l. 12s. 1½d. residue of the said rent alleged to be due, a tender.*

At the trial, before Rolfe, B., at the Summer Assizes for Caermarthenshire, 1846, the plaintiff, in order to prove the tender, called Thomas Thomas, who proved that he called on the defendant on the 8th of January 1846, with a letter which he received from the plaintiff, and delivered to the defendant, and which was as follows:—

"Dear Sir,—I have sent by the bearer, Thomas Thomas, 26l. 5s. 7½d. to settle one year's rent of Nanty-foair.

"Yours, &c., John Bowen."

(7) 1 Taunt. 224.

(8) 1 Cr. M. & R. 565; a. c. 4 Law J. Rep. (n.s.) Exch. 5.

The witness further stated, that he told the defendant that he had the 26l. 5s. 7½d. in his pocket ready to pay him, but the defendant refused to take it, saying, that more was due. The defendant objected that, according to the terms of the letter, a condition was imposed, namely, that the sum should be taken as paid in full for a year's rent, and would estop him from disputing that the remainder had been paid, and that what took place did not amount to a legal tender. The jury found that nothing was due beyond the sum tendered, and the learned Judge was of opinion that the plea of tender was not proved, and directed a verdict for the defendant on that plea, giving leave to the plaintiff to enter a verdict on that plea, if the Court should be of opinion that, as matter of law, the facts as proved supported the plea.

*Chilton* now shewed cause.—A tender should be of a precise sum, without any qualification or condition. Here, if the defendant had accepted the money, clogged with the condition that it was to be taken as all that was due for a year's rent, he would have been excluded from shewing that the remainder of the year's rent, which was admitted to be 52l., had not been paid—*Eckstein v. Reynolds* (1). This is not like *Read v. Goldring* (2), where the tender was made unconditionally, and the only question was as to the extent of the agent's authority. The plaintiff might have insisted on the question being left to the jury—*Marsden v. Goode* (3). The Court must look at the written instrument, which imposes a condition—*Evans v. Judkins* (4), *Lord Hastings v. Thorley* (5), *Sutton v. Hawkins* (6), *Cheminant v. Thornton* (7), *Peacock v. Dickerson* (8).

*Watson* (*Lush* was with him), contra.—It was not said, either in the letter or by the witness, that the defendant was not to be paid the sum tendered, unless he would

(1) 7 Ad. & El. 80; a. c. 6 Law J. Rep. (n.s.) K.B. 198.

(2) 2 Mau. & Selw. 86.

(3) 2 Car. & Kir. 133.

(4) 4 Campb. 156.

(5) 8 Car. & Pay. 573.

(6) Ibid. 259.

(7) 2 Ibid. 50.

(8) Ibid. 51, n.



receive it in full satisfaction. The money is offered, but the defendant refuses to take it, because he contends that there is more due—that occurs in almost every case of tender.

[COLERIDGE, J.—It must be taken that the tender is made in the terms contained in the letter, which was for the Judge to construe.]

The Judge was wrong in holding that the letter imposed a condition.

[WIGHTMAN, J.—Suppose when the letter was delivered, the money mentioned in it had been offered, and the defendant had said, I will take the money, but I will not take it for more than half a year's rent, and had, in fact, kept the money.]

It was perfectly open to do so; he may take the money, and repudiate the condition. If the person who goes with the money were upon this to refuse to hand it over, then, of course, it would be no tender. This case is like *Bull v. Parker* (9), where Wightman, J. decided, on the authority of *Henwood v. Oliver* (10), that the legal effect of a tender was not defeated by its being expressly made, "in full discharge of the account" sent by the plaintiff.

[WIGHTMAN, J.—In *Bull v. Parker* I certainly had an impression at first that the tender was not complete.]

That case cannot be distinguished from the present. (He was then stopped.)

LORD DENMAN, C.J.—We all agree. We think that a person who goes to make a tender goes for the purpose of extinguishing a debt; and, where the money is offered, the party to whom it is offered may put it into his pocket, and that he ought to do so. The fact of his taking the money is no admission of itself that no more is due to him. If the party who goes to make the tender says, "I won't pay you unless you give me a receipt in full," that would be no tender at all; but in this case nothing of that sort occurred. I think that the view taken by the learned Judge at the trial was not in conformity with the two cases lately decided, which have been referred to,

(9) 2 Dowl. N.S. 345; s.c. 12 Law J. Rep. (N.S.) Q.B. 93.

(10) 1 Q.B. Rep. 409; s.c. 10 Law J. Rep. (N.S.) K.B. 158.

and the distinction suggested would only give rise to a lawsuit in every case.

COLERIDGE, J.—I am of the same opinion. The only question is, whether the terms of the letter were such as to impose a condition on the party accepting the money accompanied by the letter. I think that no condition was imposed, and that the tender therefore, was good. I own, at the same time, that the case partakes of something of hardship, as the letter states that the amount offered is the full amount of a year's rent. My difficulty is, that this might go in any other proceedings to establish as against him an admission that the smaller sum was the amount of a year's rent.

WIGHTMAN, J.—I consider this as not being a conditional tender; and I can only give the same reason for my opinion as induced me to decide the case of *Bull v. Parker* in the Bail Court. I decided that case on the authority of *Henwood v. Oliver*, which, I think, was correctly decided, and was not in principle distinguishable from the case then before me or from the present. It is important to refer to the judgment of my Brother Patteson in that case; he says "The defendant who makes a tender always means that the amount tendered, though less than the plaintiff's bill, is all that he is entitled to demand in respect of it. How then would the plaintiff preclude himself from recovering more by accepting an offer of part accompanied by expressions which are implied in every tender? *Expressio eorum quæ tacite insunt nihil operatur*. If the defendant, when he paid the money, had called it part of the amount of the plaintiff's bill, he would thereby have admitted that more was due; and the effect of the tender would have been defeated."

ERLE, J.—I am of the same opinion. The party who tenders money has a right to exclude any presumption against himself that what he pays is not all that is due from him. If, indeed, he imposes a condition that the sum to be received is to be taken as all that is due, and that a general acquittance is to be given, then the tender is clogged with a condition which cannot legally be imposed.

*Rule absolute.*

1847. }  
Nov. 3, 16. } ABSOLON v. MARKS.

*Promissory Note*—3 & 4 Anne, c. 9.—  
*Uncertainty.*

*A note made by several persons payable to "our and each of our order," and indorsed by one of these persons, is a good promissory note within 3 & 4 Anne, c. 9.*

Assumpsit by indorsee against maker of a promissory note. The plea set out the note, which was as follows:—"Six months after date we jointly and severally promise to pay to *our and each of our order* the sum of 750*l.* for value received," [signed by the defendant and four other persons.] It then averred that the said note was made as well by defendant as the said persons in the said note named, who were real persons, and that the indorsement in the declaration mentioned was an indorsement in blank, and not a special indorsement or an indorsement in full, and was an indorsement by defendant alone.

The replication traversed that the indorsement was by defendant alone.

A verdict having been found for the plaintiff, on this issue, at the Summer Assizes for Kent, 1846,—

*Peacock* obtained a rule to arrest the judgment, on the ground that this was not a good promissory note within the statute 3 & 4 Anne, c. 9, against which—

*Crowder* and *Wordsworth* appeared to shew cause, and referred to *Wood v. Mytton* (1), as governing the present case; when the Court called upon

*Peacock*, in support of the rule.—There is a point in this case which did not arise in *Wood v. Mytton*. This note is uncertain, as it is made payable to the order of certain persons *and each of them*, so that any one of them might give a title by indorsement. Uncertainty in the payee vitiates a note. *Blanchenhagen v. Blundell* (2) is directly in point. There a note payable on the face of it to A. or B, or his or their order, was held not a good note within the statute, because it was not payable in certain either to A. or B; but the claim of either, or the indorser of either, might be defeated by payment

to the other, and that if it was not within the statute when issued, subsequent events could not make it so.

*Crowder* and *Wordsworth*, contra.—The principle of *Wood v. Mytton* clearly applies; and this became a good note when it was indorsed by the defendant: the previous ambiguity was then rendered certain. The construction must be, that the note is made payable to the order of us *or each of us*. In *Blanchenhagen v. Blundell* the note could only be made certain by the act of a stranger to the note in its inception, whereas here it may be done by one of the makers of the note.

*Cur. adv. vult.*

LORD DENMAN, C.J., on a subsequent day, delivered judgment.—This was an action on a promissory note, made by several persons (one of whom was the defendant), and purporting to be payable to the order of three several persons *and each of them*. One of these persons indorsed to the plaintiff. An objection was raised that this was not a good promissory note, on account of the uncertainty in the payee, which, it was said, was not cured by subsequent indorsement; and the case of *Blanchenhagen v. Blundell* was referred to. We paused for the purpose of considering that case, and we are of opinion that there is no uncertainty in this note, as the indorsement by one of the payees (which is found as a fact by the jury) has rendered it certain. There is, therefore, no ground for arresting the judgment.

*Rule discharged.*

1847. }  
Nov. 5, 8. } PADWICK v. TURNER.

*Pleading*—*Bill of Exchange*—*Days of Grace*—*F frivolous Demurrer*.

*A declaration by indorsee against acceptor of a bill of exchange, payable three months after date, "which period has elapsed;" alleged a promise by the defendant to pay according to the tenour and effect of the bill. Breach, that the defendant has disregarded his said promise, and has not paid the said sum, &c. A demurrer, that the declaration did not sufficiently shew that*

(4) 16 Law J. Rep. (N.S.) Q.B. 446.

(2) 2 B. & Ald. 417.

*the three days of grace had elapsed before action, was set aside as frivolous.*

Action by indorsee against acceptor of a bill of exchange.

The declaration stated that one P. made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to his order 71*l.*, three months after the date thereof, *which period has now elapsed*; and the defendant then accepted the said bill, and the said P. then indorsed the same to the plaintiff, of which the defendant had notice, and then promised the plaintiff to pay him the amount of the said bill, according to the tenour and effect thereof, and of his said acceptance. Yet the defendant hath disregarded his said promise, and hath not paid the said sum of money or any part thereof, &c.

Demurrer assigning for causes, that the declaration ought to allege that the defendant had not paid the bill when due, and also that the three days of grace had elapsed before the commencement of the action. An order setting aside this demurrer as frivolous had been made by Patteson, J., at chambers, who was of opinion that the days of grace were included in the three months alleged to have elapsed.

*Phipson* now moved for a rule to shew cause why the order of the learned Judge should not be rescinded.—The breach varies from the form given in Reg. Gen. Trin. term, 1 Will. 4, which is, that the defendant did not pay the bill *when due*; that imports that the bill was not paid after the lapse of the days of grace, which by the custom of merchants are superadded to the time limited for the currency of the bill as part of the contract.

[COLERIDGE, J.—The breach is, that the defendant disregarded his *said promise*, which is to pay according to the tenour and effect of the bill.]

[LORD DENMAN, C.J.—Surely the breach is, that the defendant did not pay at the time when according to the custom of merchants he was bound to pay.]

It is submitted, that on special demurrer this breach is not equivalent to that. The previous allegation "which period has now elapsed" does not exclude the supposition that the action was brought before the days

of grace had expired. In a case of *Flight v. Turner*, before Alderson, B., at chambers, a demurrer to a similar declaration was upheld. He referred to *Brown v. Harraden* (1).

*Cur. adv. vult.*

LORD DENMAN, C.J.—In this case there was a motion to rescind an order of my Brother Patteson, by which he set aside a demurrer as frivolous. We paused for the purpose of consulting him, and in consequence of a case, which was referred to as having been decided by Mr. Baron Alderson at chambers, and said to be on a similar point. My Brother Patteson does not waive in the opinion which he before held; and we cannot help thinking that the question decided by Mr. Baron Alderson was not the same as the present. However that may be, we concur in thinking this demurrer frivolous. We wish to add, that we are always very unwilling to interfere with the decision of a Judge in a case of this kind, when he has had all the circumstances brought before him, and has considered that the justice of the case required the demurrer to be set aside.

*Rule refused.*

1847. } THE QUEEN v. THE INHABITANTS OF LEEDS.  
Nov. 13. }

*Appeal—Prior Order of Removal—Quashing for Deficiency of Examination—Estoppel—Decision on the Merits—Evidence.*

*An order of removal from P. to L. was founded on examinations, which stated that the pauper rented a tenement of above 10*l.* for a year, and paid rent during his tenancy. On appeal, the Sessions confirmed this order, subject to a case on the point, whether the examinations were defective for not shewing that "the" rent was paid by the pauper. The case directed that if this Court should consider the objection to the examinations fatal, the order was to be quashed "for deficiency of the examination" whereon it was founded. The Court of Queen's Bench, after argument, quashed the order of Sessions and order of removal.*

(1) 4 Term Rep. 148.

On appeal against a subsequent order removing the same pauper from P. to L. upon the same settlement, the appellants objected that the respondents were estopped by the decision in the former case, (which was set out in the examinations,) and rested their objection upon production and proof of a copy of the record in the Crown Office, shewing that the former order had been quashed. The respondents did not offer any evidence to shew that the judgment did not proceed on the point of settlement. The Sessions held that the respondents were not estopped.

The appellants then tendered evidence to shew that the decision of the Court of Queen's Bench proceeded on the ground that the former examinations were insufficient in the point of shewing a settlement, which the Sessions held to be inadmissible (subject to the opinion of this Court); but it being admitted, that if this evidence could be received, the decision did proceed on that ground, they further asked, whether such a decision was conclusive:—Held, first, that the quashing of the prior order "for deficiency of the examinations" was equivalent to a general quashing, and that the respondents were not estopped by the former judgment, either party being at liberty to shew the grounds on which it proceeded.

Secondly, that evidence of the grounds of the decision of this Court was admissible.

Thirdly, that the decision in the former case was on a point of settlement, and conclusive.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 1.]

1847. } HARVEY, PUBLIC OFFICER, ETC.  
Nov. 11. } v. SCOTT, PUBLIC OFFICER, ETC.

*Joint Stock Banking Company—Execution against retired Members—Scire facias—7 Geo. 4. c. 46.—Return—Fraud—Limiting Execution.*

In order to issue a sci. fa. against retired shareholders in a joint-stock banking company under 7 Geo. 4. c. 46. s. 13, it is sufficient if reasonable and bona fide at  
New Series, XVII.—Q.B.

tempts have been made to obtain satisfaction from the existing shareholders; and it is not essential that executions should have been issued against every existing shareholder, if it appear probable that such executions would have been ineffectual.

Judgment was signed against the public officer of a banking company in an action brought on contracts entered into at various dates between August 1845 and January 1846. The name of B. appeared as a shareholder in a return made the 24th of March 1845 and in all subsequent returns up to September 1845, when it was omitted. It was stated that this last return was informal, and that it was believed B. was still a shareholder. No return of B.'s retirement was ever made:—Held, to be prima facie evidence that B. was a shareholder when the contracts were entered into.

The fact that B. was not then a shareholder may be pleaded to the sci. fa.

It is no answer to the application that there has been a fraudulent transfer of shares from a person who might have been proceeded against, but to which the plaintiff is not shewn to have been a party.

The plaintiff is not compelled to proceed against an insolvent shareholder, who is entitled in equity to reimbursement from other solvent persons.

If a sci. fa. issues against a person who was a shareholder when part only of the contracts recovered upon were entered into, the Court will limit the execution against him to the amount for which he is liable.

Judgment having been signed in an action of debt against the public officer by default for the nominal debt in the declaration, the Court will grant leave to issue a sci. fa. on that judgment against former shareholders upon an undertaking not to levy for more than is really due.

Rules had been obtained in Trinity term last, calling upon W. Pawson, John Brookes, John Ridley and John Cargill, and several others, to shew cause why writs of scire facias on the judgment obtained by the plaintiff in this cause should not be issued against them respectively, to enable the plaintiff to have execution upon the said judgment.

It appeared from the affidavits on which the rule was founded that the action, which

was in debt, had been brought, on the 3rd of February 1847, against the defendant, as public officer of the Newcastle-upon-Tyne Joint Stock Banking Company, to recover 33,550*l.*, due from that bank to the London and Westminster Bank, and that judgment was signed by default in that action for the nominal debt of 136,701*l.* and costs, on the 3rd of March following. The Newcastle Bank stopped payment on the 23rd of January 1846, and was utterly and entirely insolvent and had no assets or property whatever; on the 5th of May, writs of *sci. fa.* were issued against ten persons, whose names were given, all of whom were then shareholders in the said bank, and judgment was signed against them, for default of appearance, and writs of *fi. fa.*, issued upon these judgments, had been returned *nulla bona*; that from inquiries made as to the property and situation in life of these ten persons, it was apparent that nothing would be obtained from the executions against them. The affidavits then set out particulars as to each of these ten persons, all of whom were stated to be "worth nothing," and that at the date of the issuing of the said writs of *sci. fa.* the only other shareholders in the Newcastle Bank were the persons mentioned in a list annexed, who, together with the said ten persons, were the persons named in the return made by the bank on the 19th of March 1847, who were all described in this list as being either dead or worth nothing, and that nothing would be obtained if executions were issued and put in force against all or any of them; that before the judgment in this action was obtained, all the shareholders who possessed any property whatever ceased to be shareholders, and returns to that effect were filed under the statute; that there were no assets or property of any nature or kind whatsoever belonging to the said bank, and that the only means of recovering the said debt were by forcing payment from those persons who were shareholders when the contracts upon which the said judgment was signed were entered into, but who had since retired from being shareholders. The action was brought on thirty-five bills of exchange indorsed by the Newcastle Bank to the London and Westminster Bank, at various dates from the 4th of August 1845 to the 8th of

January 1846, except that in the thirty-fifth count, which was indorsed on the 4th of May 1846. The affidavits stated that at the time when the contracts on which judgment was obtained were entered into (except the contract mentioned in the thirty-fifth count), Eliza Ann Pawson (by the name of Eliza Ann Beverley), John Brooke, John Ridley and John Cargill were respectively shareholders in the Newcastle Bank, the name of the said E. A. Beverley having been inserted in the return made the 2nd of March 1844, and in all returns from that date until the return of the 26th of March 1846, wherein it was stated the said E. A. Beverley had ceased to be a shareholder. William Pawson married E. A. Beverley in the latter part of the year 1844. The name of John Brooke appeared in the return of the said bank made on the 24th of March 1845, and also in all subsequent returns, until the general return made on the 4th of September 1846 (a copy whereof was annexed, which did not contain the name of J. Brooke). That deponent was advised and believed that the last-named return was informal and improper, and that the said J. Brooke continued to be a shareholder until the next general return, made in March 1846, and that deponent had been informed by the officer at Somerset House, who has the custody of the return of joint-stock banks, that no return had been filed under schedule B. of 7 Geo. 4. c. 46, of the said J. Brooke having ceased to be a shareholder in the said bank. The name of John Ridley was inserted in the return of the 2nd of March 1844, and appeared in the subsequent returns until the 8th of April 1846, in which he was stated to have ceased to be a shareholder; and the name of John Cargill was inserted in the return made on the 24th of March 1845, and appeared in all subsequent returns, until that of the 8th of April 1846, in which it was stated that he had ceased to be a shareholder. The affidavits stated that the whole of the debt of 33,550*l.* 16*s.* 7*d.*, and interest, remained due, except 900*l.* received since the recovery of the said judgment, and that this application was not made in collusion with the directors or shareholders of the Newcastle Bank; that three years had not elapsed since the shareholders who have so retired as aforesaid, or

any of them, ceased to be members of the said firm.

*Watson* and *Sir J. Bayley* now shewed cause, on behalf of *Pawson*, who made no affidavit in answer to the rule.—It ought to appear that all steps have been taken to make the judgment available against all those who were shareholders at the time when it was obtained; as that is a condition precedent to taking steps against former members. By 7 Geo. 4. c. 46. s. 13, this power is only given in case “any execution against any member for the time being shall be ineffectual;” that implies, that all means must be first exhausted to put the judgment in force against all the existing shareholders—*Eardley v. Law* (1). This point has been before the Court of Common Pleas who differed in opinion—*Field v. McKensie* (2). It is quite consistent with these affidavits that no *bond fide* attempts have been made to levy under the writs of *fi. fa.* issued against the ten persons named. The sheriff would return *nulla bona*, if they were merely lodged in his office.

*Sir J. Jervis* (*Attorney General*) and *Bovill* were not called on to support this rule.

*Per Curiam* (3).—We are satisfied that enough has been done to entitle the plaintiff to the *scire facias* in this case.

*Watson* and *Cleasby* then shewed cause on behalf of *Brooke*, on affidavits stating that he was not a member of the Newcastle Banking Company, at the time when the causes of action in the declaration mentioned, or either of them, accrued in respect of which this action was brought, or at the time when the contracts, or either of them, were entered into, upon which judgment was obtained; that since the stoppage of the said bank one *H. B.* the manager, and *G. T. G.* the solicitor and one of the managing directors of the bank, transferred to the said company the shares of several persons (naming them), particularly of one *T. C. Gibson*, who were members of the said banking company at the time of its stopping payment, without any authority to do so,

and for the purpose of preventing the creditors from enforcing payment against such persons, and that such alleged transfers were without valid consideration, and fraudulent, and null and void; and in the case of the said *T. C. Gibson*, were made in collusion and concert with the said *G. T. G.* and *H. B.*; and that such persons were present members of the said banking company, and ought to have been exhausted by plaintiff, before having recourse to *Brooke*; that *J. S. Pidgeon*, who was mentioned in the affidavits in support of the rule as one of the present members of the company, was actuary of the English and Scottish Law Life Assurance and Loan Association, which consists of persons capable of paying, and had, as such actuary, on the 6th of September 1843, certain shares assigned to him as trustee for the said association, by virtue of which he was still a member of the said company, and entitled to be indemnified by the said association against any liability incurred on their behalf, for which purpose he had lately filed a bill in Chancery against the association.—First, the affidavits of the plaintiff do not shew that *Brooke* ought to be made liable. He is not shewn to have been a shareholder in August 1845, when the contracts were entered into. His name appears in the return of March 1845, but not in that of September 1845, and he may have ceased to be a member at any period between March and September.

[*COLERIDGE, J.*—They say the September return is improper; and independently of that it stands upon the deponent's advice and belief that *Brooke* was a member in September.]

His own affidavit denies that he was so. He says, “he was not a member when any of the causes of action accrued, or when any of the contracts were entered into.”

[*COLERIDGE, J.*—It would have been so simple to say when he ceased to be a member.]

*Prima facie*, as there is no return subsequent to August shewing him to be a shareholder, that is enough, without his being obliged to give the very date of his retirement. The statement as to information and belief that he continued a member, merely means that there was no proper return made of his retirement. This being an application to the discretion of the Court, the applicant

(1) 12 Ad. & El. 802; s. c. 10 Law J. Rep. (n.s.) Q.B. 46.

(2) 16 Law J. Rep. (n.s.) C.P. 203.

(3) Lord Denman, C.J., Coleridge, J., Wightman, J., and Erle, J.

ought not to come with such vague materials.

[LORD DENMAN, C.J.—We do not think they are vague at all.]

[WIGHTMAN, J.—Brooke may plead to the *scire facias* that he was not a partner when the contract was entered into.]

Then the transfer of shares from the members named in the affidavits was collusive, and the plaintiff ought to shew that he has endeavoured to obtain satisfaction from them, as they are still substantially shareholders. As to Pidgeon, proceedings ought also to have been taken against him; for though he is stated himself to be worth nothing, he holds shares, as trustee, on behalf of a large company, and they would be liable to him for the amount recovered against him. This point cannot be pleaded as a defence to the *sci. fa.*

[ERLE, J.—Surely you may shew that you are only a shareholder of the second class; and that all steps have not been taken against those of the first class.]

It is submitted that the Court must be satisfied on that head before granting the *sci. fa.*

[LORD DENMAN, C.J.—In a similar case where the fact came out on affidavits in answer, we directed an issue—*Bosanquet v. Woodford* (4), why should it then not be pleaded?]

It could not be pleaded that the judgment would have been effectual to a certain amount only against Pidgeon; and, besides, though perfectly solvent when the executions were delivered to the sheriff, he may be insolvent now.

[ERLE, J.—The important time is when the application is made. It would be a good answer to this action, if you shewed us that execution issued against Pidgeon would produce satisfaction of the debt.]

In effect that is shewn by these affidavits. But this rule is wrong in form; it is for a *sci. fa.* to issue execution on the judgment obtained in the action; and it appears that Brooke was not a partner at the time when the contract declared on in the 35th count was entered into. He is not, therefore, liable to the debt arising out of that contract, or to be taken under this judgment,

which is entire, and neither damages nor costs can be severed. It is like the case of proceedings against bail, where the verdict must be conformable to the affidavit of debt—*Firth v. Harris* (5).

The *Attorney General*, in support of the rule (*Bovill*, who was with him, was not heard).—As to the last point, the *sci. fa.*, being under a statutory power, may be limited to that part of the judgment to which Brooke is liable. As to the other objections, Brooke was a member in March 1845; and the presumption is that he continued to be so, until he is shewn to have ceased, and the void return of September 1845 does not do away with that presumption. If he really was not a member in August, we may plead that to the *sci. fa.* Then if there was collusion in the transfer of Gibson's shares, that may be pleaded—*Phillipson v. Earl of Egremont* (6). Lastly, it is no answer that proceedings have not been exhausted against all persons who were members between the time when the contract was entered into, and when judgment was signed; it is sufficient to take *bond fide* steps against all who were members at the time of judgment. Pidgeon is shewn to have had no legal assets, which is all that the statute applies to. He might be entitled to recover from the insurance company in equity, but the plaintiff is not bound to wait for the result of a suit in Chancery and so let the three years expire. All that is necessary on such a motion as this is, that the Court should see that there is a real case for further proceedings being allowed.

LORD DENMAN, C.J.—We are all of that opinion. The proceeding by *scire facias* was introduced into the act for the purpose of giving a party the opportunity of contesting his liability in a legal mode. Here the judgment has been proved to be ineffectual to a certain extent—it is not necessary to shew to what precise extent—it is sufficient if the whole debt has not been raised. In that case the judgment creditor may go on against those who were shareholders at the time when the contract was entered into. Then is Mr. Brooke proved to our satisfaction

(5) 8 Dowl. P.C. 689.

(4) 5 Q.B. Rep. 310; s. c. 13 Law J. Rep. (N.S.) Q.B. 93.

(6) 6 Q.B. Rep. 587; s. c. 14 Law J. Rep. (N.S.) Q.B. 25.



to have ever been a shareholder, and not to have ceased to be so at the time when the contract was made? Mr. Cleasby argues that he does not appear to have ceased; but I think it is good law that if he is shewn to be a member in March 1845, he will be presumed to continue a member until he is proved to have retired (7). Now, in order to prove that he had ceased to be a member in August his affidavit is relied on, but I do not know what he means by saying he was not a member when the contract was made, or when the causes of action accrued: he may mean, that under some view which he takes of the law, he had then ceased to be a member; he might have stated distinctly on what day he ceased to be a member, for that must be within his knowledge: we cannot act upon some view of the law he may take. Then, as to Gibson, he really has nothing to do with the matter. Any fraud practised in the way suggested would not relieve the other party from his liability. If the circumstances are such as to relieve Brooke from his liability, he may plead them to the *scire facias* (8), or any matter which would shew that the statute does not apply to him; or perhaps he may come to the Court to set the proceedings aside. Otherwise, we must decide that there is fraud, without hearing the party against whom the fraud is alleged. The last point is, that the affidavit itself does not make out a case against Brooke, because it shews that for some part of this judgment he cannot be liable. But I have no doubt that we can restrain, in some way or other, the judgment, so as to prevent it being put in force against him as to this part. Probably, the mode suggested by the Attorney General will best effect this purpose. We should, of course, watch the proceedings, and take care that he is not a sufferer for anything for which he is not properly liable; but we should be defeating justice if we did not say that a party, having been once liable, continues to be so until he shews that his liability has ceased.

COLERIDGE, J.—I am of the same opinion. The clause of the statute appears to apply to two bodies of persons—those who

were shareholders at the time when the judgment was recovered, and those who were shareholders at the time when the contract was entered into. Now, it is a condition precedent to proceeding against the second class, that the judgment must have been attempted to be put in force against those of the first class. Assuming Gibson to have been within the first class—which is not shewn by the affidavits—and assuming the proceedings to be fraudulent, the parties engaged in getting him out of that class are not connected at all with the present plaintiff, and their proceedings, therefore, cannot affect this question. The statute, without specifying any mode, enables the Court to authorize execution against the second class of persons; and it has been decided that the proper mode is by *scire facias* (9), and we are to decide under what circumstances we will allow the proceeding. We must see that we do not injure either party by granting this power on insufficient materials; but, if a *prima facie* case is made out, the *scire facias* ought to go, in order that the matter may be properly sifted.

WIGHTMAN, J.—I quite agree. If we were to say that this was not a *prima facie* case for a *scire facias* to issue, I think it would be a doctrine extremely dangerous for depositors with joint-stock banks. The first point made is that Brooke was not a shareholder at all at the time of the contract. On that question, it appears to me that his affidavit is by no means satisfactory; and, besides, he may plead to the *scire facias* that, in truth, he was not a shareholder at that time, and therefore he will not be substantially injured by this decision. But it is said there is a shareholder who made a collusive transfer of his shares, and that he ought to have been proceeded against. How can the plaintiff know that? It is not suggested that he was a party to the fraud: it is enough that he has tried to make the judgment available against those who were shareholders at the time when he obtained judgment; but it is said he has not issued execution against every person, to see whether he has assets or not. I think quite enough has been done to shew that

(7) See *Steward v. Dunn*, 12 Mee. & Wels. 655; a. c. 13 Law J. Rep. (N.S.) Exch. 324.

(8) See *Fowler v. Rickerby*, 9 Dowl. P.C. 682; a. c. 10 Law J. Rep. (N.S.) C.P. 149.

(9) See *Ransford v. Bosanquet*, 12 Law J. Rep. (N.S.) Exch. 489.

he has attempted *bond fide* to recover the debt against the existing shareholders. Next it is argued that Pidgeon might have been compelled to pay the debt, because he has some equitable claim against an insurance company. It seems to me the statute did not contemplate such a proceeding as that; but we are to exercise our discretion in the matter, and say whether we think there is reasonable ground for insisting on payment from a person in that position, and we clearly think there is not. As to the last point, that the execution cannot issue, because Brooke was not a shareholder at the time when the whole subject-matter of the judgment was contracted, it must be recollected that this *scire facias* is under the statute, and provided as a remedy against persons who are not at common law liable under the judgment. It seems to me there will be no difficulty in limiting the execution so as to make it proper in such a case as this.

ERLE, J. concurred.

*Rule absolute.*

On a subsequent day,—

*Manisty* shewed cause on behalf of Ridley and Cargill, on affidavits stating the same facts as in the case of Brooke, but he did not argue any of the points before decided. —There is one point which has not been brought before the Court: the judgment is signed against the public officer for the whole debt laid in the declaration, though only 33,550*l.* is due; the plaintiff ought not to be allowed to have a judgment against the shareholders for more than is really due, but he should enter a *nolle prosequi* or a *remittitur* as to the residue. This is not like the case of an ordinary defendant who might have come in at the trial and shewn how much was due. Here parties, strangers to the action, are to be brought in by the equitable jurisdiction of the Court. The judgment for the whole sum binds the property of the shareholders, though no execution can issue except by leave of the Court. This was decided recently in the Common Pleas. Besides, the *sci. fa.* being in the nature of an execution must follow the judgment. The party will be injured by having a judgment registered against him for a greater sum than is due.

*The Attorney General*, contra.—No difficulty can occur, as the execution will be limited to the amount due, on the principle laid down in the former rule. The judgment being suffered to go by default, it was taken according to the usual practice for the debt in the declaration.

LORD DENMAN, C.J.—I do not see why we could not issue a writ of inquiry to ascertain the amount actually due.

WIGHTMAN, J.—In every case of debt, judgment is taken for the whole sum claimed, and it is set right afterwards. I see no difficulty in granting leave to issue this *scire facias* upon an undertaking not to issue execution for more than is due.

*Manisty* assented to this.

*Rule absolute; plaintiff undertaking not to levy for more than is due.*

1847. } GREVILLE v. STULZ AND  
Dec. 3. } OTHERS.

*Witness—Commission to examine—Order*  
—1 Will. 4. c. 22. s. 4.

*Where a commission to examine witnesses abroad issues under 1 Will. 4. c. 22. s. 4, the names of the commissioners and the place at which it is to be executed must be specified in the order authorising the commission, or in some subsequent order.*

*A commission authorized the swearing of an interpreter on the examination of French witnesses. The return shewed that the interpreter had been sworn, but did not state that he interpreted the evidence of any of the witnesses:—Held, unnecessary.*

*The commission directed the witnesses to be examined apart;*

*Quære—Whether the return must expressly state they were so examined.*

*Error coram nobis to reverse outlawry.*

On the 13th of August 1846, a summons was taken out on behalf of the plaintiff in error, to shew cause why a commission should not issue to examine on interrogatories certain witnesses residing at Enghien les Bains, Seine et Oise, in the kingdom of France. A copy of this summons was served on the attorney for the defendant in error,

who attended, and opposed the summons on the ground that there had been a former commission, which was still unexecuted, and claimed the costs of the former commission, to which the attorney for the plaintiff in error objected, on the ground that the defendant in error had not joined in the former commission (1). The following order was then made by Pollock, C.B.:—

“Greville v. Stulz and } Upon hearing  
others, in error. } the attorneys, &c.  
on both sides, I do order that a commission do issue herein to examine Adelaide Vandenhende and Celina Hugnegny, as witnesses herein, on behalf of the plaintiff in error, who now reside at Enghien les Bains, Seine et Oise, in the kingdom of France, on interrogatories. That the commission, interrogatories and depositions when taken, be returned to me at my chambers, in Rolls Garden, Chancery Lane, London, under the hands and seals of the acting commissioners, and that office copies thereof be read in evidence on the trial, saving all just exceptions, without production of the originals, and that all questions of the costs of the former commission be reserved.

“Dated the 14th day of August 1846.”

A copy of this order was served on the attorney for the defendants in error on the same day, and the commission issued accordingly under the seal of this Court, directed to Thomas Gill, Thomas Pickford, and Thomas Lawson (therein respectively described) as Commissioners to examine Adelaide Vandenhende and Celina Hugnegny, witnesses upon certain interrogatories to be exhibited to them as well on the part of R. F. Greville, Esq., the plaintiff in error, as on the part of J. Stulz, &c., defendants in error in a certain cause, &c. The commission commanded the said Commissioners, or any two of them, on or before the 24th of October next, at a certain day and place, or certain days and places, to be appointed by them for that purpose, “to cause the said witnesses to come before you at Paris, in the kingdom of France, and

then and there to examine each of them apart upon the said interrogatories on their respective corporal oath first taken before any two or more of you, according to the form of their several religions, and that you do take such their examinations, and reduce them into writing on paper or parchment in the English language, and when you shall have so taken them, you are to send the same without delay to the Right Hon. Sir F. Pollock, Knt., &c., at his chambers, &c., closed up under your seal, or the seals of any two or more of you, distinctly and plainly set together, with the said interrogatories, and this writ to be filed of record in our said court at Westminster. And we give you, or any two or more of you, full power and authority, jointly or severally, to swear any one or more interpreter or interpreters upon his or their oath or oaths solemnly well and truly to interpret the oath or oaths or interrogatories which shall be administered and exhibited by either of the said parties to any such witness or witnesses, who do not understand the English language, out of the English into the language of such witness or witnesses, and also to interpret their respective depositions taken to the said interrogatories out of the language of such witness or witnesses into the English language. And we further command that all and every the clerk or clerks, interpreter or interpreters, translator or translators, employed in taking, interpreting, writing, transcribing, translating, or engrossing the deposition or depositions of witnesses, or in translating the questions to and answers of the said witnesses to be examined by virtue hereof, shall, before he or they be permitted to act as clerk or clerks, interpreter or interpreters, translator or translators, as aforesaid, severally take an oath, truly and faithfully, and without partiality to any or either of the parties in the cause, to interpret and translate the several questions and answers, and to take and write down, transcribe, and engross the depositions of all and every witness and witnesses produced before and examined by you, the said Commissioners, or any of you, as far forth as he or they are directed and employed by the said Commissioners, or any of them, to take down, write, or engross the said depositions, which oath any two or more of you are hereby empowered to administer to such

(1) The order for the former commission was made by Wightman, J., the defendant in error having refused to join in it. It was stated that the former commission had issued, but in consequence of the absence of the commissioners therein named from Paris, it could not be executed within the time limited for the examination of the witnesses under it.

clerk or clerks, interpreter or interpreters, translator or translators, according to his or their several religions. Witness, Thomas Lord Denman, at Westminster, the 19th day of August, in the tenth year of our reign, A.D. 1846."

A copy of the interrogatories was forwarded to the attorney for the defendant in error, and a notice served on him of executing the commission at the house of Mr. Thomas Lawson, No. 10, Rue Royale St. Honoré, in the city of Paris, at eleven o'clock, A.M., on the 1st of October 1846, at which time it was accordingly executed. The attorney for the defendants in error attended the opening of the commission, at the chambers of the Lord Chief Baron, and inspected the depositions, and bespoke copies thereof, which were accordingly furnished to him, and he never made any objection to the regularity of the proceedings at any time before the hearing of the cause.

The cause was tried, on the 5th of November 1846, before Patteson, J., when the above order and commission were put in evidence, whereupon the counsel for the defendants in error objected that the commission was invalid, as it was not founded on any order which named the Commissioners, or gave any directions as to the time or place of examination. The learned Judge considered that it was doubtful, but received the commission; which, as well as the interrogatories, was read. The return of the Commissioners was then proposed to be read; it was as follows:—

"Depositions of witnesses, &c., produced, sworn, and examined on &c., at &c., before us, &c., we, the acting Commissioners, under the said commission, before we acted in or were present at the swearing or examining of any witness having taken an oath, &c., and also the interpreter by us employed to interpret the oaths and interrogatories administered and exhibited to the witnesses who did not understand the English language, out of English into the French language, having before acting in the said commission been first duly sworn before us well and truly to interpret, &c., and having done all such other things as we are directed by the said commission to do before entering upon examination of the two witnesses under the said commission.

"The examination of Adelaide Vandenhende, residing at, &c., Enghien les Bains, in the kingdom of France, a witness produced, sworn and examined before us, the said Commissioners, on the part of the plaintiff in error. [Then followed her answers in English to the several interrogatories.] The other examination had a separate heading in precisely the same terms, *mutatis mutandis*.

(Signed) Thos. Gill, Thos. Lawson,  
Commissioners."

It was objected, that the depositions could not be read, as it was not stated that the witnesses had been examined apart; that the name of the interpreter employed was not given in any part of the proceedings; and that it did not appear which (if either) of the witnesses were examined through the interpreter, or whether they were examined in French or English. The learned Judge thought himself bound to receive the evidence, as, in the absence of positive proof to the contrary, it was to be assumed that everything was rightly done under the commission, according to the authority of *The Queen v. Douglas* (2). The depositions were accordingly read, and the plaintiff in error obtained a verdict.

*Barstow*, in Michaelmas term 1846, obtained a rule, calling upon the plaintiff in error to shew cause why there should not be a new trial on the grounds insisted upon at the trial; against which—

*Martin* and *E. Beavan* now shewed cause.—The first objection is taken to the commission, which is said to have issued without proper authority; and that there ought to have been a second summons and a second order naming the Commissioners, and specifying the time and place for taking the examination; but the commission itself is the authority for taking the examination—1 Will. 4. c. 22. s. 4.—and it has issued perfectly regularly in the present case, and according to the course of practice where the opposite party does not join in the commission. *Steinkeller v. Newton* (3) is not in point: there, the proceedings took place without any notice to the opposite party, and fraud was imputed.

(2) 16 Law J. Rep. (N.S.) Q.B. 417.

(3) 1 Sc. N.R. 148; s. c. 9 Law J. Rep. (N.S.) C.P. 262.

[COLERIDGE, J.—The commission can only be issued by us under a statutable authority, which does not appear on the face of it, and you must therefore prove the order: if so, this objection arises.]

The commission having issued under the seal of the Court, and tested by the Lord Chief Justice, will be presumed to have issued rightly. A *scire facias* under the 7 Geo. 4. c. 46. can only issue after a rule of court, but in proceedings on the *scire facias* it is not necessary to shew that such a rule has been made. A commission may go to India under 13 Geo. 8. c. 63. s. 44. on motion in court, but that need not be stated—*The Queen v. Douglas*.

[PATTERSON, J.—There, a mandamus issues, and is the act of the Court. My difficulty here arises from the words of the statute, that the details as to the time, place, and manner of examination are to be directed by the Court or a Judge, and are not merely to be inserted in the commission by the officer of the court without authority.]

[COLERIDGE, J.—The plaintiff himself has put in the order here; he cannot then turn round and say it is immaterial.]

*Atkins v. Palmer* (4) shews that the only question is, whether the Commissioners have substantially discharged the duty imposed upon them. In a case of *Entwistle v. Deat* (5), tried at the sittings, at Guildhall, after last Trinity term, the same objection as the present was raised to a commission, and the order was called for but not produced; and the Lord Chief Baron, who tried the cause, thought that he must assume that the commission had issued properly. But this order is sufficient without naming the Commissioners. The 1 Will. 4. c. 22. s. 4. applies to two cases: one where the examination is taken within the jurisdiction where the Commissioners must be named in the order; and the other, where the examination takes place out of the jurisdiction where they need not be named. In the latter case, the witnesses need not be named in the order—*Cow v. Kinnersley* (6).

[COLERIDGE, J.—They need not *all* be

named; but *some* must, in order to shew it is not a mere fishing commission.]

In *Clay v. Stephenson* (7) the oath to be taken by the commissioners was dispensed with. *Doe d. Thorn v. Phillips* (8) may be relied on by the other side; but that only shews that in a motion to the Court the name of the commissioner must be given; it is different in orders obtained at chambers, where frequently the parties do not agree until afterwards on that point. The practice in equity is the same as has been here pursued—*Gresley on Evidence*, p. 70. But the defendants were here parties to the order being made, and did not make any objection to it; they cannot after lying by now object to the commission.

[COLERIDGE, J.—They admit the order to be good so far as it goes, but say there ought to be another order supplying the deficiency of the first.]

Next, as to the name of the interpreter being given in the return to the commission. That cannot be necessary, as it would have been of no advantage to have done so.

[LORD DENMAN, C.J.—It never appears that he interpreted at all; he is only stated to have been *employed* to do so. We cannot presume that an interpreter was needed; both the witnesses may have understood English.]

The same answer applies to the objection, that it is not stated which of the witnesses were examined through an interpreter; it does not appear that any were so examined.

[LORD DENMAN, C.J.—You may pass over that.]

The last point is, that the witnesses were not examined apart; but it will be presumed that the commissioners did all they were bound to do; they state that they "did all such things as they were directed by the commission to do." The examinations are returned separately, and with distinct headings, and are each signed by the Commissioners—*The Queen v. Birmingham* (9).

*Barstow*, in support of the rule.—The Court has no power at common law to issue this commission—*Attorney General v. Bo-*

(4) 4 B. & Ald. 377.

(5) *Martin* stated this case as in the text, having been counsel in it.

(6) 6 Man. & Gr. 981; s. c. 13 Law J. Rep. (N.S.) C.P. 114.

NEW SERIES, XVII.—Q.B.

(7) 3 Ad. & El. 807; s. c. 4 Law J. Rep. (N.S.) K.B. 212.

(8) 1 Dowl. P.C. 56.

(9) 15 Law J. Rep. (N.S.) M.C. 65.

*vett* (10). The statutable authority must therefore be strictly pursued, and there must be some order made directing the time, place, and manner of the examination. This very objection was taken in *Steinkeller v. Newton*, and the Court there decided that the commission had issued without authority.

[LORD DENMAN, C.J.—The statute does not require that the order should name the Commissioners: may not the Court name some person itself?]

[COLERIDGE, J.—The general practice is, if the parties differ as to who the Commissioners shall be, the Judge who makes the order leaves them to agree upon somebody.]

Still, when they have agreed, they must come for an order to ratify their choice. But the order should at all events state in what particular *place* the examination is to be taken: it merely says that the witnesses reside in France.

[COLERIDGE, J.—I learn from the Master that if such a rule or order issued for a commission, and it were brought to the office, they would not draw up the commission until the parties had agreed upon the Commissioners, and the time, place, and manner of holding the examination, or there had been an order obtained for that purpose.]

LORD DENMAN, C.J.—I regret that we cannot get over this objection. The order is the authority for taking the examination at any place out of the jurisdiction. Here, it does not name any place where the commission is to be executed, as it appears to me it ought. Every possible presumption should be made in favour of the proceedings having been rightly conducted, but this defect is one which we cannot presume to be so cured.

PATTERSON, J.—As this commission was issued by order of a Judge, there ought to be something from which we may see that it was executed at the place directed by the order. Now, there is nothing here to enable us to do so. In the case referred to before the Lord Chief Baron at *Nisi Prius*, the order was not produced, and therefore it was presumed to be sufficient to warrant the commission which was produced; whereas here, the order is produced, and does not specify any

place where the commission is to be executed. We can therefore make no presumption in that respect. It is for the Judge who makes the order to say what the particular circumstances are under which the commission is to be executed. In many cases the parties will agree as to these details, and may then apply to the Judge to ratify their agreement; if they do not agree, and the first order does not mention those details, I think they must get a subsequent order for the purpose. Nothing of the sort has been done here.

COLERIDGE, J.—I am of the same opinion. The order being put in, it becomes necessary to look to it, and see if it warrants the commission: if it do not, the commission falls to the ground. I am clearly of opinion that the order should name the place. No one can read the statute without seeing that its meaning is, that all the circumstances under which the commission is to issue are to be settled on a preliminary application to a Judge or the Court. In commissions issued within the jurisdiction, it is expressly provided that the first order must state who the Commissioners are; but it is not so in the case of a foreign commission. The order in that case issues, so to speak, in blank, but that must be afterwards supplied. I am not sure that a commission does not *ex vi termini* mean that somebody must be named to execute it. Here, it is contended that the party may take an order to the officer of the court, and put in the name of any person he chooses to execute the commission. I cannot think such is the meaning of the statute; therefore I think this order was insufficient.

WIGHTMAN, J.—If this case had rested solely on the commission, I should have thought there was a great deal in Mr. Martin's argument; but here, the order of the Judge is put in, which is defective in not stating the place where the commission is to be executed, which is a most material part of the order. Any defect in that particular might have been supplied by a subsequent order; but none such appears to have been made. There seems, therefore, to be no authority to issue this commission at all.

*Rule absolute* (11).

(10) 15 Mee. & Wels. 60; s. c. 15 Law J. Rep. (n.s.) Exch. 155.

(11) See *M'Combie v. Anton*, 6 Man. & Gr. 27.

BAIL COURT. }  
1847. } TRIPP AND ANOTHER v.  
Nov. 13. } STANLEY.

*Warrant of Attorney—Judgment—Affidavit.*

*Upon motion to enter up judgment upon a warrant of attorney more than a year old, it is not necessary to shew to the Court that the defendant is now alive, if the defendant has agreed to dispense with the necessity for so doing.*

This was an application to enter up judgment against the defendant, upon a warrant of attorney more than a year old. The affidavit, upon which the rule was moved, stated that the deponent "had seen the defendant alive, and conversed with him within the period of three months now last; and that he verily believed that the defendant, shortly after the deponent saw him, went to reside, and that he now resided, in Paris, in the kingdom of France." The warrant of attorney itself contained the following clause: "it is hereby also declared, that, in order to enter up judgment upon, and by virtue of the within written warrant of attorney, it shall not be necessary to make any affidavit of the fact of the said Sir W. Massey Stanley being alive at or shortly before the time of entering judgment, or to obtain a Judge's order or rule of Court to warrant such judgment, and notwithstanding the within warrant of attorney should be a year old, or upwards, at the time of the entry of such judgment, any rule or practice of the Court to the contrary in anywise notwithstanding."

*Bros.*, in support of the rule.—First, the affidavit sufficiently shews that the defendant is alive—*Bayley v. Western* (1).

[*PATTESON, J.*—In that case it was not known in what part of France the defendant resided; here he states that he resides in Paris. You might have sent some one over there to inquire whether the defendant was alive.]

But, secondly, even if the affidavit were insufficient in this respect, the defendant having himself waived the necessity of making it, the plaintiffs are entitled to this rule.

*PATTESON, J.*—It has been expressly

held that a party may dispense with the necessity of a *scire facias* to revive a judgment—*Morgan v. Burgess* (2); and I see no reason why he may not also dispense with the usual affidavit in this case. You may take your rule.

*Rule absolute.*

BAIL COURT. }  
1847. } THE QUEEN v. GRIMSHAW.  
Nov. 18, 22. }

*Quo Warranto—Costs—9 Anne, c. 20.—Coroner for Borough.*

*Upon a quo warranto information for exercising the office of coroner for a borough (appointed under 5 & 6 Will. 4. c. 76.) judgment having been given for the Crown,—Held, that the relator was not entitled to costs by the 9 Anne, c. 20.*

This was an information in the nature of a *quo warranto* for exercising the office of coroner of the borough of Wigan.

In Trinity term last (June 5), the Court of Queen's Bench gave judgment for the Crown on the first and fourth issues, and for the defendant on the second and third (3). This judgment was entered up by the relator with costs.

*Cowling*, on a former day, in this term, obtained a rule *nisi* calling upon the relator to shew cause why so much of the judgment as awarded costs to be paid by the defendant to the relator should not be set aside. He cited *The King v. Williams* (4), *The King v. M'Kay* (5).

*Martin* and *Pickering* now shewed cause.—The coronership is an "office" within the meaning of that word in the statute 9 Anne, c. 20. It is found by the special verdict that previous to the passing of the 5 & 6 Will. 4. c. 76. the office of coroner was held by the mayor by virtue of his office. At that time clearly, therefore, it was a corporate office—*Com. Dig.* 'Officer' (G); as much so as the office of Recorder—*Com. Dig.* 'Franchise' (F) 24. If a corporate officer

(2) 1 Dowl. N.S. 850.

(3) The facts of the case are fully reported in *The Queen v. Grimshaw*, 16 Law J. Rep. (N.S.) Q.B. 385.

(4) 1 Burr. 402; s. o. 2 Lord Kenyon, 68.

(5) 5 B. & C. 640.

(1) 7 Dowl. P.C. 601.



then before the 6 & 7 Will. 4, does the fact of this appointment having been under that statute make any difference? It is submitted that it does not. By the 62nd section of the 5 & 6 Will. 4. c. 76. the town council are to appoint the coroner; and by 7 Will. 4. & 1 Vict. c. 68. s. 3. he is required to lay his accounts before the town council, and is to be paid by the treasurer out of the borough fund. In the case of *The King v. Williams*, relied upon in moving for this rule, the defendant had not usurped a corporate office, he had merely exercised a non-corporate right. In *The King v. M'Kay* the place in which the office was, was not a town corporate. So also in *The King v. Hall* (6), it was held that a commissioner of a court of requests was not a corporate officer; and in *The King v. Wallis* (7) the same was held with respect to a constable. All these are cases very different from the present. Secondly, the defendant having succeeded upon two of the issues, is entitled to his costs upon all—*The King v. Downes* (8). Thirdly, this is a question which ought not to be decided by the Court upon a summary application like the present; but the defendant should be left to his remedy by writ of error upon the judgment—*The King v. Williams*.

*Cowling*, contrà. —If the defendant is entitled to costs at all, he is doubtless entitled to his costs of all the issues; but it is submitted that the office of coroner is not a corporate office within the meaning of the statute 9 Anne, c. 20, and therefore that he is not entitled to costs. There is no necessity whatever for a corporation to have such an officer; and by the 62nd section of the 5 & 6 Will. 4. c. 76. it is only in the event of a grant of Quarter Sessions having been made to a borough that the corporation have power given to them to appoint a coroner. If there be no separate Court of Quarter Sessions for the borough, the county coroner is required by the 64th section to act for the borough. The coroner, therefore, need not be a member of the corporation at all: he may be a perfect stranger. He is not an officer appointed annually, but is to hold his office during good behaviour. He does not submit his accounts to the corporation, but

to the Quarter Sessions, that is to say, to the recorder. Nor are his duties at all connected with the corporation. He is, in point of fact, an officer of the Crown, and subject to the controul of the Secretary of State, to whom by the 63rd section he is required to make a return of the inquests held. It is true that he is appointed by the corporation, and is paid out of the borough fund, but so is a police constable, and yet he is not a corporate officer within the meaning of the statute. Suppose the corporation have an advowson situate within the town corporate, would a rector appointed by them be a corporate officer? or would the county coroner acting for the borough where no borough coroner has been appointed, be a corporate officer? The statute of Anne does not, in truth, apply to offices of a freehold nature, but to such only as are subject to annual election. In the case of *The King v. Williams*, as reported by *Lord Kenyon* (9), *Lord Mansfield* says, that the statute of Anne "does not extend to every usurpation of offices which may be out of a corporation, as stewards of leets, &c." The act is uncommonly clear and express as to this point, and the word "franchise" in the title must be interpreted from the body of the act, which restrains it to freedoms. That statute has always been construed with strictness. Thus, the place in which the office is exercised must be a corporate town—*The King v. Richardson* (10), *The King v. Wallis*, *The King v. M'Kay*. The case of *The King v. Hall* is directly in point. If the relator is not entitled to costs, this Court will interfere in the manner proposed by the rule. In the case of *The King v. Williams* the only course was to bring a writ of error, for the judgment there came from the Court of Great Sessions in the county of Denbigh. In *The King v. M'Kay* the present course was the one pursued; and if this Court decides to refuse the relator his costs, let him bring his writ of error.

*Cur. adv. vult.*

Nov. 22.—*PATTESON, J.*—I have looked into the acts of parliament and the cases which were cited upon the discussion of this rule; and it appears to me that I am

(6) 1 B. & C. 237; s. c. 1 Law J. Rep. K.B. 88.

(7) 5 Term Rep. 375.

(8) 1 Ibid. 453.

(9) 2 Lord Kenyon, 68.

(10) 9 East, 469.

not called upon to express any opinion as to whether, under the original charter of incorporation of the borough of Wigan, the coronership was a corporate office within the meaning of the statute 9 Anne, c. 20. The effect of the 6 & 7 Will. 4. c. 76. was to repeal the provisions of that charter with respect to this appointment. The defendant in this case was appointed by virtue of the 62nd section of that statute, which enacts, that "the council of every borough in which a separate Court of Quarter Sessions of the Peace shall be holden shall, within ten days next after the grant, &c. appoint a fit person, not being an alderman or councillor, to be coroner of such borough so long as he shall well behave himself in his office." The question, therefore, is simply this: "Whether or not the office of coroner, as created by the 6 & 7 Will. 4. c. 76, is a corporate office within the meaning of the statute of Anne. And it seems to me that it is not: but that it is essentially an office held under the Crown, the legislature having studiously prevented the holder of it from being dependent upon the corporation. It is true that he is appointed by the corporation, but this fact, it is clear, is not sufficient to make him a corporate officer. I think, therefore, that the prosecutor of this information is not entitled to costs. I was asked, in the event of such being my opinion, to allow the present judgment to stand, and to leave the defendant to his writ of error, as was done in the case of *The King v. Williams*; but I do not think that I ought to take that course, for I see no more difficulty in the prosecutor bringing a writ of error upon a judgment without costs, if he should be advised that such a judgment is erroneous, than in the defendant bringing error upon a judgment awarding him costs. For these reasons, I think, that this rule should be made absolute.

*Rule absolute.*

BAIL COURT.

1847. } *In re* PRESTON.  
Nov. 20, 22. }

*Habeas Corpus—Infant—Guardian—  
Power of Attorney.*

*Upon an infant, a boy of the age of nine years, being brought up before the Court by habeas corpus, it appeared that upon the*

*occasion of her husband's death, the mother then residing in India, gave over the child into the care of her late husband's mother, who subsequently died, leaving all her property to this grandchild and his brother, and appointing two persons her trustees and executors, and the guardians of the child; these persons acted, and had continued to act, as guardians, and were recognized as such, and approved of by the mother, and their conduct as guardians was not impeached in any way; she, however, marrying again, and still residing in India, suddenly executed, conjointly with her husband, a warrant of attorney, authorising certain parties, therein named, to demand and receive the custody of the child. This demand had been made upon and refused by the guardians, and in consequence of such refusal application was made, under this warrant of attorney, for the habeas corpus. Under these circumstances, the Court refused to disturb the custody of the child.*

*Semble—that a party who is of right entitled to the custody of an infant cannot, by warrant of attorney, empower another person to apply to this Court to change the custody.*

A writ of *habeas corpus* had been issued, directed to Henry Potts and James Hutchins, commanding them to bring up the body of Edward Preston, an infant of the age of nine years. The writ was obeyed, and the child brought up, when, upon the affidavits filed on both sides, the following facts appeared:—"Edward Preston was the son of a Mrs. Templer by a former husband, who died in 1840, leaving her a widow with two children, and in indifferent circumstances. Mrs. Templer was resident in India. Mrs. Mary Ann Preston, the mother of Mr. Preston, offered to take charge of the children, and after some letters had passed between the parties, Edward Preston was, in the year 1841, sent over from India by his mother to Mrs. M. A. Preston. In June 1843 the grandmother took the child to Germany with her, and placed him at school there, and shortly afterwards returned to England, where she died in December 1843. By her will, made on the 19th of April 1841, she left her entire property to trustees, for the use of her two grandchildren, and by a codicil, executed on the

20th of October 1843, appointed Mr. Potts and Mr. Hutchins trustees of the property and executors of her will. She also appointed these persons the guardians of her grandchildren. Both gentlemen proved the will, but Mr. Hutchins took the more active part in the matter. At the Midsummer vacation in 1844, the child was brought home from Germany, and was placed at school in England by Mr. Hutchins; but afterwards, the boy becoming ill in health, he was sent to Hastings, by the advice of a medical man, for the benefit of the sea air. Whilst there he was constantly seen by the friends of Mr. Hutchins; and he corresponded regularly with his mother. In 1845 Mrs. Preston, the mother of the child, married her present husband Mr. Templer. From the time of the grandmother's death down to as late as the 29th of July 1846, several letters had been received by Mr. Hutchins from Mrs. Templer expressive of her satisfaction at and gratitude for his care of her child.

However, on the 6th of March in this year, a warrant of attorney was executed by Mr. and Mrs. Templer, authorizing Robert Wilson "to apply to Henry Potts and James Hutchins, &c., to deliver up the said Edward Preston to him or to such person as he might appoint to receive the said Edward Preston, and to receive and take possession of the said Edward Preston, and to receive and take possession, or authorize and empower accordingly to receive and take possession of the said Edward Preston; and to apply to the said Henry Potts and James Hutchins for all sums of money, &c. due to them for the maintenance of the children under the will of the said Mary Ann Preston; and to examine and investigate accounts, and to make the children wards of Chancery if thought necessary, and generally to do all things for the purposes aforesaid." It was under this warrant of attorney that the application for a *habeas corpus* was made, and it was proposed to place the child into the custody of a Mrs. Allen; who, however, was sworn in the affidavits filed on behalf of Mr. Potts and Mr. Hutchins to be a person in such a condition of life as to render her altogether unfit for such a purpose.

*Bovill* now appeared for Mr. Potts and Mr. Hutchins. — By this application, the

Court is asked to say, that this child has not arrived at years of discretion; and if not, then to place him in the custody of those who have a right to receive him—*Ex parte Greenhill* (1). There is no such person here. The father of the child is dead; the mother is resident abroad; there is no authority known to the law by which an agent or attorney can be appointed to demand such custody in the place of the parents: nor are the circumstances of the case, as they appear on the affidavits, such that the Court would remove the child from the custody of Mr. Hutchins, who has not put the child under any improper restraint, and who, according to the testimony of Mrs. Templer herself, has treated the child always in a satisfactory manner. The boy is in the gallery of an adjoining court; he is nine years of age; let the Court see and question him, and ascertain whether it is his wish to leave Mr. Hutchins, and go under the care of those to whom it is proposed by the applicants for this writ to place him. That course was pursued in *In re Ann Lloyd* (2).

*Bramwell* appeared in support of the application.—The real applicant here is the mother of the child, who is entitled by law to its guardianship—*Co. Lit. by Hargrave*, 88, b, n. 3. Does it make any difference that Mrs. Templer is not here to make the demand in person? If it did, a parent who is abroad could never obtain possession of her child without undertaking a voyage to this country. It is a general principle of law, that if a party have a right, that right may be delegated to another. In *Com. Dig.* tit. 'Guardian,' D, it is said, "If a guardian by reason of nurture delivers the infant to another for his instruction, he may retake him." Here, although Mrs. Templer acquiesced in the appointment of these gentlemen as guardians for a time, she is now anxious to remove her child from their custody and place him in the custody of another guardian. The course pursued by the Court in the case of *In re Ann Lloyd* is not applicable to the present. The child there was a girl between eleven and twelve years of age; and considerable stress seems to have been laid upon the

(1) 4 Ad. & El. 624.

(2) 3 Man. & Gr. 547; s. c. 11 Law J. Rep. (N.S.) C.P. 43.

fact that the child was illegitimate, and that the mother had no right to its custody. The rule to be deduced from all the cases is, that the Court will satisfy itself who is the person entitled to the custody of the child, and will order the child to be delivered up to such person—*Ex parte M'Clelland* (3), *The King v. Greenhill*, *Lyons v. Blenkins* (4), *The King v. Johnson* (5), *The King v. Isley* (6).

*Cur. adv. vult.*

Nov. 22.—PATTERSON, J. now delivered judgment.—This was an application made on the part of Mr. and Mrs. Templer, for a writ of *habeas corpus* to bring up the person of a child of the age of nine years, and who was the son of Mrs. Templer by a former husband. At the time of the application, I was much struck with the novelty of the circumstances under which it was made; the mother and her husband residing in India, beyond the jurisdiction of the Court, and having executed a warrant of attorney empowering another party to demand the custody of the child. No precedent was cited in support of the application, nor am I aware that any such is to be found.

But the case does not entirely rest upon that ground. In other circumstances it is very peculiar. It appears that several years ago, whilst Mrs. Templer was residing in India, her husband, a gentleman of the name of Preston, died, leaving her a widow, with two children, the elder of whom, the subject of the present application, being at that period of the age of two years. Her husband's mother, Mrs. Mary Ann Preston, being a woman of some property, offered at that time to take charge of the two children, and to bring them up; and after some letters had passed between the parties, the child in question was sent to England, and was received by his grandmother. With her the child remained for some years, and afterwards was taken by her to Germany, and placed at a school there. The grandmother returned to England and shortly afterwards died, leaving by her will her entire property

to her two grandchildren; and by a codicil appointing a Mr. Potts and a Mr. Hutchins her executors and trustees of the property so devised to her grandchildren, and she also appointed those gentlemen to be the guardians of the children. Of course, Mrs. Preston had no power to make a testamentary guardian; but, nevertheless, after her death, Mr. Hutchins entered upon his duties as such, took charge of the child, sent him to school, and by the advice of medical men afterwards removed him to Hastings, for the benefit of the sea air, at which place he was living at the time this application was made. Some correspondence from Mrs. Templer is set out in the affidavits, in which she seems to express some anxiety as to what had become of the child after the grandmother's death, but upon those inquiries being answered, she appears to have acquiesced in the appointment of Mr. Hutchins as the guardian of the boy, and to be much obliged to him for the care he was taking of him. But it does appear that she was not well satisfied with the amount allowed by the trustees for the maintenance of the other child who had remained with her in India; but no complaint was made at any time by her as to the treatment of this boy. Of a sudden, however, without any reason being assigned, a warrant of attorney is sent over to this country, authorizing certain parties not only to demand the boy of Mr. Hutchins, but to do a great many other things; amongst others, to call upon the trustees to render an account of the property devised by Mrs. Preston, and specially to apply to the Court of Chancery to make the children wards of that court. No adequate motive for these hostile steps appears on the face of the affidavits; I do not believe that the real history of the transaction has been brought before me, but, as I before observed, some question of money matters is probably the real foundation for these proceedings. The affidavits which have been filed in answer, state that Mr. Hutchins was informed by Mr. Harrison, one of the attornies, that the intention was to take the child from him, and to place him with a Mrs. Allen; and then the affidavits proceed to shew that Mrs. Allen is in an inferior condition of life, and is altogether a person into whose care it would not be right to place the boy.

(3) 1 Dowl. P.C. 81.

(4) Jac. 245.

(5) 1 Stra. 579.

(6) 5 Ad. & El. 441; a. c. 5 Law J. Rep. (N.S.) K.B. 253.

Inasmuch, however, as there was no opportunity of answering this affidavit, I am not disposed to attach much weight to it. Such, then, being the circumstances of the case, I have looked into Mr. M'Pherson's book upon the *Law of Infants*, which was handed up to me by Mr. Bramwell, and in which all the authorities upon the subject are collected; and I can find none in which an application of this sort has been granted, upon a demand being made by a person acting under a warrant of attorney from the parents of the child, and in the absence of any such precedent, I much doubt whether the Court would under any circumstances grant the application. It may be, that if the parents are resident abroad, and wish to have the custody of their child, they must come to this country, and in person make the demand. Apart from this question, however, I do find a case cited in that book, which, in many of its circumstances, resembles the present. I mean the case of *Lyons v. Blenkin*, cited at p. 138 of Mr. M'Pherson's book. There, "a grandmother provided for her granddaughters by the devise of lands and by pecuniary legacies, and intrusted to her daughter, the aunt of the infants, the management of their property and the discretion of providing for their maintenance and education out of it, and also appointed her their guardian." So, here, you have money left to the child by his grandmother; trustees appointed by her; an appointment so far as she can make it of a guardian, and acquiescence in such appointment by the mother; and, then, without any reason being given, a sudden dissatisfaction with such guardianship. In that case, Lord Eldon not having chosen to decide the question upon *habeas corpus*, the father presented a petition for the restoration of the infants to him; but his Lordship considered that the father by his consent had enabled the guardians to act, and he refused to withdraw the children from the custody of their aunt. There is another case of *Ex parte Hopkins* stated, in which an uncle took three nieces with their father's consent into his house, maintained them, and at his death left them considerable legacies. They remained under the guardianship of one of the executors of the testator, and Lord King refused upon the

application of the father summarily to deliver over the bodies of the infants into his custody. These authorities are quite sufficient to justify me in saying, that under the peculiar circumstances of this case, I am not justified in changing the custody of this child. There is no surmise of ill treatment, or that the child has been improperly brought up; and if there be any disagreement as to money matters, that should form the subject of an application to the Court of Chancery, but is no ground upon which I, sitting here in a court of common law, am authorized to order the child to be given up to the attorneys of the mother.

Whilst the case was being argued, I was asked by Mr. Bovill to see the child, and to learn from him into whose custody he would wish to be placed. It is always a difficult matter to say at what age a child may have discretion enough to exercise his will properly in this respect, but it seemed to me almost a mockery to ask a child of nine years of age whether he would sooner remain with the person who had brought him up or go to a perfect stranger. I, therefore, declined to see and question the child. But upon the other grounds which I have stated, I think that this rule must be discharged.

*Rule discharged.*

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1847. } THE QUEEN v. THE INHABITANTS OF MYLOR.  
Nov. 10. }

*Poor Law—Order of Removal—Sending Documents—Effect of Omission.*

*Where the examination, on which an order of removal was made, set up two distinct grounds of removal, and a document applying exclusively to one of them referred to in the examination, and produced before the removing Justices, was omitted to be sent by the removing parish, together with the copy of the order, the respondents were precluded from giving evidence at the Sessions in support of either of the grounds of removal.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 6.]

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1847. }  
Dec. 9. } **ANGELL v. HARRISON AND  
OTHERS.**

*Pleading — Trespass — Fraudulent Removal of Goods to prevent Distress —*  
11 Geo. 2. c. 19. s. 1.

*In trespass for entering the plaintiff's dwelling-house, the defendant pleaded, that at the said time when, &c., S. held certain premises, situate at, &c., as tenant thereof to the defendant, under a certain demise thereof, made on, &c., by the defendant to S., for the term of, &c., from thence next ensuing, upon which a yearly rent of 60l. was reserved by quarterly payments, on &c.; that half a year's rent was owing from S. to the defendant, and that after the said rent became due, and while it was unpaid, S. fraudulently removed certain goods from the demised premises to prevent the defendant distraining, and in concert with the plaintiff deposited the said goods in the said dwelling-house of the plaintiff, in which, &c., and justified entering the plaintiff's house within thirty days after the removal, for the purpose of seizing the said goods as a distress, there being no sufficient distress upon the demised premises, under 11 Geo. 2. c. 19. s. 1.*

*On special demurrer, it was held that the plea contained a sufficient statement of the defendant's right to distrain.*

Trespass for breaking and entering the dwelling-house of the plaintiff, and making a great noise, &c., and continuing there for a long space of time, to wit, &c., under the false and unreasonable pretence that the defendant had a right to enter and seize certain goods therein as a distress for rent.

Second plea, that one Eliza Spencer, on, &c., to wit, a long space of time then last past, and from thence until and at the said time when, &c., held and enjoyed certain premises, situate and being in the parish of St. Pancras, in the county of Middlesex, as tenant thereof to the defendant Harrison, under and by virtue of a certain demise thereof, before then, to wit, on the 29th of September 1843, made by the said defendant Harrison to the said E. Spencer, for the term of three years from thence next ensuing, upon which demise a certain yearly rent, to wit, the rent or sum of 60l. was reserved and made payable by the said E.

Spencer to the said defendant Harrison, by four even and equal quarterly payments, to wit, on &c., during the said term; that just before the said time when, &c., to wit, on Lady-day then last past, a large sum of money, to wit, the sum of 30l. of the rent aforesaid, for two quarters of a year of the said demise, ending on the day and year last aforesaid, became and was due, owing, and payable from the said E. Spencer to the said defendant Harrison, and then and from thence until and at the said time when, &c., remained and continued due, in arrear, and unpaid to the said defendant Harrison; that just before the said time when, &c., that is to say, after the said rent became and was due and payable, and when the same was actually due, in arrear, and unpaid, and within thirty days next before the said time when, &c. to wit, on &c., the said E. Spencer fraudulently and clandestinely conveyed away and carried off and from the said premises so held and enjoyed by the said E. Spencer, as such tenant thereof to the defendant Harrison as aforesaid, certain goods and chattels, then being the proper goods and chattels of her, the said E. Spencer, and in her possession, to prevent the defendant Harrison from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid, and for that purpose and with the privity and consent of the plaintiff, conveyed the said goods and chattels into the said dwelling-house of the plaintiff, in the said declaration mentioned, and placed and deposited them there; for which reasons and because the said rent still remained in arrear and unpaid, and because there was no sufficient distress upon the said premises so held by the said E. Spencer as aforesaid, whereon the said defendant Harrison could distrain for such arrears of rent, and because the said goods and chattels which had been so fraudulently and clandestinely conveyed away and carried off by the said E. Spencer as aforesaid, still remained and were in and upon the said dwelling-house of the plaintiff, in the declaration mentioned, and in which &c., to which the same had been so conveyed as aforesaid, the said defendant Harrison, in his own right, and the said other defendants as the servants of the said defendant Harrison, and by his command, afterwards, and

while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said goods and chattels were and had been so fraudulently and clandestinely conveyed away and carried off as aforesaid, that is to say, at the said time when, &c., entered into the said dwelling-house in which, &c., the outer door thereof being then open, and stayed and continued therein a short and reasonable time, in order to seize and take the said goods and chattels so therein then being as aforesaid, as a distress for the said arrears of rent so due and owing unto the said defendant Harrison as aforesaid, and did thereupon, at the said time when, &c., and within thirty days next after the said goods and chattels had been and were so fraudulently and clandestinely conveyed away and carried off as aforesaid, in the said dwelling-house in which, &c. take and seize and detain the said goods and chattels so there found, and then being the goods and chattels of the said E. Spencer as aforesaid, as a distress for the said arrears of rent then due and unpaid as aforesaid, and according to the form of the statute in such case made and provided, as they lawfully might for the cause aforesaid, and using no improper force and violence, and staying and continuing in the said dwelling-house in which, &c. no unnecessary or improper time on that occasion, which are the same trespasses in the said declaration mentioned. Verification.

The third plea was in the same form, except that the demise was stated to be made to, and the rent due from, E. Spencer the younger.

Demurrer to the second and third pleas, on the following grounds:—That no title in Harrison to distrain for the said rent, nor the nature, quantity, or quality of his estate or interest in the demised premises, is shewn; that it does not appear that Harrison had any reversion expectant on the determination of the demise, and also that the quantity, quality and description of the goods, alleged to be removed into the dwelling-house of the plaintiff, are not set forth; and that the pleas are uncertain, and want particularity.

*Huddleston*, in support of the demurrer.—The plea is bad, for not stating the nature, quality, or quantity of the defendant's

interest in the demised premises; this, it was said in *Bowler v. Nicholson* (1), would be a fatal objection, if taken, as here, on special demurrer. See also 2 *Wms. Saund.* 285, *a. k.* *Grimstead v. Marlowe* (2) shews the distinction between a declaration and a plea: in the former the plaintiff may declare generally on his possession; but, in the latter, a legal title must be set forth—*Pearle v. Bridges* (3), *Com. Dig.* tit. 'Pleader,' C, 41, E, 22, 3 M, 26. This plea is analogous to an avowry before 11 Geo. 2. c. 19; in which case the title must have been pleaded fully—*Silly v. Dally* (4).

[WIGHTMAN, J.—The plea alleges that Spencer held under a demise from the defendant; that may be traversed.]

That is not sufficient: it should be averred that the defendant had the reversion in the demised premises, so as to entitle him to distrain; it is consistent with this plea that he demised all his interest to Spencer. *Hooker v. Nye* (5), which may be relied on in support of the plea, only shews that this objection will not prevail on general demurrer.

[LORD DENMAN, C.J.—Is it not sufficient to follow the words of section 1. of 11 Geo. 2. c. 19?]

[WIGHTMAN, J.—Pleas are pleaded over and over again in this form—*Thornton v. Adams* (6), *Bach v. Meats* (7).]

[COLBRIDGE, J.—*Hooker v. Nye* and *Bowler v. Nicholson* were actions between landlord and tenant; and the pleas were framed with reference to section 22, not section 1, of the act; and, in the latter case, the objection was, that the plea was defective in particularity, not in omitting to state title. This plea is much fuller, and gives the dates and names of the parties to the demise.]

Littledale, J., in *Bowler v. Nicholson*, alludes to sect. 1. of the statute, as that under which the plea is framed. Secondly, these pleas do not sufficiently describe the

(1) 12 Ad. & El. 341; s. c. 9 Law J. Rep. (n.s.) Q.B. 353.

(2) 4 Term Rep. 717.

(3) 3 Keb. 61; s.c. 2 Wms. Saund. 401, *a.*

(4) 1 Lord Raym. 331.

(5) 1 Cr. M. & R. 258; s. c. 3 Law J. Rep. (n.s.) Exch. 340.

(6) 5 Mss. & Selw. 38.

(7) Ibid. 200.

goods which the defendant entered to seize; and the plaintiff is not able to discover to what particular goods he is to point this evidence. He ought not to be compelled to prove that all the goods in the house are his own. In *Anthony v. Haney* (8) and *Patrick v. Cole-rick* (9) the goods were described.

[COLERIDGE, J.—The plaintiff is alleged to have assisted in the removal, and must therefore know which the goods are.]

*Crompton*, contra.—This plea is in accordance with the form adopted ever since the passing of 11 Geo. 2. c. 19; and as it sets up a statutable authority, it is enough if it follows the words of the statute. The analogy drawn from an avowry before the statute will not hold; for in replevin the defendant is an actor, but in trespass he merely justifies his act, and the statement of the tenancy is mere inducement and collateral to the defence: this plea does not set up matter of title, but an excuse for committing the trespass complained of. It is like the case put in *Com. Dig.* tit. 'Pleader,' 3, M, 16: "If the defendant pleads *molliter manus* in defence of his possession, he need not shew by what title he was possessed; for it is only inducement to the plea." The statute 11 Geo. 2. c. 19. s. 1. requires, that there should be a demise whereon rent is reserved; that is here alleged with the requisite particularity of the term, date, and names of parties. That was the nature of the objection on which *Bowler v. Nicholson* was decided: no point was there made as to the want of statement of a reversion. The statute gives a new right to landlords to be exercised under the circumstances there stated. If the legislature had considered that it was necessary to plead specially, a concise mode of pleading would probably have been provided, as is the case in other defences given under sections 21. and 22. But, next, there is a sufficient statement of a reversion; the rent is said to be "reserved." *Prima facie* a "demise" implies a reversion; where the whole interest is passed it is more properly an assignment. *Preece v. Corrie* (10) shews, that there could

be no right of distress in such a case, and therefore the goods could not be removed to avoid a distress.

[LORD DENMAN, C. J.—Do the precedents omit the statement of a reversion? That seems necessary to the defence under the statute, which only dispenses with a deduction of original title, not with a statement of a present right?]

In *Hooker v. Nye* it is held, that if there is no reversion in the defendant it ought to be replied.

[COLERIDGE, J.—You must shew a right to distrain as a foundation for the right to enter, and therefore you must shew a reversion.]

The statement that Spencer held under and as tenant to the defendant, means that the defendant had the reversion; otherwise it would be an assignment. Lastly, as to the description of the goods, the plea follows the words of the statute, and is sufficient.

*Huddleston*, in reply.—The statement that Spencer held as tenant to the defendant, does not shew any right of distress. If all the defendant's interest had been passed to Spencer, she might still hold as tenant at a rent; though not being incident to a reversion, it could not be distrained for —*Pollock v. Stacey* (11).

LORD DENMAN, C.J.—The legislature, by 11 Geo. 2. c. 19. s. 22, thought the old practice in replevin unreasonable, and gave a general form of avowry for rent in arrear. That is quite a distinct matter from the present, which arises under a different clause of the same statute. *Bowler v. Nicholson* only decided that section 22. cannot affect defences under section 1; which gives a new right in case of the fraudulent removal of goods by tenants of lands, upon the demise of which any rent is reserved for the purpose of preventing a distress. Here the declaration alleges a breaking of the plaintiff's house; the defendant pleads that in the house were goods, removed by his tenant to avoid a distress for rent due and reserved under a demise. It appears to me that this is sufficient to make out a defence under that section, the words of which are followed by the plea. I had some doubt at first whether

(8) 8 Bing. 186; s. c. 1 Law J. Rep. (N.S.) C.P. 81.

(9) 3 Moe. & Wels. 483; s. c. 7 Law J. Rep. (N.S.) Exch. 135.

(10) 5 Bing. 24; s. c. 6 Law J. Rep. C.P. 205.

(11) 16 Law J. Rep. (N.S.) Q.B. 132.



it was quite sufficient, because section 1. does not set out all that is requisite to a complete defence. There must be a reversion in order to justify a distress. Mr. Crompton's answer is, that the plea would be inconsistent unless there was a reversion in the defendant, and I think we ought to give effect to that argument. *Prima facie*, at least, where the tenant is said to have removed his goods to avoid a distress, it must be presumed that rent for which a distress might be made was due. And *Hooker v. Nye* is a sufficient authority that such *prima facie* statement is sufficient, and that the plaintiff ought to reply any answer he may have to it. *Preece v. Corrie* supports this view, for it establishes, so far as it goes, that a party may be tenant without there being any reversion. Notwithstanding, therefore, the expressions used in *Bowler v. Nicholson*, this plea does state sufficient to justify the defendant under the statute.

PATTERSON, J.—This is an action of trespass *quare clausum fregit*, brought by a person wholly unconnected with the premises in respect of which the rent is alleged to be due. Then the defendant pleads a defence under section 1. of 11 Geo. 2. c. 19, which is not like an avowry under section 22, but states the terms and date of the demise, and the name of the tenant. It is true the defendant does not state his own title, but he states a demise to E. Spencer, and that rent became due and was in arrear, and that she removed the goods to the plaintiff's premises in order to avoid a distress. I think this pretty sufficiently shews that Spencer entered on the demised premises, and was in possession, for she removed the goods to prevent the landlord distraining. Then it is said, that without a statement of the defendant's title, no right to distrain is shewn. No doubt at common law in avowing to an action of replevin this would be so; but I do not know that it would be necessary to do so at common law in justifying in trespass. I always understood there is a distinction between replevin and trespass in this respect, and for this reason, that in the former action the defendant is an actor, setting up a claim, and not merely a party defending himself. I quite agree with the note in the last edition of *Saunders*; it is very guardedly expressed. I do not think that

a plea stating merely that A. held as tenant to B. under a demise theretofore made, would be good if pleaded to an action of trespass. I cannot agree with the observation of Lord Lyndhurst, in *Hooker v. Nye*, that this is the usual form of the plea; I think the demise ought to be stated with greater particularity. However, here the defence is under section 1. of the statute, and the words of the plea follow the words of that section. The statement of the tenancy is collateral matter only, this being an action by a perfect stranger to the demised premises, and the goods having been removed from other premises; therefore it was not necessary to state it with all the allegations of title, even admitting (which I do not) that such a statement is ever necessary in trespass. The only point which weighed with me at all was, whether there was any thing amounting to a statement of a reversion in the defendant. I think, taking all the words of the plea together, it is sufficiently stated; for it is said that rent was reserved on a demise, and that the goods were removed to prevent a distress. If there was no reversion it ought to have been replied. As to the case of *Bowler v. Nicholson*, I do not think any of the Court intended to express an opinion whether such a plea would or would not be good on special demurrer. It is necessary to determine that point now. I should have thought, in this particular plea, it would have been enough to have said that Spencer held the premises under a demise theretofore made; but none is here stated, and therefore, even on special demurrer, the plea is good.

COLERIDGE, J.—I am of the same opinion after some hesitation. I should be sorry if, to defeat a technical objection, the law should be strained. Two principles are relied on: one that mere collateral matter need not be pleaded; the other, that enough must be shewn to justify the act complained of. I think there is no difficulty here in reconciling these two principles. Mr. Crompton made use of a very apt illustration of a party defending his own possession, in which case he need not set out his title, but he must shew enough to justify his conduct. Applying that principle to the present case, it appears to me that if the defendant had stated his title as at common

law, beginning with a seisin in fee, it would have been purely collateral to this defence. At the same time, it is necessary that enough should appear on the plea to shew that the defendant has a right to distrain. Now, the plea follows the terms of section 1. of the statute. No doubt the framers of that statute thought they had stated enough on the face of that section to give a landlord the justification intended. That is something in support of this plea. Another strong argument is, that since the time when the statute passed the precedents have been uniform. Then, we have *Hooker v. Nye*, which, subject, as it may be, to the observation made by my Brother Patteson, is, at all events, an authority as to the reversion and right to distrain being implied from the words used. It is here stated that the goods were removed to avoid a distress, and that there were no goods remaining on the premises to countervail the rent due, and then, what is very important, that the plaintiff was acting in concert with Spencer to remove the goods from the premises. This seems to import that the landlord had a reversion, and followed the goods for a distress. It seems to me, therefore, that there is quite enough stated to shew a right of distress in the defendant.

WIGHTMAN, J.—It appears to me that this form of pleading is certainly admissible in the present case. I feel that great weight is the distinction made between actions of replevin and trespass. In the former, at common law, the party justifying was obliged to set out a complete title; but a distinction always obtained between justifying for taking cattle damage feasant, where it was enough to rely on possession, and to state that the cattle were doing damage in the close in which, &c. Here the defence is given by statute, which expresses under what circumstances the goods may be followed. The plea uses the terms of the act, and something more; there is a certain particularity adopted in pleading this defence, and a right to distrain is implied in the statements. And there could be no such right to distrain unless there were also a reversion, although the statute does not in terms shew any necessity for stating the reversion. The plea shews a *prima facie* right at least to follow the goods.

For this *Hooker v. Nye* is an authority, if any be necessary. On the other points, I agree with the rest of the Court.

*Judgment for the defendant* (12).

1847. }  
May 7; } HORNER v. DENHAM.  
July 7. }

*Pleading — Payment — Satisfaction — Costs.*

*Defendant pleaded non assumpsit to all but 12l. To 11l., parcel of the 12l., payment and acceptance in satisfaction, after action brought. To the residue, payment of 1l. into court. The plaintiff traversed the payment of the 11l., and took the 1l. out of court. It appeared by the evidence that the amount due to the plaintiff, at the commencement of the suit, did not exceed 12l., and that 11l. was paid after action brought, and accepted by the defendant in satisfaction of that amount:—Held, that the plaintiff after the payment of the 1l., was not entitled to proceed for costs, in respect of the 11l.; but that the defendant was entitled to have the verdict entered for him, and to the general costs of the action.*

A rule nisi had been obtained for entering the verdict for the defendant, and for striking out the damages of 1s., which, by the order of Maule, J., at the trial of the cause, had been entered for the plaintiff. [The pleadings and facts are fully stated in the judgment of the Court.]

*Talfourd, Serj. and Keating* shewed cause.—Though the jury have returned a general verdict substantially for the defendant, yet the Judge, seeing the legal effect of the finding, has ordered the verdict to stand for the plaintiff. It is true that a debtor after payment of the debt cannot be called upon to pay damages; but here the plea is not pleaded in bar of the damages, and the case is therefore distinguishable from *Corbett v. Swinburne* (1).

*Cooke, contra.*—The plaintiff might have

(12) See, as to the necessity of there being a reversion in order to perfect this defence, *Pluck v. Digges*, 2 Dow. & Cl. 180; *Ashmore v. Hardy*, 7 Car. & Pay. 501.

(1) 8 Ad. & El. 673; s. c. 7 Law J. Rep. (nra.) Q.B. 215.

taken the 1*l.* out of court, together with the costs of the action at that time, and the case would then have been the same as if 12*l.* had been paid into court. The plaintiff should not have traversed the payment of the 11*l.* after action brought. That plea has been found in the defendant's favour; and, after payment of a debt, a party cannot sue for nominal damages—*Beaumont v. Greathead* (2).

*Cur. adv. vult.*

The judgment of the Court was subsequently delivered by—

LORD DENMAN, C.J.—In this case the first count has been disposed of in favour of the defendant. The question upon the second and third counts is, whether the plaintiff is entitled to any damages. The learned Judge ordered an entry of 1*s.* damages, and gave the defendant leave to apply for a rule to rescind that order, and that rule we are now to decide. The second count is in assumpsit, for use and occupation, for 20*l.* The third count is on an account stated, and is in effect included in the second count. The pleas are, first, as to all except 12*l.* (omitting fractions), non assumpsit. Second, as to 11*l.*, parcel of 12*l.*, in bar of further maintenance, that the defendant, after writ, and before declaration, paid, and that the plaintiff received that sum of 11*l.*, in satisfaction thereof and of all causes of action in respect thereof. Third, payment of 1*l.*, residue, into court. The replication, as to the first plea joins issue; as to the second plea traverses the payment and receipt; and as to the third plea takes the 1*l.* out of court.

The evidence shewed as to the first plea, that the defendant, at the commencement of the action, was not indebted beyond the sum of 12*l.* for the cause of action declared on. As to the second count, that after the writ had been issued, but before the defendant or the plaintiff were aware of it, and before declaration, the defendant paid, and plaintiff received, the sum of 11*l.* mentioned in the plea.

The plaintiff admitted, that if the writ had not been issued, this payment and receipt would have proved the common plea of payment in bar of the action as to that amount; but contended, that it would not

prove this plea in bar of the further maintenance of the action, because at the time it was received the plaintiff had become entitled to the costs of the writ, and that the plaintiff did not receive it in satisfaction of the costs, as he did not know that he was so entitled, and upon this ground we understand the learned Judge directed the entry of 1*s.* damages for the plaintiff.

But it appears to us, that, upon these pleadings and facts, the defendant was entitled to succeed on both issues, and that the plaintiff was not entitled to any damages as the plaintiff failed to establish a right to more than the sum admitted; the verdict on the first issue, raising this question, should be reversed, and entered for the defendant. The second plea raises the question, whether 11*l.* had been paid and received in satisfaction of so much of the cause of action as amounted to 11*l.*; and the evidence shews that it was so, and entitles the defendant to a verdict thereon. There appears no reason for requiring that the plea should state, or the evidence shew, that this sum was received in satisfaction of any costs, for the costs of the writ, which were all the costs incurred when this payment was made, are offered to the plaintiff by the third plea. If the defendant had paid no money to the plaintiff, he clearly might have paid 12*l.* into court, in bar of the further maintenance of the action as to that sum, and if the plaintiff chose to admit that no more was due, he might take it, and the costs of the action; but if he chose to claim more, the costs of the action would abide the result of such claim.

By paying part to the plaintiff, after writ issued, we think the defendant was in not a worse situation than if he had paid nothing; that he was not obliged to pay the 11*l.* twice over, but was at liberty to say that his liability had not exceeded 12*l.*; that 11*l.* had been discharged by payment, and that the remaining 1*l.*, with the costs of the writ and action, were at the option of the plaintiff, if he gave up any further claim. If the plaintiff had given up any further claim, he would have the costs of the writ only once; and if he made a further claim, the entire costs of the writ were to depend on that claim in the ordinary way. Then, as the defendant has succeeded in respect of that claim, he is entitled to the

general costs of the action. The rule, therefore, must be made absolute, for entering the verdict on the general issue for the defendant, and for striking out the damages, and for delivering the *postea* to the defendant.

*Rule absolute.*

1847. }  
Dec. 10. } MILLS v. BLACKALL.

*Assumpsit—Consideration—Pleading.*

*A declaration stated that the defendant was possessed of a ship, and the plaintiff was a master mariner, having interest at N, for loading a vessel; and it having been proposed that the defendant should give the plaintiff the command of the said ship, for a voyage to the West Indies and back, it was agreed that in consideration of the plaintiff having interest in N, for loading a vessel, the defendant would give the plaintiff the command of the said ship, with the understanding that the plaintiff would use all possible exertions for the benefit of the ship and owners; and that for such services the defendant would pay the plaintiff 8l. per month during the command by the plaintiff, and other sums during the voyage, with outward and homeward primage. Allegation of mutual promises. Averment, that the defendant gave the plaintiff the command of the said ship, and that he set out on the voyage, and carried and delivered an outward cargo; that the plaintiff arrived at N, and finding that a homeward cargo could not be obtained without disadvantage, he proceeded to R, and there took in a homeward cargo, and delivered the same at London, and then resigned the command to the defendant, who accepted the same; that from the time when the command was given to him till he so resigned it, the plaintiff used all possible exertions for the benefit of the said ship and owners. Breach, non-payment by the defendant of the monies due to the plaintiff. Plea, that the plaintiff did not use all possible exertions, &c., modo et formâ:—Held, on demurrer, that the declaration imported a sufficient consideration; and that the plaintiff, having taken the command of the ship, might maintain the action.*

*Held, also, that the plea traversed only part of the consideration, and was, therefore, insufficient.*

*Assumpsit.* The first count stated, that whereas, at the time of the making of the agreement after mentioned, the defendant was possessed of a certain ship or vessel called the *Cuba*, then lying at the port of London, and the plaintiff was a master mariner, having interest in the island of Nevis, in the West Indies, for loading a vessel; and it having been proposed by the plaintiff to the defendant that the defendant should give the plaintiff the command of the said ship, for a voyage to the West Indies and back, thereupon, heretofore, to wit, on &c., by an agreement in writing then made between the plaintiff and the defendant it was agreed, that in consideration of the plaintiff having interest in Nevis aforesaid for loading a vessel, he, the defendant, would give the plaintiff the command of the said ship called the *Cuba*, with the understanding that the plaintiff would use all possible exertion for the benefit of the said ship and owners thereof; and that, for such services, the defendant would pay the plaintiff the sum of 8l. 8s. per month, during the command by the plaintiff, and also 5l. per month, during the said voyage, for finding the cabin in requisites and cuddy stores; and also 30l. for horse-hire and contingent expenses in the West Indies, with outward primage, and the usual and customary homeward primage. The cabin to be at the service of the plaintiff, as also the profit of passage-money (if any) therein, the plaintiff finding all the requirements thereof; and the said agreement being so made, afterwards, to wit, on &c., in consideration of the premises, and that the plaintiff, at the request of the defendant, then promised the defendant to observe and perform all things which, according to the said agreement, were by and on the behalf of him, the plaintiff, to be observed or performed, the defendant promised the plaintiff to observe and perform all things which according to the said agreement were by and on the behalf of the defendant to be observed or performed. Averment of due performance by the plaintiff of all things which according to the said agreement were, by and on behalf of him, to be observed or performed; that in pursuance of the said agreement, the defendant gave the plaintiff the command of the said ship, and that he set out in command of the said ship from London aforesaid, on the voyage aforesaid; that the said ship carried an

outward cargo from London aforesaid, to be delivered at divers ports and places in the course of the said voyage, to wit, to be delivered at the island of Canary, on the coast of Africa, and at the said island of Nevis, and at the island of St. Kitt's, in the West Indies aforesaid ; that the plaintiff safely delivered the said cargo at the destination thereof, to wit, at the several places last aforesaid ; that the sum earned by the said ship for freight in respect of the said outward cargo amounted to 120*l.* ; that the plaintiff having so as aforesaid set out on the said voyage, duly performed and completed the same, and having so completed the said voyage resigned the command of the said ship into the hands of the defendant as hereinafter mentioned ; that in the prosecution of the said voyage the plaintiff arrived at the said island of Nevis, and finding that a homeward cargo was not likely to be obtained there for the said ship, without disadvantage to the said ship and owners from delay, the plaintiff in the execution of the said voyage proceeded thence with the said ship to the island of Porto Rico, in the West Indies, and there procured a full homeward cargo for the said ship, to wit, a cargo of 474 hogsheads of sugar ; that the plaintiff having procured the said cargo, took in the same at Porto Rico aforesaid, and set out home and carried the said cargo from Porto Rico aforesaid home, to wit, to London aforesaid, and arrived there heretofore, to wit, on &c., and safely delivered the said cargo there, and then resigned the command of the said ship into the hands of the defendant, who accepted the said resignation ; that during all the time from the time when the command of the said ship was given him, until the time when he so as aforesaid resigned the said command, the plaintiff used all possible exertions for the benefit of the said ship and of the owners thereof ; that the said time during which he had the command of the said ship amounted to six months, and that the time during which the said voyage continued amounted to six months ; that the plaintiff found the cabin during all the said voyage in requisites and cuddy stores, and incurred great expenses for horse hire and contingent expenses in the West Indies, to wit, 30*l.* ; that outward primage is at the rate of 5*l.* per cent. upon the sum earned for freight

in respect of the said outward cargo, and the usual and customary homeward primage upon the said homeward cargo is at the rate of 6*d.* for every hogshead so as aforesaid carried from Porto Rico aforesaid, and delivered at London aforesaid : of all which premises the defendant from time to time had notice ; that although the sum of 53*l.* 9*s.* 5*d.* has accrued due to him from the defendant in pursuance of the said agreement, at the rate of 8*l.* 8*s.* per month for every month during the said command by him of the said ship, to wit, for six months, at and after the rate aforesaid ; and although the sum of 26*l.* 16*s.* 8*d.* has accrued due to him from the defendant in pursuance of the said agreement, at the rate of 5*l.* per month for every month during the said voyage, to wit, for six months, at and after the rate aforesaid ; and although the sum of 30*l.* has accrued due to him from the defendant in pursuance of the said agreement for horse hire and contingent expenses in the West Indies aforesaid ; and although the sum of 6*l.* has accrued due to him from the defendant in pursuance of the said agreement for primage on the said outward cargo, at a certain per-centage on the amount earned for freight, to wit, on the sum of 120*l.*, at the rate of 5*l.* per cent. upon the said sum of 120*l.* ; and although the sum of 11*l.* 17*s.* has accrued due to him from the defendant in pursuance of the said agreement for the usual and customary homeward primage on the said homeward cargo, at and after the rate of 6*d.* per hogshead for every hogshead of sugar of the said homeward cargo so carried and discharged and delivered as aforesaid ; and although the defendant has from time to time had due notice of all the premises, and although a reasonable time has elapsed before the commencement of this suit for payment by the defendant to the plaintiff of the said several sums of money respectively ; and although the defendant has been often requested to do so, yet the defendant has disregarded his said promise, &c. Counts for work and labour, for commission on goods sold by the plaintiff for the defendant, for goods bought by the plaintiff for the defendant at his request, for money paid, and on an account stated.

Fourth plea, that the plaintiff did not use all possible exertions for the benefit of the

said ship, or of the owners thereof, in manner and form as the said plaintiff hath above in the said first count of his said declaration in that behalf alleged.

**Demurrer.** The grounds specially stated were, that the fourth plea treats the matter therein traversed, namely, that the plaintiff hath used all possible exertion for the benefit of the said ship and owners as a condition precedent to the right of the plaintiff to recover upon the said agreement, whereas, in truth and law, it is not a condition precedent thereto; that the said plea traverses an immaterial averment, and offers an immaterial issue; also, that it is uncertain whether the said plea denies or confesses the contract or promise in the said first count stated; and the defendant ought to have made it appear whether he denies or confesses the same. Joinder in demurrer.

**Mills**, in support of the demurrer.—The plea treats it as a condition precedent that the plaintiff should use all possible exertions to procure a cargo; but this is clearly an independent stipulation on the part of the plaintiff, a failure to perform which would give the defendant a right to be compensated by damages, but will not deprive the plaintiff of his remedy against the defendant. *Stavers v. Curling* (1) is directly in point. But it may be contended, that the declaration does not shew any consideration for the defendant's promise. Looking to the whole declaration, it is clear that the consideration, expressed on the face of the agreement, is, that the defendant should render to the plaintiff the command of the vessel. As to mutuality, that is imported by the word "agreement"—*Mouniford v. Horton* (2).

**Ogle**, *contra*.—There is no valid consideration for the defendant's promise. The introductory averments in the declaration will only explain, but not add to, the subsequent part; and it does not appear there is any mutuality. The plaintiff could not be forced under this agreement to take charge of the ship.

[**PATTESON, J.**—There are cases where

an action will lie without mutuality,—on a guarantie, for instance. If the plaintiff here does take the command of the ship under the agreement, surely he may maintain an action for his services, although the defendant could not compel him to take the command.]

That would be on the count for work and labour, not on the special count.

[**COLERIDGE, J.**—What is called a special count is really an *indebitatus* count unnecessarily expanded. The agreement to use all possible exertion is nothing more than the ordinary duty of the master; and if you strike that out, there remains an agreement that if the plaintiff will become master, the defendant will pay him for his services, and an averment that the plaintiff did become master.]

The count rests entirely on the agreement; and the case ought to be considered as if the action was commenced the day after the contract was made.

[**WIGHTMAN, J.**—That is not so. We must consider the action brought the day after the work done. In the case put by my Brother Patteson, of a guarantie, no action lies till the goods are supplied.]

Then the plea is good. The defendant was to pay the plaintiff "for such services"; those include the using all possible exertions as part of the conduct of the ship. The plaintiff has made this part of the consideration for the promise; and therefore it may be traversed.

**LORD DENMAN, C.J.**—After some doubt I think this declaration may be sustained. If the plaintiff has done the work, and the defendant has had some benefit from it, he is bound to pay for it, although he may not have received all the benefit which he would if the work had been done with all possible exertions.

**PATTESON, J.**—This is a very legitimate mode of pleading, to state the agreement *in hæc verba*, and then allege mutual promises. It is every day's practice to do so in cases on policies of insurance. The question is, whether we can collect from the declaration any and what consideration. The words "in consideration of the plaintiff having interest at Nevis," must be taken only as giving the reasons for the agreement. That

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(1) 3 Bing. N.C. 355; s.c. 6 Law J. Rep. (N.S.) C.P. 41.

(2) 2 New Rep. 62.

NEW SERIES, XVII.—Q.B.

is evident from the preceding part of the declaration. Then we must look at the whole of the agreement, and it amounts to this, that the plaintiff having interest at Nevis, should be put in command of the vessel, and should use all possible exertions to get a cargo, and that the defendant should pay him for such services. The plea traverses only part of the consideration, and is therefore insufficient. It then comes to the question, whether the declaration is good on general demurrer; and I think it is—it is such as any person of ordinary sense would understand, and that is sufficient.

COLERIDGE, J.—I am of the same opinion on both points. On the plea I never felt any doubt. If it had shewn that the whole of the consideration had failed, it would have caused the promise to fail also. However, it only alleges a partial failure, and that will not do away with the promise. As to the first point, my only doubt was as to the mode of stating the agreement, which is not very technical. I have no doubt that the meaning of the agreement is, that if the plaintiff would take charge of the vessel, and would use his best exertions to get a cargo, the defendant would pay him at the rate mentioned. Until the plaintiff had taken the command, no action could be brought against the defendant; but where he has once done so, I think it quite clear he may maintain an action for his services.

WIGHTMAN, J.—The objection to the declaration is, that there is no mutuality shewn. That objection might be entitled to great weight if the case rested on the contract unexecuted. But here the plaintiff has done all that the contract contemplated he should do. Such a contract in its inception is obligatory on one party only, as in the instance of a guarantee; but if the person who is not bound does act under the contract, a right of action accrues to him against the other. On the plea, I agree with the rest of the Court.

*Judgment for the plaintiff (3).*

(3) See *Havelock v. Geddes*, 10 East, 555.

1845.  
Jan. 4;  
Dec. 8.  
1846.  
Feb. 11.  
1847.  
July 9.

ROGERS v. BRENTON.

*Custom—Mine—Minerals—Lex Loci—Stannaries of Cornwall—Bounding—Renewal of Bounds—Profit in alieno solo.*

*A custom for a miner or bounder to enter and work land, in search of minerals, (such working not having been commenced or prosecuted by the owner or other person) rendering a portion of the produce to the lord or owner of the soil, and giving due notice of his proceedings, is not an illegal or unreasonable custom; and the interest so acquired by virtue of the custom is, if the bounder continues in possession and works the mine, such an interest in the mine as may be recovered in ejectment; but such customary right cannot exist unless there be a bonâ fide continuing by the bounder to search for ore: and, therefore, where the plaintiff declared on his possession of a certain "tenement," to wit, "the right to dig and get ore, found and being within certain tin bounds," and charged the defendant with disturbing him, and carrying away the ore, &c.,—Held, that although the statement of the plaintiff's right might properly describe that which existed when he first took possession of the bounds under the custom; yet in order to make out his right as claimed he must shew a bonâ fide continuing to work the mine, and that the annual renewal by new cutting the turves, however useful for ascertaining the limits, could not be considered as equivalent to such working.*

*Held, also, that such a claim was to be tried as a custom limited in local extent, and not as the local law of a particular district.*

The declaration stated that the plaintiff, before, &c., to wit, on the 6th of January 1839, and from thence continually until the commencement of this suit, was lawfully possessed of, and entitled to, and ought to have had and enjoyed the tenement following, that is to say, the right and liberty to get, dig, raise, and carry away for his, the said plaintiff's own use, the tin and tin ore

found and being within a certain place or plot of ground, called the Ruby Tin Bounds, situate in the parish of Wendron, in the county of Cornwall; yet the defendant, well knowing, &c., but contriving to injure and disturb, &c., whilst &c., wrongfully, &c. dug, got, raised, and carried away divers large quantities, to wit, twenty tons of tin and tin ore, found and being within the said place or plot of ground hereinbefore described.

Second count, trover for tin and tin ore.

Pleas—first, not guilty.

Second, to first count, that the plaintiff was not lawfully possessed of, nor entitled to, nor ought he to have had or enjoyed the said tenement in that count mentioned, that is to say, the right and liberty to dig, get, raise, and carry away for his the said plaintiff's own use, the tin and tin ore found and being within the said place or plot of ground, *modo et forma*.

Third, to the second count, not possessed of the tin and tin ore.

The cause was tried, before Wightman, J., at Westminster, at the Sittings after Trinity term, 1843. The plaintiff claimed to be entitled to a certain share in tin bounds, called the Ruby Tin Bounds, in the county of Cornwall. These "bounds" had been held, as of right, for many years, and had been made the subjects of sale and settlement. It was contended that the bound-owner having marked out bounds, and paid a trifling fine to the lord of the manor, had a right to set the mine at work. The right to a mine once bounded, if not worked, was stated by witnesses to be kept alive by annual renewals. The renewal was by turning up a turf at the four corners, and many instances were mentioned in which bounds had been left unworked for eighteen or nineteen years, and then worked again; but the ordinary mode was, if the mine was not worked, to renew within a year and a day. The defendant was a captain of a mine which had been seven or eight years at work, and had taken ore which the plaintiff claimed as being within his bounds. The defendant did not dispute the right of the bounder to work; but contended that his right to get ore only continued so long as by the stannary laws he should "work his tin-work by himself, his wages man or farmer,

paying toll once a year and a day, or otherwise continuing his working in driving an adit and sinking a shaft, and withal preserving the four corner bounds;" and that the annual renewal of turning up four turves is only to preserve the boundaries, and identify and divide one man's pitch or set from that of another man, and does not create or preserve a title to bounds; if the bounds were left unwrought for forty or fifty years, the right was lost; also that the right to bound could in no case be claimed over the inclosed lands, but over the wastes alone. A verdict having been found for the plaintiff, with leave to the defendant to move to enter a nonsuit, in Michaelmas term, 1843,—

*Sir W. W. Follett (Solicitor General)* applied for a rule nisi to enter a nonsuit according to the leave reserved. First, on the ground that the evidence did not support the custom, as alleged in the declaration. Secondly, that the custom, as alleged there, would exclude the interest of the lord of the manor, and was, therefore, bad. The proof was that if the owner did not work the mine, any tinner might, rendering the lord his share of ore got; but here it was not proved or pretended that the plaintiff, the bound-owner, continued to work the mine. Thirdly this is a custom to take a profit in *alieno solo*, and clearly bad—*Blewett v. Tregonning* (1). There ought also to be a new trial, as the stannary laws, which were admitted, were not evidence to support the custom. Also the verdict was contrary to the evidence.

A rule nisi having been granted, in Hilary term, 1845,—

*Kelly, Smirke and Montague Smith* shewed cause.—The defendant, who was a mere wrong-doer, disputes that which he calls a custom; but which, in reality, is part of the general law of Cornwall, recognized in many judicial decisions, and the basis of many family settlements and purchases. It is analogous to the law of gavelkind, peculiar to particular counties, and traces its existence to a time anterior to that when Cornwall became an integral part of England. It may be shortly stated to be a right in "tinnerns" to take and set apart any particular portion of the waste, within the manor of the Duchy of Cornwall, and to

(1) 3 Ad. & El. 554; a. c. 3 Law J. Rep. (n.s.) K.B. 223.



plant and set bounds there, and to work the mines under the places so bounded, rendering to the "Duke of Cornwall every fifteenth dish of ore;" it being an incident of the custom, that the mines, when not in work, should be annually renewed. It is objected that this is a custom, and a bad custom; but it is not a mere custom to take profit *in alieno solo*; it is a right which may be, and has been, made the subject of ejectment, and may be considered as a right to a certain portion of the soil itself, with certain limitations—*Doe d. Lord Falmouth v. Alderson*, fully reported in *Smirke's Stannaries of Cornwall*, p. 39.

[COLERIDGE, J.—That was the case of a mine actually at work.]

But still the question raised was, whether the interest of the bound-owner, like that of an outstanding termor, did not bar the plaintiff. In *Doe d. Hanley v. Wood* (2) nothing was proved on the part of the plaintiff but a licence to take ore. The observations of Abbott, C.J. are in the plaintiff's favour. With respect to the bounder's interest, the law appears to be settled by *Vice v. Thomas*, *Smirke's Stannaries of Cornwall*, 1843, pp. 4, 32. In that case the petitioner set out his title as grantee of bounds for twenty-one years; and in giving judgment, in that case, the Lord Warden, assisted by the Judges, expressly decides that the interest of a bound-owner is recoverable in ejectment. In *Doe d. Lord Falmouth v. Alderson* it was not denied that such a right as that claimed by the plaintiff might exist. In that defendant, who being a bound-owner, who had been let in to defend for a mine (3), failed to establish his right as against the plaintiff, on the ground that the bounds had not been properly kept up. In the course of the argument, on shewing cause against a rule for a new trial in that case in November 1836, it was objected by the counsel for the plaintiff that the claim of the defendant was in right of a custom to take a profit *in alieno solo*, which was bad. —*Grimstead v. Marlow* (4), on which it was said, by Parke, B., "There is nothing in that objection. The custom is alleged to be part of the common law of Cornwall;"

and, in giving judgment, he observed that "the interest of the bound-owner (the defendant) depends on the custom, and ought to be found by a jury. I pronounce no opinion upon it. With respect to the mode of acquiring and preserving the right, the stannary laws are tolerably clear. To obtain the right *de novo*, proclamations are indispensable; but ancient bounds require none. To preserve the latter it is necessary for the bounder or others in his behalf either to renew annually, or, as it seems, to work within them, keeping up the visible marks of the old corners. If by either of these modes of preserving the right, a possessory interest in the tin mines was, on the 1st of July 1835, vested in a third person, it is an answer to this action." The documentary evidence of the custom is fully set out in the appendix to *Rowe v. Brenton* (5).

[COLERIDGE, J.—Can the bound-owner, by going through the form of renewing, without working at all, defeat the rights of the public at large? If so, the custom might operate to prevent anything being got from the mine by any one.]

It is not to be assumed or supposed that the right will be abused. The custom is not more unreasonable than the custom for the tanners to agree with the Duke of Cornwall that they are to take to the mines on payment of toll, without any obligation on these tanners to work the mines.

[LORD DENMAN, C.J.—The custom might operate so as to allow any bound-owner to prevent the ore getting into the market, with a view to keep up the value of some other mine, and create a monopoly.]

That might be said of the ownership of the mine itself. Besides, the custom had its origin in times when commercial rivalry was little thought of, and is not to be impugned by arguments derived from the present state of society. In former times it is not likely that adventurers would have begun to work at all, without some sort of title to protect them.

[WIGHTMAN, J.—It was objected, at the trial, that the custom was bad for uncertainty as to the extent to which bounds might go. For anything that appears, any

(2) 2 B. & Ald. 724.

(3) 1 Mee. & Wels. 210; s. c. 5 Law J. Rep. (N.A.) Exch. 153.

(4) 4 Term Rep. 717.

(5) 3 Man. & Ryl. 497.

man, according to the custom, might bound the whole county.]

The same may be said of the custom of requiring fines without limit to amount on renewal of copyholds.

As to the question of taking profit *in alieno solo*. In *Tyson v. Smith* (6) the same objection was made, and *Blewett v. Tregonning* was referred to. In that case under the custom a right was, in fact, claimed to take a profit in the soil of another, but it was held good; and Tindal, C.J. in giving judgment, says, "A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for *Consuetudo ex certâ causâ rationabili usitata privat communem legem* (Co. Litt. 113, a), as the custom of gavelkind and borough English, which are directly contrary to the law of descent; or again the custom of Kent, which is contrary to the law of escheats." *Blewett v. Tregonning* was founded on *Gateward's case* (7), which was a question of common. This is a *lex loci*. In *Doe d. Thomson v. Pearce* (8), *Gilbert v. Tomison* (9), *Arkwright v. Cantrell* (10), and *Beresford v. Bacon* (11), similar customs have come under discussion. In the last case the plea setting up the custom was held ill, but that was on the ground that it was not alleged to exist in a county or parish, but in a particular close; and it is true that a custom *de non decimando* would not be good for one parish or manor, but it would be good for a county—*Gwillim*, p. 373, 21 Edw. 4. fol. 28, 22 Edw. 4. fol. 8, *Vin. Abr.* tit. 'Custom,' *Newton v. Shafto* (12). All the requisites of a custom are well put in *Cuddon v. Estwick* (13), and they exist here. The case of the *Stannaries* (14) recognizes a similar custom. In *The Mayor of Lynn v. Taylor* (15), a custom for the freemen of Lynn to take gravel in the *locus in quo* to ballast their vessels was held good, being for the benefit of navigation; and

*Gateward's case* was held not to apply. In the judgment in that case the mining customs of Derbyshire were referred to and recognized. It is said that the custom is unreasonable; but of the reasonableness the Court cannot judge. Supposing a custom was set up for the Duke of Cornwall to enter on all mines and take the ore, making only a compensation for the superficial damage, which is the case in every country in Europe except England, can it be said that such a custom would be unreasonable? Can this Court say that that which is the custom of every other country is an unreasonable custom? If so, the custom set up by the plaintiff is *à fortiori* reasonable, for it provides for ample notice to the landowner, and it is only in default of his interference that the bound-owner's right can attach, and he cannot be called upon to have the mine always at work. But, in point of fact, the bounds in this case were constantly renewed and the mine at work at intervals. The defendant entered six or seven years ago and worked the mine; no evidence was given as to the party under whom he claimed, but the action is now defended by the lessee of the duchy. The plaintiff's family have exercised the right ever since the Conquest; and *Gateward's case* is not like this, as this is not a profit *à prendre*, but a claim to the soil itself.

[WIGHTMAN, J.—At the trial that was put as an *à fortiori* argument against the custom.]

Here ample consideration is paid to the lord by the bound-owner; that also distinguishes the present case from *Gateward's case* as well as from *Blewett v. Tregonning*, *Bac. Abr.* tit. 'Custom,' (D). Besides, great expense is incurred by the bound-owner in working the mine and searching for the ore—*Smirke*, p. 39, *Doe d. Lord Falmouth v. Alderson*. A custom which might be bad in one vill, might yet be good in another—*Vin. Abr.* tit. 'Custom,' (E), pl. 7 and 8, 'Copyhold,' (K), 4, 6, and 7, *Co. Litt.* 43, b, *Hoskins v. Robins* (16). The essence of the custom is the continual renewal. It is not unreasonable even as against the lord—*Hicks v. Gardiner* (17), *Horton v. Beckman* (18).

(6) 9 Ad. & El. 421.

(7) 6 Rep. 374, fol. 59.

(8) Peake, Add. Ca. 242.

(9) 4 Dowl. & Ry. 222.

(10) 7 Ad. & El. 565; s. c. 7 Law J. Rep. (N.S.) Q.B. 63.

(11) Lutw. 1317.

(12) 1 Sider. 267.

(13) 6 Mod. 123.

(14) 12 Rep. 202, fol. 9.

(15) 3 Lev. 160.

(16) 2 Saund. 323.

(17) 2 Bulstr. 196.

(18) 6 Term Rep. 761.

There is no real distinction between this case and that of copyhold, which having originated in a custom to hold land at the will of the lord has grown up into a right to hold it against him—2 *Black. Com.* 95. The custom has been assumed to exist, and has been recognized as legal in *The King v. the Inhabitants of St. Agnes* (19), *Crease v. Barrett* (20), *Crease v. Sawle* (21).

*Sir T. Wilde, Crowder and Butt*, contra. —This claim goes beyond any that has been sanctioned by any Court. It amounts to a claim of a right to divest the lord of a great portion of his estate by the mere act of taking up a few turves; and more than that, if after getting up these turves, and never perhaps working the mine at all, the claim as made is of the right to enter upon the tenant or owner who is working, and take from him all the ore he may have raised. Such a custom cannot be supported. In addition to this, it is uncertain. First, as to the necessity of the renewal of the bounds; secondly, as to the time of such renewal; thirdly, as to the mode of bounding—*Gray's case* (22), *Lovelace v. Reynolds* (23), *Pad-dock v. Forrester* (24). As to that, the usage as proved was, according to some witnesses, that when a mine was once bounded, neither working nor renewal was necessary. If there was any evidence to support the custom, it was so uncertain and contradictory that the defendant would, at all events, be entitled to a new trial. This is likened to the case of gavelkind; but gavelkind was the common law of England once, and has been frequently recognized by parliament. *Vice v. Thomas* is no decision in favour of such a right as claimed in this declaration. In *Doe d. Lord Falmouth v. Alderson* the question was, whether the bounds were ancient bounds, and the Judge left to the jury the question suggested by the Court. That case only shews that the plaintiff can only recover on his own title; and the right thus claimed was an easement only. If the Court cannot

trace the origin of the custom, they will look to its incidents, and judge whether it be reasonable. The extent of the district over which it is said to prevail cannot affect the question of its reasonableness. The question in *Newton v. Shafte* arose out of circumstances of border history. No case has been cited where such a custom as this, or indeed any other custom, was held to be reasonable, on the ground that it applied to a large district. The case of *Arkwright v. Cantrell* does not touch the present. In *Gilbert v. Tomison* the custom was different and was not disputed—*Doe d. Thomson v. Pearce. Broadbent v. Wilks* (25), where all the incidents of a custom are fully gone into, is a strong authority for the defendant. There is nothing in the custom as laid to compel the boulder to render any portion to the lord. If the plaintiff can recover in the present case, he may equally recover against the lord.

*Cur. adv. vult.*

At the sittings after Hilary term, 1846, the Court intimated an opinion that the case ought to be allowed to go down to trial again, the Judge who tried the cause not being altogether satisfied with the verdict; they were, however, requested by the defendant's counsel to give judgment on the question of the validity of the custom itself, which was raised in the rule for a nonsuit.

*Cur. adv. vult.*

LORD DENMAN, C.J., subsequently delivered the judgment of the Court.—The remaining question in this case, which the Court is now called on to decide, turns upon the validity of a custom or local usage, on which the plaintiff must rely to establish the most important allegation in his declaration, which the defendant expressly traverses by one of his pleas. The plaintiff declares on his possession of a tenement, which he describes as "the right and liberty to dig, get, raise and carry away the tin or tin ore found and being within a certain place or plot of ground, called the Ruby Tin Bounds"; the second plea denies this, and in part proof of it the plaintiff has offered evidence of, and the

(19) 3 Term Rep. 480.

(20) 1 Cr. M. & R. 919; a. c. 4 Law J. Rep. (n.s.) Exch. 297.

(21) 2 Q.B. Rep. 862.

(22) 5 Rep. 78, b.

(23) Cro. Elis. 546, 563.

(24) 3 Man. & Gr. 903; a. c. 11 Law J. Rep. (n.s.) C.P. 107.

(25) Willes, 360.

jury have found the existence in fact of the following custom:—That any tinner within the county of Cornwall may acquire the right to the tin within certain limits, according to the conditions, and following the rules, which will be found particularly stated in *Rewe v. Brenton* (26); and that the right, when so acquired, may be preserved by an annual renewal of the bounds; and that it is not necessary for its preservation that the minerals, if any, within the limits, should be sought after, and the land worked for mineral purposes, by the bound-owner or on his behalf.

The defendant contends that such a custom cannot exist in law, and, consequently, that the right laid in the declaration is not proved. The argument has proceeded on two grounds: the plaintiff contending, first, that, considered as a mere custom, to be tried by the ordinary tests, this is not unreasonable; and, secondly, that it is not properly a mere custom so to be tried, but that it is the local law of an extensive district, anterior, it may be, in origin, to the date when Cornwall became part of, and subject to, the general law of England; and that its effect is not to create merely an easement to be enjoyed in the land of another, but a tenement.

Although a decision on the second ground might dispense with a consideration of the former, it will be found from the nature of the inquiry more convenient to examine both in the order in which they are stated. In the great case of mines in *Plowden*, 310, 340, the Judges, as is well known, decided by a very large majority, that even where the gold or silver in a mine of base metal, as tin, in the land of a subject, is of less value than the base metal, the mere circumstance of its existence there causes the prerogative of the Crown to attach upon it, and makes it a mine royal,—and that the Crown has liberty to dig for it, place it on the surface, and carry it away. This resolution, however, clearly did not satisfy the learned reporter; he seems to have thought it proceeded from "ignorance of the nature of base mines;" all of which he surmises to contain some proportion of the richer and royal metals—gold or silver. The decision of the case, however, he observes, did not

turn on this point, for that, as the defendant there had pleaded, the intendment, which was to be the best for the Queen, must be that the gold and silver in the mines in question was of sufficient quality and value with reference to the base metal properly to qualify the whole mine as a mine of the royal metals. Another resolution, therefore, of all the Judges in the same case (p. 336) remains untouched—"that if the ore or mine in the soil of the subject be of copper, tin, &c., in which there is no gold or silver, in this case the proprietor of the soil shall have the ore or mine, and not the Crown by prerogative."

We have adverted to this case, and these resolutions, with a view to the important position, from which the whole argument must start, the ownership, namely, of the tin mines, and from whom derived; and in this sense it is material to observe, that although the principal part of the precedents and authorities cited in the argument in *Plowden* were drawn from Devon and Cornwall, yet even there these were not urged as having any peculiarity of local history which distinguished them either from each other or from the rest of England; on the contrary, they were used as applicable to the case in hand of a mine in Cumberland; and in the judgment no distinction whatever was adverted to between the Stannary districts *inter se*, or between them and any other mineral tract in England.

Nothing has been alleged in the present case to bring this mine within the description of a royal mine; and we think it would be wrong to encourage the slightest doubt that, apart from all question of boundary, the ownership of a tin or copper mine in Cornwall is in the owner of the freehold of the soil, *ratione soli*, by the common law of England, applicable to it, as to any other mineral district in any other part of England.

Upon this ownership, however, the custom of bounding has been engrafted, and to the extent to which both sides are agreed to admit it in fact there can be no doubt that it is most reasonable, fulfilling every requisite of a good custom. In substance it is this:—the mine is parcel of the soil; the ownership is in the owner of the soil; but it is a parcel which to discover and bring to the surface may ordinarily require capital, skill, enterprise, and combination;

which while in the bowels of the earth is wholly useless to the owner as well as to the public, and the bringing of which into the market is eminently for the benefit of the public. If, therefore, the owner of the soil cannot or will not do this for himself, he shall not be allowed to lock it up from the public; and therefore in such case (unless where by inclosure he may seem to have devoted the land to other important purposes inconsistent with mining operations, such as agriculture or building,) any tinner, *i. e.* any man employing himself in tin mining, may secure to himself the right to dig the mine under the land, rendering a certain portion of the produce to the owner of the soil.

It is right to observe in passing, how every step even in this strong invasion of the rights of ownership still is made with reference to them. In the first place, the lands to be bounded (we speak of a supposed original case of bounding) must be wastrel; if it be several and inclosed, it must have been anciently bounden while wastrel, and so in the language of the country "assured for wastrel;" the liability must have first attached on it therefore before inclosure and devotion to other useful purposes. Then after the tinner or boulder has commenced by cutting the turves, and so marking out the limits within which he will work, proceedings are to be taken in the Stannary courts, of which the owner has notice—and sufficient time is allowed before the boulder's title becomes complete—during which the owner may still intervene and preserve his rights entire, so as he will exercise them for the benefit of the public. If he abstain from any interference, it may be well considered that he has consented to the boulder's proceedings;—and the customary render of the portion called toll-tin may be a very sufficient consideration to him for what he gives up of his original exclusive rights.

When by the completion of the boulder's proceedings in the Stannary court his title is perfect, the question next material to be considered is, what is its legal character and amount? It is claimed on the present declaration as a "tenement;" it is contended by the defendant that it amounts to no more than an easement,—and as such is bad

in point of law. In the case of *Vice v. Thomas*, reported by Mr. Smirke, the petitioner claimed under the bound-owner; he stated that J. S. Enys "was lawfully possessed of the tin bounds after mentioned," and granted to him by indenture "liberty, licence, and power to dig, &c., throughout his tin bounds in Polbarrow mine, within certain described limits of the said mine," with liberty to dig drifts, shafts, &c. He then averred that in pursuance of the liberties granted he began to dig, work, and search for tin and tin ore within and under the said bounds,—and erected machinery,—and continued to dig till a certain time, when he discontinued, but with full intention of returning when convenient to him, and with that intention left his machinery standing upon the same bounds;—that he had raised large quantities of tin, disposed of it to his own use, and paid the toll and farm respectively. He then complained of a forcible entry and dispossession by the defendants. It is necessary to state the petition thus minutely, in order to apply the judgment, which follows:—"The next question then to be considered is, whether it is right to assume that the possession of the mine might have been recovered in ejectment. The vice warden, in deciding this case, did not express any doubt that possession of the mine might be recovered in ejectment; his proposition was merely this, that a court of equity had concurrent jurisdiction with a court of law. The cases cited at the bar during the argument shew, that *ejectment* will lie for a mine in circumstances like those in the present case, and I consider that such is the law of the case"—p. 35. (27)

The judgment from which we have made this extract is of the highest authority;—the case was very learnedly and ably argued, and H. R. H. the Lord Warden was assisted by five most eminent Judges. And this extract is the hinge on which the whole decision turned. But it certainly was not intended to lay down anything contrary to former decisions of the common law courts. The case of *Doe d. Hanley v. Wood* was cited in the argument, where a grant by deed not to be distinguished from that in *Vice v. Thomas* was

held to operate not as a lease, but only as a licence to enter and work :—but it was truly answered, that there the Court had only to construe the deed ; here, the Lord Warden had to decide on the interest of the grantee, *who had entered and worked and been in possession*, which possession he had never abandoned, but by his machinery was still maintaining. And such a case the Court in *Doe v. Wood* expressly excludes from the effect of its then decision. However, in *Doe d. Earl of Falmouth v. Alderson*, the defendant in ejectment entered into a consent rule to defend “for a certain tin bound in the parish of — (setting out the abutments) containing a certain mine, &c.” It was objected, and the Court held, that a tin bound as such was not recoverable in ejectment ; and Parke, B. asked the defendant’s counsel why he could not defend for a *mine lying within certain bounds* called tin bounds ?—evidently having present to his mind the same distinction which had been taken in *Doe v. Wood*, and was adopted by the Court in *Vice v. Thomas*, between a mere right to work acquired by bounding, and the interest of a bounder in possession and actually working a mine. This cause—the defendant adopted the suggestion of the Court—went to trial (in the summer of 1846), before Mr. Baron Alderson. It appeared that Lord Falmouth was the owner of the soil,—the land had been bounded,—there was a mine within the bounds,—they had been duly renewed for a period extending as far back as living memory could go, and the mine had formerly been worked by the bound-owners. In 1834, for some months the defendant had attempted to discover ore, but afterwards abandoned the mine and removed his machinery. In 1835, Lord Falmouth granted a set to another party, who entered and worked successfully,—upon whom the defendant entered, and forcibly expelled him. It must be presumed, though it is not stated, that there was in the declaration a demise by Lord Falmouth’s lessee, as Lord Falmouth himself was clearly out of possession by his own grant. At the trial the defendant did not shew himself to be the assignee of the bounds, but his counsel contended that the evidence of outstanding bounds was in itself a defence, as an outstanding term

would be, whether the defendant had any interest in them, or claimed under the owner, or not. This of course assumed that the bound-owner’s interest, though he should not be in possession, is a possessory interest, not a mere incorporeal liberty or easement ; and the question thus raised was not presented to the jury. Our Brother Parke says, “The first question is, whether the interest of the bound-owner is such a possessory interest as would enable him to bring ejectment, or whether he has a mere liberty to enter and get the mineral ; the next question is, whether such an interest, if any, was in him at the date of the demise in the declaration ; *the interest of the bound-owner depends on the custom, and ought to be found by a jury.*”

The case went down to a second trial in the summer of 1837, before my Brother Patteson ; and upon the first point, according to Mr. Smirke’s report, p. 42, (28), he stated the question to be, “whether, by the custom, the bound-owner has only an easement, that is, a right to enter and dig for tin, the possession of the soil and rest of the mine remaining in the lord, or whether he has such an interest and title in the mine that he may, for the purpose of getting tin, exclude the lord from the possession. It is difficult to see how this is to be put as a question of fact, but I am bound to do so : and if it should turn out to be, as I incline to think it is, rather a question of law, the Court above will know how to deal with it.” The jury found that the bound-owner had not a mere easement, but a right to the mine. And the Court was not moved to review this part of the direction ; indeed, the counsel for the defendant scarcely could quarrel with it ; the finding upon it was in their favour, and the verdict in the cause was for the plaintiff on the other question raised in it.

In this case of *Doe v. Alderson*, it is to be observed that the question did not arise upon any pleading, but upon the effect of evidence—what interest it was that the evidence taken altogether shewed to be actually in the bound-owner ; and this may have been a mixed question of law and fact, and so properly for the jury. In the case before us the plaintiff has expanded the

right, which he claims, on the face of the record; and that being so, it must be for the Court to pronounce on its effect. And there can be no doubt that the claim on the face of this declaration not only falls short of asserting any possessory interest in the soil, but wholly excludes it.

Nor can the plaintiff maintain that the bound-owner's right by the custom goes beyond the statement in the declaration,—and yet may prove it,—any more than he who claimed a right of common or a right of way over land could prove either by shewing a title to the land itself; for, as in those cases, although the land-owner may of course consume the herbage, or walk across the land, yet such incidents to the ownership are distinct in law from rights of common or way; so here, the right claimed is claimed as a tenement distinct and complete in itself, and separate from possession of the soil, or ownership. We are very far from saying that the plaintiff has in his declaration narrowed improperly the customary right of the bound-owner, as it stands immediately after the delivery of possession to him by the Stannary bailiff,—and apart from the actual possession and working of a mine. In several of the cases this fact has been relied on by the bound-owner, that possession was awarded upon the completion of the proclamations by the Stannary court, and delivered under a writ of possession. Mr. Smirke, in his careful report of *Vice v. Thomas*, p. 77 (28), has given us the form of a writ of possession after the third proclamation: it recites the judgment for the owners, “quod recuperent possessionem bundarum sive operis stannarii prædicti, vocati,” &c.; and then commands the bailiff to deliver the possession of the bounds or tin-work in the same words. This, therefore, throws no light on the legal character of the bounds, nor proves that any possession of the land passes. One test, perhaps, may usefully be applied. It is well known that the “stannary” customs, as the name imports, were confined to tin only; copper mining is of comparatively modern introduction into Cornwall; it is now discovered that the two metals are frequently found within the limits of the same work;—but we apprehend that it never has been contended that the boulder, merely

(28) Stannaries of Cornwall.

as such, working a tin mine, and extracting copper from it with the tin, has any right to the copper. If not to the copper, how can it be argued that he has any right except to the tin which he does extract, and to that which he may extract so long as he remains bound-owner, *i. e.* so long as those rights which he has first acquired by the custom are preserved to him by the custom, *i. e.* by his due compliance with all those rules which the custom imposes for their preservation?

This, then, brings us to the point which was more especially contested on the argument—whether this customary right can exist without continuing *bond fide* to search for tin, and to work the land for mining purposes within the inclosed limits;—whether it is sufficient merely to renew the bounds annually by a new cutting of the turves, as at the commencement. Assuming for the present the validity of the custom, if the *bond fide* working within the bounds be made a part of it, and assuming that it is a custom, which is to be tried by the tests established by the common law, for ascertaining whether a custom be good or not, it appears to us that without this qualification it cannot be sustained. Customs, especially where they derogate from the general rights of property, must be construed strictly, and, above all things, they must be reasonable. Bounding is a direct interference with the common law rights of property;—it takes from the owner of land, who is unable or unwilling at a particular moment to dig for tin under his waste land, the right to do so, it may be for ever, and vests it in a stranger, making only a customary render in return;—it empowers the stranger not only to extract the mineral from beneath the surface, but to enter on the surface, and cumber it with the machinery, buildings, and refuse stuff, which the operations below occasion,—and all this without the least regard to the convenience or interests of the owner. The only things which make this reasonable are the render of the toll-tin to the owner, and the benefit to the public received thereby in the extraction of the mineral from the bowels of the earth;—both these are not only lost, but the latter, it may be, positively prevented, if the boulder may decline to work, and yet retain the right to exclude the owner. Instead of insuring that the

minerals should be brought to the surface, the custom so construed may be made the means of keeping them locked up within it, and at the same time of preventing any improvement on the surface. Many bounds may become the property of the same owners, who may think their interests best served by limiting the supply and diminishing competition,—while the owner will decline to expend his capital on building, or agricultural improvements, because at any moment the bounder may renew his operations, and entirely and without compensation defeat the purposes of his expenditure. If it be said that the public good is best served by that regulated supply which best serves the private interests of the bounder—that whenever it is for the interest of the public that the mine should be worked, the interest of the bounder will be to meet the demand by an adequate supply—and that when the mine is not worked, it is only because it is for the interest equally of both that it should not be,—without admitting or denying the truth of these assertions, one answer is, that where such a state of things has existed so long and so decidedly as to amount to reasonable proof that the original purpose with which the bounds were inclosed has been abandoned, it is unreasonable to maintain the bounds themselves. It may have been that the owner did not inclose the land or work for the mineral himself only on account of a temporary inability, or the temporary existence of the same causes which the bounder now alleges as the ground for his ceasing to work : why, then, is he to lose his earlier and better right for ever, and under the same circumstances the bounder to preserve his? Another answer is drawn from regarding the original purpose of the custom, which was not founded on the doctrine of demand and supply, but on the expediency simply of bringing the mineral to the surface for the use of men. Another, if another be needed, is, that a render of a portion of the mineral to the owner of the land, is part of the consideration on which the bounder's right was originally founded ;—it is part of the compact, without which it may be that the land-owner would never have consented to the bounds ; and it is of course quite independent of such considerations as that of working profitably to the miner.

The condition that the bounds shall be annually renewed by new cutting the turves is useful for keeping the limits well ascertained, and also preserving the evidence of ownership ; but it is no substitute for the working itself, considered as the ground on which the reasonableness of the custom rests.

When the evidence in this case is referred to, the variations and uncertainty in which those are involved, who contend that the bound-owner need not work, strongly favour the conclusion in law to which we have arrived. The jury, indeed, have drawn a conclusion of fact from the whole—which, as such, we should not feel disposed to disturb—for it was their province to draw it from the statements submitted to them. But on reading the report, and finding among other things that there is a conflict among the witnesses who, from professional habits, might have been supposed best able to speak to the point, whether even an annual renewal of the bounds be necessary to preserve the ownership in the bounds, and also that much reliance seems to have been placed on the fact, entirely inconclusive, that owners of lands have in many instances not proceeded as for forfeiture of the bounds, where the mines have not been worked, we see every reason to believe that the unqualified right now claimed is but an abuse of the original limits of the custom, inconsistent with its object, and not to be sustained on any principle.

Thus far we have assumed that the custom, qualified by the condition of *bond fide* working, is good in law ; but it was strongly argued, that tried by one well-established rule, it could not be sustained. It was said, and truly, that the bounder takes a profit in the soil of another, and that a right to do so cannot by law rest on custom. This doctrine was affirmed in *Blewett v. Tregonning*, in which the earlier cases from *Gateward's case* downwards will be found collected. The plea in that case, on which the question arose, was framed evidently with a view to escape from the resolution in *Gateward's case* ; but the Court would not admit the distinction in fact, and held the plea bad after verdict. But it is a misapplication of the doctrine to apply it to the case now before us—that stands on just, though strictly technical reasoning, which may be well collected from the judgment in



*Day v. Savage* (29). That which is matter of interest, as the taking a profit from the soil, must for its existence have some person in whom it is ; and a flux body, which has no entirety or permanence, cannot take that interest, which by the supposition is immemorial and permanent, because from its nature it cannot prescribe for anything. Necessity, however, will controul this. The case of common of pasture exemplifies both the rule and the exception. In itself it is an interest—it is the taking a profit from the soil—it is properly matter of prescription. If the copyholders of one manor will claim it in the wastes of another, they must, because they can, do so, by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate has such a permanence as enables him to prescribe ; but if they claim it in *his* wastes, they cannot prescribe in their own names and rights, by reason of the want of permanence, nor can they in their lord's name, for he cannot claim common in his own land ; they are, therefore, from necessity allowed to claim it by custom. But what is the necessity ?—that growing out of the original compact, when they received permission to cultivate for their own benefit, and on condition of certain services, certain portions of the lord's land ;—that compact included the right of commoning on the lord's waste, and the law will not suffer that right to want a legal character, and so be without the means of its legal enforcement, though at the expense of strict legal reasoning. In the same way the right now in question must have originated in each instance in a virtual contract ;—the owner has permitted the tinner to enter and work, when he will not work himself, or devote his waste exclusively to other purposes by inclosure, on the condition that the tinner shall render to him a certain portion, fixed by custom, of the produce of the mine. Here, as in the instance of a common, the thing is in its nature to be claimed by prescription only, but they who have it, and ought to have it in justice, cannot prescribe for it ;—from necessity, therefore, that the undoubted right may not be defeated, they shall be allowed to claim it by custom.

Having arrived at this conclusion, we have only to consider the remaining point

(28) Hob. 86.

made by the plaintiff, that bounding was not to be tried merely as a custom limited in local extent, and as an exception on the general rules of the common law ; but as the local law of a distinct and extensive district, having its origin, it may be, earlier than the time when Cornwall became a part of England, or subject to its general laws. This point was argued, with much learning and ingenuity, by Mr. Smirke ; but we think his argument failed in respect of such historical certainty in fact, as is necessary to build any legal conclusions on ; further, assuming that difficulty overcome, we think it failed in legal authority. We have already observed in the commencement of our judgment, that in the case of mines, no distinction was made between a mineral tract in Cumberland and one in Devon or Cornwall—nor any between the stannaries in those two counties—the law as to the former was gathered from the precedents as to the latter. Whatever local usages may have prevailed in ages too distant for history or the legal antiquary to trace their records with certainty, Cornwall has been for so many centuries dealt with as parcel of the kingdom of England, that they must now, and can only in English courts of justice be dealt with according to the principles of the common law. This does not in any way conflict with our allowance of such local laws as gavelkind, or borough English, or tenant right : such as these we try by ordinary principles, and, having regard to their origin we find them not unreasonable. And so with the usages in mineral districts, not alone in Cornwall, but the King's Field in Derbyshire, Dean Forest, and others, have theirs, and they will be allowed ; their reasonableness being tried by tests the same, not in fact, but in principle, as we should apply to other local usages,—by a reference to their history, origin, and the local peculiarities on which they are to operate.

But even had it been clear that bounding was a law of Cornwall before it was parcel of England, yet there are authorities to shew that we could deal with it only on the same general principles which we apply to the testing of other customs, those we have just mentioned. An instance of this sort is to be found in *Vin.*

*Abr.* 'Customs,' H, fol. 10, which will be found in the Year Book, 34 Hen. 6. p. 27, of a custom in the Isle of Man, not indeed in judgment there, but which shews the manner in which English Judges reasoned upon such customs as to their lawfulness. But a case precisely in point is the celebrated one of *Tanistry in Davis's Reports*, p. 28, where the custom of descent, though of undoubted antiquity, anterior to the introduction of the English law, was reasoned upon and finally decided against on the principles of English law, because uncertain.

The ground of inconvenience, which might result from our decision in favour of the defendant, was not much pressed in the argument before us; but we collect from the report, that it appeared in evidence that tin bounds had for a considerable period been made the subject of conveyance, settlement, and devise; and it is possible, therefore, that inconvenience may result where there has been such a neglect of working as to forfeit the title to them. We have not been insensible to this, and have given it our consideration; but it has not appeared to us to warrant a change in our conclusion, which ought to rest on legal grounds only: if the inconvenience be so great as may be apprehended, it is better that it should be remedied by the legislature than be made a reason for our coming to a conclusion which those grounds will not warrant. We do not apprehend, however, any real inconvenience; nothing that we have said compels the bounder to strictly continuous working,—such reasonable time for consideration, preparation, and due selection of plans and planes must always be allowed, as the nature of the undertaking reasonably requires; and when he has once *bona fide* worked, his ceasing to work for a time will be, therefore, open to explanation, so as to prevent forfeiture. It is only when the conduct of the bounder is such as to warrant the conclusion that he has ceased to be in good faith pursuing that object which alone justified his entry on the land, and which is the reasonable foundation of his title. The present is such a case: we understand it to be admitted that for many years the bounder has ceased to work, and cannot succeed unless the custom unqualified according to the statement in the commencement of our judgment, can be sustained. We are of opinion that it cannot; and there-

fore, our judgment must be, that a nonsuit be entered according to the leave reserved.

*Rule absolute for entering a nonsuit.*

BAIL COURT.

1847.

Nov. 17.

PARKER v. BAYLEY.

*Insolvent—7 & 8 Vict. c. 96.—Refusal of Final Order—Fresh Execution upon same Judgment—Form of Process—Irregularity.*

*The defendant, who had been taken in execution upon a judgment, having obtained an interim order for his protection from process, under 7 & 8 Vict. c. 96, afterwards attended upon his first examination before the commissioner, who dismissed his petition under the 24th section, upon the ground of a debt having been fraudulently contracted. The defendant not being then in custody, the commissioner did not make any order remanding the defendant to his former custody, and the defendant therefore went at large. He was afterwards, on the 20th of August, taken in execution upon a fresh ca. sa. in the usual form upon the same judgment. Upon motion made on the 6th of November to set aside this writ, and to discharge the defendant out of custody,—Held, first, that under the 6th section of the above statute the plaintiff was authorized in taking the defendant in execution upon the same judgment. Secondly, that if there was any irregularity in the form of the process, the application to set it aside on that ground was made too late.*

*Semble—First, that such was the correct form of process to use. Secondly, that under the circumstances the commissioner had power to make an order remanding the defendant to his former custody.*

The defendant in this case had been taken in execution upon a judgment recovered in this action, upon the 27th of June 1844.

On the 9th of September in the same year, the defendant filed his petition and schedule in the Court of Bankruptcy, under section 6. of 7 & 8 Vict. c. 96, and obtained his discharge, and an interim order for his protection from process. The 16th of October following was the day appointed for his first examination before the commissioner, and on the 15th of October an agreement in writing, but not under seal, was

prepared by the defendant's attorney, by which the defendant proposed to covenant with his creditors generally that he should pay into the hands of the official assignee appointed to act in the matter of the petition, the weekly sum of 5*l.*, &c. This paper writing concluded thus: "We, the creditors of the said F. W. N. B. (the defendant) whose names are hereunto affixed, do hereby severally and respectively, and as our several and respective act and agreement, testify and declare our consent to and acceptance of the said proposal and agreement, and that we will, when so requested, sign, seal, and execute unto the said F. W. N. B. any further act or document that may be considered requisite for the carrying into permanent effect the aforesaid arrangement." Then followed the signatures of several of the creditors, the plaintiff amongst others. The defendant however never signed the document, and it was unstamped. On the 16th of October the defendant was opposed by a creditor who had not signed the above, upon the ground that the debt with him had been contracted by the defendant fraudulently; and this being proved to the satisfaction of the commissioner, he dismissed the defendant's petition upon that ground, and refused to make a final order. The defendant not having been brought up in custody was allowed, after this adjudication, to depart; and he remained at large until the 28th of August in the present year, when he was again taken into execution, upon a fresh writ of *ca. sa.* upon the same judgment.

On the 9th of September following a summons was taken out at chambers, calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody, he having been previously taken in execution upon the said debt, and discharged by consent; but the learned Judge before whom it was attended refused to make any order. On the 16th of September, another summons was taken out, calling upon the plaintiff to shew cause why the writ of *ca. sa.* should not be set aside for irregularity, and why the defendant should not be discharged out of custody, &c. This summons was attended before the same learned Judge, and dismissed with costs. The defendant's affidavits were silent as to there having been any application to a Judge at chambers at all; but the above facts appeared in the plaintiff's affidavits. On the

fifth day of term this Court was moved, and a rule *nisi* granted in the same terms as contained in the last-mentioned summons.

*Bovill* shewed cause.—This execution is perfectly regular. The 6th section of 7 & 8 Vict. c. 96. expressly provides, "that after the time allowed by the interim order has expired, the defendant may again be taken in execution upon the judgment." The commissioner perhaps had jurisdiction to remand the defendant back to custody, and to make an order for such purpose, when, upon the ground of fraud, he had dismissed the defendant's petition under the 24th section; but not having done so the plaintiff was at liberty again to arrest him, and a fresh writ of *ca. sa.* was the proper form of process. The second execution is the creation of the act of parliament, and the 6th section does not require either an *alias ca. sa.* or a *scire facias*; nor is any express mode of arrest given by that section. With respect to the agreement, it amounts to nothing; it is not under seal, it is unstamped, not signed by the defendant, and as soon as the defendant had his final order refused him, became altogether inoperative. Secondly, if there is any irregularity in the form of process, the application to set it aside has been made too late. It does not appear by the defendant's affidavits that there had been any summons taken out and attended at chambers so as to explain the delay. This is a fatal objection—*Goren v. Tute* (1). Again, by the plaintiff's affidavits it appears that this matter has been twice heard before the same Judge at chambers; the defendant therefore has already exercised his right of appeal against the first order—*Thompson v. Becke* (2).

*Charnock*, *contrà*.—The *ca. sa.* upon which the defendant was arrested, and is now in custody, is a nullity. The 7 & 8 Vict. c. 96. prescribes one mode only by which a defendant under the circumstances of this case can be again taken in execution; and that is by an order of the commissioner under the 24th section, which provides, "that in every such case wherein any such petitioner shall have been a prisoner in execution, and discharged out of custody by order of the commissioner, &c. such peti-

(1) 7 Mee. & Wels. 142; s.c. 10 Law J. Rep. (N.S.) Exch. 61.

(2) 4 Q.B. Rep. 759; s.c. 12 Law J. Rep. (N.S.) Q.B. 305.

tioner shall be remanded by an order of the commissioner to his former custody"—*Ex parte Partington* (3). Not having pursued that course, the plaintiff had no power whatever to take the defendant under a *ca. sa.* Secondly, if he had that power the form of writ was irregular; it should have recited all the circumstances of the case. There has been no delay sufficient to prevent the defendant taking this objection.

PATTESON, J.—There is no difficulty in this case. It is quite clear that the petition of the defendant was not dismissed upon the ground of any arrangement having been come to between the defendant and his detaining creditors. Doubtless, the agreement in question was prepared by the defendant to induce the commissioner to accede to the proposal contained in it; but when the defendant appeared upon his first examination the commissioner refused to be a party to any such arrangement, being satisfied that a debt contracted by the defendant with an opposing creditor had been contracted fraudulently, and he refused the defendant his final order expressly upon that ground. I think that the commissioner might then, under the 24th section of 7 & 8 Vict. c. 96, have made an order remanding the insolvent, although he was not then brought up in custody; and perhaps that would have been the better course to have pursued: he did not, however, make any such order. But the 6th section provides, "that after the term allowed by any such interim order, or any renewal thereof (as the case may be), shall have elapsed, such petitioner shall not by such discharge be protected from being again taken in execution upon such judgment, but such judgment shall remain in full force and effect notwithstanding such discharge." It is said that the statute does not provide any particular mode in which this enactment is to be carried into effect. Although that may be the case, still this Court will give effect to the terms of the statute, and by some form of process or other carry out its enactments. The case most analogous to the present is that of an escape; and there if a defendant taken in execution upon a *ca. sa.* escape, the sheriff may again arrest him upon another *ca. sa.* upon the same judgment. A *scire facias* is not neces-

(3) 13 Mer. & Wels. 679; s. c. 14 Law J. Rep. (n.s.) Exch. 122.

sary in this case, for this writ is applicable only when a year and a day have elapsed without any execution of the judgment having been had; here the defendant had been taken in execution. It appears to me, therefore, that the issuing of a fresh writ of *ca. sa.* was the right course to pursue. But if it were necessary that the writ should have set out all the circumstances of the case, that is ground only of irregularity; and then the defendant has come too late to set it aside, for it has been expressly decided by the Court of Exchequer, in the case of *Goren v. Tute*, that unless it appear by the defendant's affidavits that an application has been already made to chambers so as to account for the delay, this Court cannot take notice that such application has been made. Upon this point the defendant's affidavits are altogether silent; and I must therefore take it that no step was taken to set aside this writ from the 28th of August to the 6th of November. Upon the ground, therefore, that the plaintiff was entitled under the 6th section to issue this writ of *ca. sa.*, and that if there has been any irregularity in the form adopted that has been waived, I think that this rule must be discharged, and with costs.

*Rule discharged, with costs.*

BAIL COURT.	} WATKINS AND ANOTHER v. TARPLEY.
1847.	
Nov. 25.	

*Sequestration — Sequestrari Facias — Amendment—1 & 2 Vict. c. 110. s. 17.—Interest on Judgment.*

In 1834 a writ of sequestration was sued out by the plaintiffs, indorsed to levy the amount of the judgment debt recovered; in 1838, the statute 1 & 2 Vict. c. 110. was passed, by the 66th section of which judgments are to carry interest; in 1839 other execution creditors of the defendant lodged writs of sequestration with the Bishop. Under these circumstances, the Court refused to grant an application of the plaintiffs, that their writ of sequestration should be amended by a claim for interest since 1838 being indorsed thereon.

Quære—Whether, under the writ as it stood, the Bishop would be bound to satisfy the plaintiffs this interest.

The plaintiffs in this case, having, in the year 1834, recovered a judgment for 2,270*l.* against the defendant, a beneficed clerk, sued out a writ of *sequestrari facias*, directed to the Bishop of Peterborough, and indorsed, to levy the amount of the debt. On the 16th of August 1838, the statute, 1 & 2 Vict. c. 110, was passed, by the 17th section of which it was enacted, "that every judgment debt should carry interest at the rate of 4*l.* per cent. per annum, from the time of entering up the judgment, or from the commencement of this act in cases of judgment then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." On the 2nd of December 1839, the Bishop received a writ, at the suit of another execution creditor, for a debt of 1,140*l.*; on the same day another writ for a debt of 614*l.*; and on the 28th of December 1839, and the 5th of December 1840, two further writs, at the suit of other creditors. The full amount of the debt had not yet been levied under the first writ. In the early part of this term a rule *nisi* had been obtained on the part of the plaintiffs calling upon the Bishop of Peterborough and the defendant to shew cause why the writ of *sequestrari facias* should not be handed to the plaintiffs or their attorney, in order that the claim for interest upon the said judgment, since the 1st of October 1838, might be indorsed thereon.

*Bovill*, for the Bishop of Peterborough, now shewed cause.—It is a fatal objection to this application that the four other execution creditors have not been brought here; their rights would be affected materially if this rule were made absolute. From what period is the proposed indorsement to take effect? If it is to take effect from the date of the original writ, it would be illegal, for at that time no interest upon a judgment could be levied; if specially indorsed, as of the present date, and authorizing the Bishop to levy interest as from the 1st of October 1838, it would over-ride the claims of the other creditors. The course for the plaintiffs to have adopted was upon the passing of the 1 & 2 Vict. c. 110. to have ruled the Bishop to return the writ; and, after such return had been made, to have issued a fresh writ, indorsed to levy so much of the debt

as remained unsatisfied, together with the amount of interest claimed.

*Aspinall* appeared for the defendant.

*Phipson*, in support of the rule.—Undoubtedly the claims of the other execution creditors will be displaced if this application is granted; but that is the necessary effect of the 17th section of the 1 & 2 Vict. c. 110. They take their rights under the respective writs which they have issued, subject to the right of the plaintiffs, as altered by that statute. There has been no abandonment by the plaintiffs of their right to interest; for at the time of the writ issued, under which they claim, they had no power to indorse upon it a direction to levy interest. It is submitted, that so long as such writ is in force, as it appears the present is, this application should be granted. It is an application in case of the Bishop, for it may be that he is bound to satisfy the plaintiffs their claim for interest under the writ as it stands.

*ERLE, J.*—My opinion is that I ought not to make this rule absolute. The question does not arise, and, therefore, it would be extrajudicial in me to give any opinion upon the point, whether, under the writ as it now stands, the Bishop is bound to satisfy the plaintiffs their interest upon the judgment. But I think, that, if in the year 1847 I ordered a writ, sued out in 1834, to be altered by an indorsement to levy interest being made upon it, I should in effect be issuing a new writ, which would take priority over those which have been in the hands of the Bishop since the years 1839 and 1840; for each of the parties who sued out those writs has taken an interest in the rents and profits of the defendant's benefice, subject only to the original rights of the first sequestrator. I have the less scruple in discharging this rule, because when the act of parliament passed the duty of the plaintiffs was either to have caused the writ to have been then amended, or to have ruled the Bishop to return it, and have then sued out a fresh writ for the debt remaining due, and the amount of interest claimed. For these reasons, I think that I ought to leave the plaintiff to enforce his claim as he best may, without specially interfering on his behalf in the matter.

*Rule discharged.*

BAIL COURT.  
1847. } BROWNE v. BURTON.  
Nov. 24; Dec. 12. }

*Deed, Execution of—Warrant of Attorney—Fraudulent Preference.*

*A deed or other writing speaks from its execution, and not from the day of its date.*

Where, therefore, a warrant of attorney, bearing date the 24th of February 1847, was executed by the defendant upon the 20th of March in the same year, and the defeasance stated that the warrant of attorney was given to secure payment of the money "on the 20th day of March next," it was held, that such payment did not become due until the 20th of March 1848, and execution having issued previous to that time, it was set aside.

Upon motion, by the assignees, to set aside a warrant of attorney given by the bankrupt, the Court will not enter upon the question, whether the same was given by way of fraudulent preference.

In this case a warrant of attorney, bearing date the 24th of February 1847, was executed by the defendant on the 20th of March. By the defeasance it appeared that the warrant of attorney was given to secure the payment of "the sum of 285*l.* on the 20th day of March next, with lawful interest for the same, from the date hereof." After the defendant had executed the warrant of attorney, he retained it in his possession until the 29th of March, when he delivered it to the plaintiff. On the 30th of March judgment was entered up, and execution forthwith issued for the said sum of 285*l.* On the 19th of April the defendant became bankrupt. On the 10th of November a rule nisi was obtained on the part of the defendant's assignees, calling upon the plaintiff to shew cause why the above-mentioned warrant of attorney and all subsequent proceedings should not be set aside upon the grounds—first, that the execution had issued too soon; second, that, according to the facts sworn to in the affidavits, execution had issued for too much; third, that according to those facts, the warrant of attorney had been given voluntarily and by way of fraudulent preference.

*Barstow* shewed cause.—First, it is submitted that it sufficiently appears from the

defeasance, that the 20th of March, upon which the money was to be paid, was the 20th of March 1847. Secondly, it is admitted, that at the time the warrant of attorney was given only 10*l.* was due, and the execution, therefore, can only stand for so much; but that is no ground for setting aside the execution altogether. Thirdly, as to the third ground, it is one which the Court will not decide upon affidavits.

*Prideaux*, in support of the rule.—First, the execution was clearly issued too soon. A deed speaks from the time of its execution, and not from the day of its date. There was no power, therefore, to the plaintiff to enter up judgment and issue execution until the 20th of March 1848—*Clayton's case* (1), *Oshey v. Hicks* (2), *Hall v. Cazenove* (3), *Steele v. Mart* (4). Secondly, execution having been wilfully issued for too much, the Court will set it aside altogether. An amendment is only allowed to be made when the execution has issued for too much by mistake—*Tilby v. Best* (5), *M'Cormack v. Melton* (6). Thirdly, if the Court think that upon this point a fair doubt exists, then certainly it is a question for a jury.

[*Barstow*, upon the second point, begged to refer to the case of *Williams v. Waring* (7).]  
*Cur. adv. vult.*

Dec. 12.—PATTERSON, J. now delivered judgment.—One of the objections in this case was, that the execution was issued too soon; that the defeasance stating the warrant of attorney to be for securing payment "of 285*l.* on the 20th of March next, with lawful interest for the same, from the date hereof," and the warrant of attorney being executed on the 20th of March 1847, the principal money was not payable till the 20th of March 1848. If the warrant of attorney had on the face of it borne date the 20th of March 1847, that would undoubtedly have been so; and the question is, whether the circumstance of the date apparent on the face of the instrument being the

(1) 5 Rep. 1.

(2) Cro. Jac. 263.

(3) 4 East, 477.

(4) 4 B. & C. 272.

(5) 16 East, 163.

(6) 1 Ad. & El. 331.

(7) 2 Cr. M. & R. 354; s. c. 4 Law J. Rep. (n.s.) Exch. 292.

24th of February 1847, makes any difference. Now, the rule uniformly acted upon from the time of *Clayton's case* to the present day is, that a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of it. That date is indeed to be taken *prima facie* as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded. *Steele v. Mari* is precisely in point. It is to be observed here, that by the language of the defeasance the principal was not to be paid on the very day of the execution of the instrument, for it provides for payment of interest "from the date hereof." Neither was this warrant of attorney, although executed on the 20th of March, delivered to the plaintiff until the 29th, nine days after the time when it is contended the principal secured by it had become due. Upon the whole, I am of opinion that the rule of law is clear; that the 20th of March, mentioned in the defeasance, must be taken to be the 20th of March 1848, whatever may have been the intention of the parties; and that the execution being premature, the rule to set it aside must be made absolute, but not to set aside either the warrant of attorney itself or the judgment; and without costs, because the rule asks for too much. I am of opinion that I cannot enter into the question of fraudulent preference; and that, as to the excess in the execution, if good at all, the execution would only be set aside *pro tanto*.

*Rule absolute to set aside the execution, without costs.*

1847. } THE QUEEN v. REUBEN HUNT,  
July 1, 7. } AND OTHERS.

*Central Criminal Court—Venue—Indictment—Certiorari—Jurisdiction.*

*An indictment, preferred and found at the Central Criminal Court, described the defendants as late of the parish of M., in the county of Middlesex, and alleged the offence to have been committed at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid. This indictment was removed by certiorari, before the passing*

*of the statute 9 & 10 Vict. c. 24, and was tried in this court by a Middlesex jury:—Held, that the bill, having been found by a competent authority, and shewing an offence committed in Middlesex, was properly tried in Middlesex by a jury of that county.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 14.]

1847. }  
Dec. 8. } SAYER v. DUFAUR.

*Insolvent—Appointment of Official Assignee under 5 & 6 Vict. c. 116. s. 1.—Chose in Action—Power of Suit.*

*The official assignee of an insolvent appointed under 5 & 6 Vict. c. 116. s. 1. may immediately on his appointment sue in his own name for an outstanding debt due to the insolvent; and the insolvent after such appointment cannot sue for it.*

*Therefore to an action by the insolvent, a plea shewing the petition of the plaintiff and protection granted, and an assignee appointed within the terms of the statute, is a good plea in bar.*

*Assumpsit for work and labour, money paid, and on an account stated.*

*Plea—Secondly, that after the accruing, &c., and after the passing of 5 & 6 Vict. c. 116. entitled, &c., and after the day in the said act named and appointed for the said acts coming into operation, and after the 1st of November, A.D. 1842, and before the passing of 7 & 8 Vict. c. 96. entitled, &c., and before the commencement of this suit, to wit, on the 16th of March, A.D. 1843, the plaintiff presented a petition for protection from process to the Court of Bankruptcy, in the said first-mentioned act mentioned and described as the Court of Bankruptcy, which petition at the said time of its being presented had annexed to it a full and true schedule of the debts of the plaintiff, with the names of his creditors, and the dates of contracting such debts severally, and the nature of such debts, and the security given for the same, and also of the nature and amount of the plaintiff's property, and of the debts owing to him, with their dates and the names of his*

debtors, and the nature of the securities which he had for such debts; and which petition contained no proposal (the plaintiff having no such proposal to make) for payment in whole or in part of his debts; that before the presenting of such petition, to wit, on the 9th of March, A.D. 1843, the plaintiff gave a notice according to the schedule to the said first-mentioned act annexed, and according to the true intent and meaning of the said first-mentioned act in that behalf, to one-fourth in number and value of his creditors, that he, the plaintiff, intended to present a petition to the said Court of Bankruptcy, praying to be examined touching his debts, estate, and effects, and to be protected from all process upon making a full disclosure and surrender of such estate and effects, for payment of his just and lawful debts; and that the time when the matter of the said petition should be heard was to be advertised in the *London Gazette* and in the *Morning Post* newspaper, one month at the least after the date of the said notice, which notice at the said time of its being so given was in writing, and signed by the plaintiff, and was in the words and figures following, that is to say:—"I William Sayer (meaning the plaintiff), at present and for three months residing at No. 73, Seymour Street, Euston Square, in the parish of St. Pancras and county of Middlesex, and for twenty-four months immediately preceding residing at No. 42, Bryanstone Street, Portman Square, in the parish of St. Marylebone, in the county of Middlesex aforesaid, and being a solicitor's clerk, do hereby give notice that I intend to present a petition to the Court of Bankruptcy, Basinghall Street, in the city of London, praying to be examined touching my debts, estate, and effects, and to be protected from all process upon making a full disclosure and surrender of such estate and effects, for payment of my just and lawful debts; and I hereby further give you notice that the time when the matter of the said petition shall be heard is to be advertised in the *London Gazette* and in the *Morning Post* newspaper, one month at the least before the date hereof. As witness my hand, this 9th of March, A.D. 1843. William Sayer (meaning the plaintiff). Witness," &c. That after the giving

of such notice, and before the presenting of such petition, the plaintiff caused the same notice to be inserted twice, to wit, once on the 9th of March, A.D. 1843, and a second time on the 12th of March, A.D. 1843, in the *London Gazette*, and twice, to wit, once on each of the days and times last aforesaid, in a newspaper, at those times respectively circulating in the county of Middlesex, to wit, a newspaper called the *Morning Post*; that for and during the period of twelve calendar months next before, and at each of the said times respectively, of giving the said notice, and of causing the same to be inserted in the said gazettes and newspapers, the plaintiff had resided and did reside within the said county of Middlesex, and within the district in the said first-mentioned act mentioned and described as the London district, and that the plaintiff was not at any of the times of the giving or inserting of any of the said notices, or at the time of the presenting of the said petition, or at any time a trader within the meaning of the statutes at the time of the passing of the said first-mentioned act, or at any time in force relating to bankrupts; that afterwards and before the commencement of this suit, and before the passing of the said secondly-mentioned act, to wit, on the 16th of March, A.D. 1843, the said petition was filed in the said Court of Bankruptcy in due form of law, and according to the directions and provisions in that behalf of the said first-mentioned act; that upon the filing of the said petition, and before the commencement of this suit, and before the passing of the said secondly-mentioned act, to wit, on the day and year last aforesaid, John Herman Merivale, Esq., then being the Commissioner in rotation of the said Court of Bankruptcy, who, by an order of the said Court, theretofore, to wit, on the day and year last aforesaid, in that behalf made by the said Court, according to the directions and provisions of the said first-mentioned act, was appointed by the said Court to hear the matter of such petition, and to whom, by the said order of the said Court, the said petition was referred by an order of him, the said John Herman Merivale, then in that behalf made by the said J. H. M., in the matter of the said petition, gave to the plaintiff protection from all process whatever, either against his



person or his property of every description, and by which said order the said J. H. M. then being such commissioner, directed and ordered that such protection was to continue in force, and that all process, except process for arresting or holding to bail under the authority of a Judge's order for that purpose, was to be stayed until the 28th of April, A.D. 1843, at two o'clock in the afternoon, being the time appointed for the appearance of the plaintiff at the said Court of Bankruptcy, in Basinghall Street, London, and for the final examination of the plaintiff, according to the form of the said first-mentioned act. And the defendant further says, that on the presentation of the said petition, and before the commencement of this suit, and before the passing of the said secondly-mentioned act, to wit, on the 10th of March, A.D. 1843, the said John Herman Merivale then being such Commissioner of the said Court of Bankruptcy so appointed to hear the matter of the said petition, in due form of law, and according to the directions and provisions of the said first-mentioned act, nominated and appointed George Green, then being an official assignee of the said Court of Bankruptcy, to be the official assignee of the estate and effects of the plaintiff, according to the true intent and meaning of the said first-mentioned act, and the provisions thereof in that behalf; that the said George Green always, from the time of the making of the said order, had been and still is the official assignee of the estate and effects of the plaintiff, and to all intents and purposes the sole assignee of the estate and effects of the plaintiff. Verification.

Special demurrer;—the point in the margin being that the plea did not shew that the estate of the plaintiff was vested in the assignee, in such a manner as to prevent the plaintiff from suing in this action, or that the official assignee ever interfered with or laid claim to the causes of action now sought to be recovered. (There were other special grounds of demurrer, shortly noticed in the argument.)

Joinder in demurrer.

*Hawkins*, in support of the demurrer.—Though the assignee takes all the insolvent's property, yet as the statute 5 & 6 Vict. c. 116. s. 1. does not confer, by express words, on the assignee any power to

sue in his own name for debts due to the insolvent, this action is properly brought in the name of the insolvent. The statute (section 1.) vests in the assignee only "so much as can be obtained without suit."

[COLERIDGE, J.—Everything is vested in him; but he is only to take possession of that which can be got in without suit. I do not see why the fact, if it were so, that the plaintiff was suing on behalf of the assignees, might not have been replied. If all interest has passed out of the plaintiff, is he entitled to recover? Suppose there were a chattel, could the plaintiff succeed on the issue of Not possessed?]

Perhaps not; the right of possession of chattels is expressly given. The 7th section has the word "credit" for the first time, and also empowers the assignees to sue in their own names.

[COLERIDGE, J.—Suppose, between the first and final order, the insolvent brought an action, what is to become of it?]

This is such a case; it is *casus omissus*.

[COLERIDGE, J.—May not the 1st and 7th section be reconciled in this way—the official assignee is to get the insolvent's goods into possession before the final order, and afterwards to sue for debts due to him, but yet no power is in the insolvent himself to sue? Suppose a chattel of the insolvent at Dublin, in the hands of a third party: that in strictness might be something which is not recoverable without suit: is the insolvent to take it with or without suit?]

Perhaps a plea of not possessed might defeat the insolvent's action, but a chose in action is a different thing. If the insolvent's assignee sued on a deed, and it were pleaded that all interest had been assigned to a third party, the plea would be bad, and the plaintiff could not be called on to shew by replication that the action was brought for the benefit of the third party.

[PATERSON, J.—I see that one of the grounds of demurrer is, that the plea does not state that the action is not brought by the assignee in the insolvent's name.]

The insolvent might, for anything that appears, release the debt, and the statute does not make the payment to the assignee any discharge as against the insolvent. If no power is given to the assignee to sue, and as the act of parliament could not have intended that no one should sue, the right

of action must remain in the insolvent. In *Jeffery v. M'Taggart* (1), the words were, "the whole estate and effects;" and Lord Ellenborough held that they did not convey to the assignee a right of suit. The plea is also bad in form; first, for not stating that there were any creditors; secondly, for not saying that the notice given by the insolvent was after the passing of the act; thirdly, for not shewing that the hearing was advertised in pursuance of the notice; fourthly, it does not shew any confirmation of the appointment of the assignee, or that the commissioner was still acting when the official assignee was appointed.

[COLERIDGE, J.—The 13th section empowers the Judges and commissioners to make orders which are *primâ facie* binding.]

*T. Jones*, contra.—The stat. 5 & 6 Vict. c. 116. s. 1. vests in the official assignee of the insolvent all "his estate and effects;" the whole question is, whether those words include debts due to him. Now, the word "effects" is at least as comprehensive as "personal estate." And *Wright v. Fairfield* (2) is an express authority that the words "all the personal estate" would give the assignee the right to sue for damages. Then, if the plea *primâ facie* shews matter impeaching the plaintiff's right to sue, from whom should the statement come of matter which negatives the presumption that the action is brought by the insolvent for his own benefit? The rule of pleading is, that the averment of material matter must come from the party in whose knowledge it is—*Winch v. Keeley* (3), *Dangerfield v. Thomas* (4). *Smith v. Coffin* (5) was a real action. Then as to the formal objection: the notice is in the form given by the schedule, and must be taken to have been after the petition. As to the remaining objections, it is enough to say that everything necessary to give the commissioner jurisdiction is shewn.

*Hawkins*, in reply.—There is nothing to give the assignee a right to sue in his own name. In *Wright v. Fairfield*, the words were "present and future personal estate."

The word "future" points at something which may be recovered.

[WIGHTMAN, J.—What is to become of the property in the mean time? The object of the Insolvent Act is to preserve the property for the creditors; allowing the insolvent to sue would not promote that. *Wright v. Fairfield* is clearly against you.]

But the words "without such," which occur here, operate to shut out the assignee from a right of action in a case like the present. It could not be necessary to reply specially, when the plaintiff shews a good right of action. It does not follow that a payment to the assignee might not be a good payment.

LORD DENMAN, C.J. (after stating the pleadings).—It appears that the plea sets out all the particulars required to bring the plaintiff within the act of 5 & 6 Vict. c. 116, and the appointment of the official assignee; and that is all that is necessary to be stated. I think all the objections in point of form were got rid of during the argument, except that which arises on the month's notice; and there really is nothing in that. The real question is as to the plaintiff's right to sue. Is the plea then in substance an answer? I think it is. I think the 1st section deprives the insolvent of all right to the debt, and of the power of suing for it. Such power cannot be in two persons at the same time; and the 1st section of the 5 & 6 Vict. c. 116. provides that "on the presentation of the petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee, who shall take possession of so much thereof as can be reasonably obtained and possessed without suit, and shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts." It is contended, that though, by the words of the act, the estate and effects of the insolvent vested in the official assignee, yet as he is only to take possession of so much as may be got in without suit, he cannot sue for that which is not reduced into possession. But I think that this is to make an unreasonable use of words in themselves not very reasonable. It seems to me that the direction given by them to the assignee

(1) 6 Mas. & Selw. 126.

(2) 2 B. & Ad. 727; s. c. 9 Law J. Rep. 8. 309.

(3) 1 Term Rep. 619.

(4) 9 Ad. & El. 292.

(5) 2 H. Black. 451.

is superfluous ; they have no more meaning than this : that the assignee is to get possession of all that he can, but are not meant to take away the right to sue. But, further, as the section proceeds to give the official assignee the same power as the official assignee under the Bankrupt Act, we must refer to the Bankrupt Act ; and *Wright v. Fairfield* is a distinct decision as to the nature of the possession of the assignees by virtue of it. The words " estate and effects " are, at least, as strong as " personal estate," which were the words there. In that case, Parke, J., though he does not take the same view as the other Judges, yet fully concurs in the judgment. Arguments have been ingeniously raised on the 7th section, which, by direct words, gives the official assignee and creditors' assignee the power of suit, after final order ; but if the 4th section had already done its work, we are not to limit the rights conferred by it, by reason of stronger words in a subsequent section, unless we have reason to think that the necessary meaning and construction is to take the right away.

An answer has been attempted on the ground of inconvenience ; but whatever weight may be given to that, we are not to decide that a man is not to sue for that which belongs to him ; and there would, on the other hand, be great inconvenience in allowing the bankrupt to sue, to the exclusion of his creditors. I think, then, that the insolvent could not reply that he sues on any particular ground, but is deprived of all right of suit.

COLERIDGE, J.—I am of the same opinion. The first question is, whether a chose in action is taken out of the insolvent by the operation of the statute 5 & 6 Vict. c. 116. s. 1 ; secondly, if the official assignee can sue for it in his own name. The words used in that section are " estate and effects." It is important to remove all doubt as to their meaning ; and it is most convenient to hold that the official assignee should not wait for the consent of the insolvent in order to bring an action for a debt due to him. Now, the statute 1 Will. 4. c. 56. was not the statute which first created assignees ; that statute refers to the statute 6 Geo. 4. c. 16. The words used in that statute were held to include all that the bankrupt could sue for. The word " future "

does not carry the matter further, as that can only refer to after-acquired property ; and if the right of action would have passed to the assignee under the 6 Geo. 4. c. 16, the plaintiff is not entitled to recover. Reliance has been placed on the 7th section, but, I think, nothing more is intended than is mentioned in the 1st section. It is said the words " shall become vested " shew that they were not considered vested before ; but it is clear that that was not the meaning of the act, and the words " shall become vested " are also in the 1st section. The question is then clear on the act of parliament. If estate and effects include choses in action, it is difficult to apply the words " without suit." Suppose a debt owing to the insolvent by a third person, what is to be done with it ? Is not the official assignee entitled to it, though it might be one which was not reasonably expected to be got without suit ? or is the insolvent immediately to sue for it ? These considerations, I think, dispose of the second question. I give no opinion on the necessity or form of replication, but I think the plea good.

WIGHTMAN, J.—I think it unnecessary to give my views of the construction of the clauses of the Bankrupt Acts at any length, as I fully agree with my Lord and my Brother Coleridge. The substance of the plea is, that the plaintiff cannot sue, because the right of action is vested in another ; and the policy of the act of 5 & 6 Vict. c. 116, as well as of the other bankrupt and insolvent acts, is, that the bankrupt or insolvent shall not sue in his own name, unless for the benefit of his estate. If he could sue in his own name, especially when we consider that a month is to elapse before a final order is made, the creditors would probably find that very little was then left to be sued for. If there is anything in the argument on the part of the plaintiff, it would come to this, that if the insolvent's goods were in the hands of a third person, who refused to deliver them to the official assignee, he could not bring an action for them.

*Judgment for the defendant.*

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1847. } THE QUEEN v. THE INHABITANTS  
June 12. } OF UPTON ST. LEONARD'S.

Witness — Interrogatories — 1 Will. 4.  
c. 22.—“ Action depending.”

*A criminal information is not an action depending, within 1 Will. 4. c. 22; and an order for the examination of a witness on interrogatories will not be made in such a matter.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 13.]

1847. }  
Dec. 4. } GENT v. CUTTS.

*Replevin Bond—Condition to prosecute without Delay—Breach.*

*Debt on a replevin bond. The declaration stated a removal of the plaintiff into the superior court, on the 2nd of November, and a declaration in replevin on the 30th of April; an avowry, on the 9th of July; and the death of the plaintiff in replevin on the 16th of November; and charged as a breach that J. S. (the plaintiff in replevin) did not prosecute his suit without delay; but, on the contrary, delayed the prosecution of the said action for an unreasonable time, and until the said J. S. long after a reasonable time had elapsed for the trial, died before issue joined. This breach was traversed modo et formâ:—Held, that the plaintiff was at liberty, under this issue, to shew a delay in the proceedings prior to the delivery of the declaration.*

*Held, also, that the condition to prosecute without delay may be broken by a delay which does not exceed the time for proceeding allowed by the practice of the superior courts.*

*Debt on a replevin bond.*

The declaration recited the bond taken by the sheriff, from J. Simpson, the tenant, and the present defendant, conditioned in the usual form, that the tenant “should appear at the next county court, and then and there enter his plaint, and prosecute his suit with effect, and without delay.” It then stated the delivery of the goods to Simpson, who, at the next county court, levied his

plaint against the now plaintiff, and two others, for taking and detaining his goods, &c., which plaint was afterwards duly removed by Simpson into the Court of Exchequer, by writ of *re. fa. lo.* returnable on the 2nd of November 1843; that, afterwards, to wit, on the 30th of April 1844, Simpson declared in replevin against the now plaintiff and others his bailiffs, and that, afterwards, to wit, on the 9th of July 1844, the now plaintiff avowed taking the goods as a distress for rent, &c. Breach, that Simpson did not prosecute his aforesaid suit in the Exchequer without delay, but, on the contrary, delayed the prosecution thereof for a long and unreasonable time, and until the said Simpson long after a reasonable time had elapsed for the trial and determination of the said action, to wit, on &c., died before issue joined in the said action, whereby plaintiff was wholly prevented from obtaining a return of the said goods and chattels, which he might, ought, and otherwise would have obtained, and whereby the said bond became forfeited. Averment, that the sheriffs duly assigned the said bond to the plaintiff.

Pleas, first, that Simpson did not delay the prosecution of the said action for an unreasonable space of time, *modo et formâ*. Secondly, *non est factum*. Issues thereon.

The cause was tried, before Erle, J., at the sittings in Middlesex, after Michaelmas term 1846, when it appeared that the goods were replevied, and the bond given on the 29th of August 1843; that the plaint was removed into the Exchequer by *re. fa. lo.* issued on the 7th of September, returnable on the 2nd of November 1843, and that the present plaintiff, and the others, who were defendants in that action, appeared on the 1st of November 1843. On the 29th of February 1844, Simpson was ruled to declare; and, on the 13th of March, he obtained time to declare, until after delivery of copies of documents, in other actions, in respect of the same distress. Orders for further time were subsequently made, and ultimately, on the 25th of April, an order was made for Simpson to declare peremptorily, on the 30th of April, on which day the declaration was filed. The defendant in replevin avowed, on the 9th of July 1844, which was too late to enable the cause to be tried at the Summer Assizes; and on the 16th of No-

vember 1844, Simpson died. It was contended for the defendant in this action, that the plaintiff was, under the first issue, bound to prove a delay by Simpson subsequently to the delivery of the avowry. The learned Judge was of opinion that the declaration charged delay generally, and left the question whether there had been any unreasonable delay to the jury, who found a verdict for the plaintiff. In the ensuing term,

*Willes* obtained a rule, calling upon the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection, and cited *Harris v. Mantle* (1), *Seal v. Phillips* (2).

*Bovill* and *Wise* now shewed cause.—This record does not admit that there was no delay prior to the declaration, but it states the facts which occurred and charges delay generally. The breach is, that Simpson delayed "the prosecution of the suit," not merely the delivery of the pleas in bar. If so, there was clearly a delay from the 2nd of November to the 30th of April, and again from the 9th of July to the 16th of November, and the jury were rightly asked whether these intervals were unreasonable. It cannot be necessary for the defendant in a replevin suit to *non pros.* the plaintiff, in order to enable him to proceed for a breach of the bond in delaying proceedings. *Perreau v. Bevan* (3) was cited.

*Willes*, in support of the rule.—The delay charged by this declaration can only be a delay which occurred subsequently to the 9th of July. The declaration omits any statement of an appearance by the defendant in the replevin suit. This shews what the meaning of it is. The general allegation of delay is controuled by the subsequent words, "on the contrary thereof, delayed the prosecution for a long and unreasonable time, and until the said Simpson, long after a reasonable time had elapsed for the trial, died"; that confines the plaintiff strictly to what occurred after the avowry. But no sufficient delay was in fact proved. The interval between the 13th of March and the 30th of April is accounted for by the Judge's orders, and cannot be included

in the computation of time against this defendant. By the practice of the Court the plaintiff was not compelled to declare within Michaelmas term; and even if he had declared in vacation, and the defendant had avowed, and the plaintiff had pleaded in bar before Hilary term, the plaintiff could not have been compelled, according to the practice of the Court, to try before the Summer assizes.

[*ERLE, J.*—The defendant in replevin may take down the cause to trial himself.]

The meaning of the condition is, that Simpson should bring the suit to a termination within a reasonable period, not that he should deliver any particular proceeding within a reasonable time. If he had omitted to declare until so late a time that the cause could not go to trial at the Summer assizes, that would be a breach; but it is not the case here.

*LORD DENMAN, C.J.*—I think there was no misdirection in the way my learned Brother left the case to the jury.

*COLERIDGE, J.*—The issue taken is, whether Simpson delayed the prosecution of the suit for an unreasonable time; and the point made is, whether evidence of a delay in declaring was admissible under that issue; and I think it was; and that, such evidence being given and unexplained, the jury were right in their verdict. It is quite beside the question whether the declaration is technically framed or not. Reliance is placed on the practice of the Court as to the time for taking the different steps; but that does not, I think, affect the right to recover on the condition of the bond. The rules of practice are pointed to actions in general, but circumstances may render a period unreasonable in one instance which would be perfectly reasonable in another.

*ERLE, J.*—The object of the replevin bond is to protect the landlord from damage by delaying unreasonably the action and preventing his having a return of the goods replevied, or the value of them. In the latter case the solvency of the sureties may be materially altered by delay. I think the plaintiff is obliged to go on, much as an attorney is who has engaged to use due diligence. That has not been done, and therefore the condition of the bond is broken.

*Rule discharged.*

(1) 3 Term Rep. 307.

(2) 3 Price, 17.—The rule was also granted in arrest of judgment; but this point was abandoned.

(3) 5 B. & C. 292; s.c. 4 Law J. Rep. K.B. 177.

BAIL COURT. }  
 1847. }  
 Nov. 11; } SMITH v. WETHERELL, CLERK.  
 Dec. 12. }

*Insolvent Debtor*—1 & 2 Vict. c. 110.  
 s. 55—*Provisional Assignee—Sequestration.*

*A provisional assignee, in whom a prisoner's estate and effects are vested by an order of the Insolvent Debtors Court, under the 37th section of 1 & 2 Vict. c. 110, has power where such prisoner is a beneficed clergyman, to apply for a sequestration under the 55th section of that statute.*

The defendant in this case was a beneficed clergyman, who having become an inmate of the Queen's Prison for debt, the Court for the relief of Insolvent Debtors, upon the application of one of his creditors, made an order on the 17th of March 1846, vesting all the defendant's real estate and effects in Mr. Sturgis, a provisional assignee. No creditors' assignee was ever appointed. On the 3rd of June following, Mr. Sturgis, as such provisional assignee, applied to the Bishop of Peterborough, under the 55th section of the 1 & 2 Vict. c. 110, for a sequestration of the profits of the defendant's benefice, which sequestration was, on the 6th of June, duly granted by the Bishop to Mr. Gates his secretary, on behalf of the provisional assignee. These proceedings were afterwards duly confirmed by the Insolvent Debtors Court, and an order made that the funds, when realized, should be paid into that court to the credit of the defendant's estate.

On the 6th of July 1846, the plaintiff issued a writ of *sequestrari facias* in this action; and, on the 8th of May last, obtained a rule that the Bishop should make a return of what he had levied under that writ. The Bishop certified the affidavit of the sequestrator under the former writ, which stated that there was at present in his hands a sequestration of the defendant's rectory, at the suit and instance of Mr. Sturgis, the provisional assignee of the estate and effects, &c., which was still unsatisfied, and which was issued and delivered to the defendant, previously to the issuing of the *sequestrari facias* by the plaintiff in this case.

NEW SERIES, XVII.—Q.B.

On the 29th of May a rule *nisi* was obtained on behalf of the plaintiff, calling upon the Bishop and the said provisional assignee to shew cause why the sequestration mentioned in the certificate of the Bishop to have been issued on behalf of the said provisional assignee, should not be set aside, and why the said Bishop should not forthwith proceed to execute the writ of *sequestrari facias* issued in this action, upon the ground that a provisional assignee had no authority to apply for a writ of sequestration under the 55th section of the 1 & 2 Vict. c. 110(1).

*Martin and J. Addison* shewed cause (Nov. 11).—The language of the 55th section is large enough to comprehend a "provisional assignee." Although, strictly speaking, a provisional assignee is not appointed by any formal order of appointment, yet the order of the Insolvent Debtors Court vesting the effects of the prisoner in the provisional assignee, under the 37th section, amounts in effect to an appointment, so as to satisfy the clause in the 55th section, which speaks of "the order appointing an assignee, &c." A provisional assignee has no authority to deal with the estate of any prisoner, until a vesting order has been made. The policy of the act would be altogether defeated if the construction contended for by the other side were to prevail. No reason can be suggested why a provisional assignee, dealing with the effects of a prisoner for the benefit of all the creditors, should not be entitled to apply for a sequestration of the prisoner's benefice. The effect of such a construction would be, that in every case where no creditors' assignee had been ap-

(1) The words of that section are, "That nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner being a beneficed clergyman or curate to the income of such benefice or curacy, for the purposes of this act: Provided always, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice, for the payment of the debts of such prisoner; and the order appointing an assignee or assignees of such prisoner, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall, accordingly, be issued, as the same might have been upon any writ of *levari facias*, founded upon any judgment against such prisoner."

pointed, a particular creditor might obtain a sequestration for his private debt, to the prejudice of the general body—*Bishop v. Hatch* (2). The language of the corresponding section (s. 28.) of 7 Geo. 4. c. 57. was open to this difficulty, and has been expressly altered in this respect by the 55th section of the present statute.

*Sir F. Thesiger* and *T. Jones*, *contra*.—The only persons who are authorized to apply for a sequestration, under the 55th section of the 1 & 2 Vict. c. 110, are the assignee or assignees of the estate of a prisoner, being a beneficed clergyman, who act under an order appointing him or them such assignee or assignees; for in the absence of such an order of appointment, the bishop is not warranted in granting a sequestration. It is submitted that there is no such order in the case of a provisional assignee, and, therefore, that no sequestration can issue upon his application. The provisional assignee is a standing officer of the Court, and although, by the 37th section, a vesting order may be made by the Court, vesting the estate and effects of the prisoner in him, he is not by that order *appointed* an assignee, for he was already such. On the other hand a general or creditors' assignee has no existence until called into being by the order of the Court appointing him under the 45th section. It is only to such an assignee that the language of the 55th section applies. If the section of the act be looked into, it will be found that almost universally, when the provisional assignee is intended, the word "provisional" is introduced, and that, where the word "assignee" stands without qualification, the general or creditors' assignee is intended. There is no hardship in the construction contended for; for the general body of the creditors can always protect themselves by causing a general assignee to be appointed. With respect to the case of *Bishop v. Hatch*, all that it decided was, that, under the 7 Geo. 4. c. 57, the profits of a benefice did not pass under the general assignment to the assignee.

*Bosvill*, for the Bishop of Peterborough, asked for costs, whichever way the rule might be determined.

[In the course of the argument the following acts of parliament were referred to: 1 Geo. 4. c. 119; 7 Geo. 4. c. 57, sections 11, 14, 16, 17, 18, 19 and 20; 1 & 2 Vict. c. 110, sections 23, 24, 35, 36, 37, 42, 45, 51, 53, 54, 55, 62 and 63.]

*Cur. adv. vult.*

*PATTESON, J.* now (Dec. 12) delivered judgment.—I have had much doubt as to the proper construction of the 55th section of the stat. 1 & 2 Vict. c. 110, on which this case depends. However, on the fullest consideration I can give the case, I am of opinion that the vesting order, as it is usually called, is an order appointing an assignee of the prisoner, in pursuance of the act, within the meaning of the 55th section. The object of that section is to prevent the income of a clergyman from being taken at once by a person over whom the ecclesiastical ordinary would have no authority, so as to provide for the due performance of the services of the church, in which the parishioners are interested, and it is therefore provided that nothing in the act contained shall entitle the assignee to the income of a clergyman; provided always, that it shall be lawful for such assignee to obtain a sequestration, "and the order appointing an assignee or assignees of such prisoner, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration." It is remarkable that this is the only section throughout the act, in which the words "order appointing an assignee" are to be found. The vesting of the estate of the prisoner in the provisional assignee is to be by *order*, and that order cannot be directed to any other person, so that there is no selection by the Court, and in some sense no appointment of the person to be assignee; but still the provisional assignee is not assignee at all of any individual prisoner until an order of the Court vesting the effects of such prisoner in him is made. The vesting order, therefore, does in some sense appoint the provisional assignee to be assignee of the prisoner in respect of whose effects it is made. The 45th section empowers the Court, but does not require it, to appoint a general assignee or assignees, and provides that where the appointment has been made and accepted, the effects of the

(2) 1 Ad. & El. 171; s. c. 3 Law J. Rep. (n.s.) K.B. 127.

prisoner shall by virtue of such *appointment* vest in the said assignee or assignees, without conveyance from the provisional assignee. This section does not direct the appointment to be by *order* of the Court; and it is remarkable that wherever in the act that appointment is referred to, the word "*appointment*" only is used, and not the words "*order of appointment*," or "*order appointing*," except only in the 55th section, which is in question. The distinction between an order and an appointment is only marked in the 45th section. It is true, that different powers are given to the provisional assignee and the general assignee by the different sections; and that for the most part, the words "*provisional assignee*" are used where that officer is intended, and the word "*assignee*" only where the creditors' assignee is intended. Yet this is not invariably so, for both are manifestly included in the word "*assignee*" in several sections (see sections 49, 62, 63, and others); whereas in other sections the words "*provisional or other assignee*" are used. Other comments on the one side and the other might easily be made on the words of the different sections of this act. I do not rely on such arguments, although I have anxiously examined the language of the act to see if it was possible to draw any conclusive argument from it.

The argument which weighs with me is this, that the main scope and object of the act is to divide the insolvent's property rateably among his creditors, and that this object will best be effectuated by such a construction of the 55th and other sections as will not give an opportunity for any particular creditor to intervene and obtain a preference over others. I see nothing in that section indicating any intention to distinguish between the provisional and general assignee, and I see no sort of reason for such distinction. The words of the section are large enough to include both, and the particular object of the section is quite beside any such distinction.

Upon the whole, I am of opinion, that the vesting order is an order appointing an assignee of such prisoner, and that this rule must be discharged with costs to the provisional assignee and the Bishop.

*Rule discharged.*

1846. { THE CHURCHWARDENS AND  
July 8. { OVERSEERS OF THE PARISH  
1847. { OF ST. NICHOLAS, DEPT-  
Dec. 11. { FORD, v. SKETCHLEY.

*Charity—Lands "belonging to the parish"*  
—Stat. 59 Geo. 3. c. 12.—*Existing Trustees—Churchwardens and Overseers—Specific Trust.*

*Lands were conveyed in 1749 to A. and B, their heirs, &c., upon trust to permit and suffer the churchwardens and overseers of D. to receive the rents and profits to and for the use and benefit of the poor of the parish of D, with power to appoint new trustees and to grant leases for twenty-one years; and the power of the trustees was extended and their title confirmed by local acts; by the operation of which and by conveyances under the powers of the original deed of trust, the legal estate was vested in known existing trustees:—Held, first, that the nature of the trust was not special, so as to prevent the operation of the statute 59 Geo. 3. c. 12. s. 17; secondly, that the words of the 17th section of that act were imperative, and not merely enabling, in cases to which it was applicable. But held, lastly, that in cases in which there were known living trustees, section 17. did not contain words sufficiently strong to divest the legal estate from such trustees, and that property so circumstanced could not be considered as "belonging to the parish" within the meaning of the statute (overruling Rumball v. Munt, 15 Law J. Rep. (N.S.) Q.B. 180).*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 17.]

1845. { In the matter of THE APPELDORE  
Jan. 30; { TITHE COMMUTATION.  
June 8. }

*Tithes—Apportionment of Rent-charge, under 6 & 7 Will. 4. c. 71—Probability of Change of Cultivation—Prohibition.*

*In the parish of A. in Kent, there were marsh and other ancient pasture lands, arable lands, and woodlands; there was a modus of 1s. per acre, payable to the vicar, for all tithes except those of corn and grain, the woodland being exempt*



from tithe by custom. *The Tithe Commissioner awarded a rent-charge to the rector and vicar, in respect of the tithe and moduses, and the award was confirmed under 6 & 7 Will. 4. c. 71, s. 52 (1). The valuer,*

(1) Stat. 6 & 7 Will. 4. c. 71, s. 33, enacts "That as soon as may be after the choosing of such valuer or valuers" (sect. 32.) (in cases where parochial agreements are entered into), "and after the confirmation of the said agreement, the valuer or valuers so chosen shall apportion the total sum agreed to be paid by way of rent-charge instead of tithes, and the expenses of the apportionment, amongst the several lands in the said parish, according to such principles of apportionment as shall be agreed upon at the meeting at which the valuer or valuers shall be chosen, or if no principles shall be then agreed upon for the guidance of the valuer or valuers, then, having regard to the average titheable produce and productive quality of the lands, according to his or their discretion and judgment, but subject in each case to the provisions hereinafter contained, and so that in each case the several lands shall have the full benefit of every modus and composition real, prescriptive and customary payment, and of every exemption from or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable; provided that it shall be lawful for the said valuers, when an even number is chosen, by any writing under their hands, to appoint an umpire before they proceed upon the business of such apportionment, and the decision of the umpire on the questions in difference between the valuers shall be binding on them, and shall be adopted by them in the apportionment."

Sect. 36, enacts "That after the 1st day of October 1838, the Commissioners shall proceed in manner hereinafter mentioned, at such time and in such order as to them shall seem fit, either by themselves or by some assistant Commissioner, to ascertain and award the total sums to be paid by way of rent-charge, instead of the tithes of every parish in England and Wales, in which no such agreement binding upon the whole parish as aforesaid shall have been made and confirmed as aforesaid." (Sections 18, 21, 27.)

Sect. 37, enacts "That in every case in which the Commissioners shall intend making such award," notice shall be given, &c.; and after twenty-one days from such notice, "the Commissioners or some assistant Commissioner shall, except in the cases for which provision is hereinafter made, proceed to ascertain the clear average value (after making all just deductions on account of the expenses of collecting, preparing for sale, and marketing where such tithes have been taken in kind,) of the tithes of the said parish, according to the average of seven years preceding Michaelmas in the year 1835: Provided that if during the said period of seven years, or any part thereof, the said tithes or any part thereof shall have been compounded for, or demised to the owner or occupier of any of the said lands in consideration of any rent or payment instead of tithes, the amount of such

appointed under section 53, in his apportionment, charged certain of the ancient pasture lands, not only with the amount payable in respect of the modus, but with a further payment of 1s. per acre to the rector, in part of the rent-charge awarded to him in lieu of the tithes of corn and grain, on the ground that there was a probability of such pasture lands being, at a future period, converted into tillage; and it appeared that, in point of fact, lands within the same district had within living memory been ploughed. Objections having been made before the Commissioners to this apportionment, both on principle and on the facts, they heard the evidence, and decided that they would confirm the apportionment, if they were not forbidden by a superior court. On motion for a prohibition,—Held, first, that it did not lie, the Commissioners having acted within their jurisdiction. Secondly, that the apportionment was correct in principle.

composition, or rent, or sum agreed to be paid instead, shall be taken as the clear value of the tithes included in such composition, demise, or agreement during the time for which the same shall have been made; and the Commissioners or assistant Commissioner shall award the average annual value of the said seven years so ascertained as the sum to be taken for calculating the rent-charge to be paid as a permanent commutation of the said tithes."

Sect. 44, enacts, "That if any modus or composition real, or prescriptive or customary payment, shall be payable instead of the tithes of any of the lands or produce thereof in the said parish, the Commissioners or assistant Commissioner shall in such case estimate the amount of such modus, composition or payment as the value of the tithes payable in respect of such lands or produce respectively, and shall add the amount thereof to the value of the other tithes of the parish ascertained as aforesaid, and shall also make due allowance for all exemptions from or non-liability to tithes of any lands, or any part of the produce of such lands."

Sections 51, and 52, provide for hearing the objections to, and for the confirmation of the award.

Sect. 53, enacts, "That as soon as the Commissioners shall have confirmed any such award, they shall call a parochial meeting for the purpose of appointing valuers . . . . and the valuers so chosen shall act with the same powers, and be subject to the same provisions as if the rent-charge so awarded had been agreed to at a parochial meeting of the landowners, &c., and the valuers had been thereupon chosen as aforesaid." (Sect. 33.)

It appeared by the affidavit of the valuer that no principles were laid down for his guidance.

It further appeared by the affidavits on both sides, that there was no appreciable probability of the woodland being grubbed up for tillage.

A rule had been obtained, in Michaelmas term 1844, calling upon the Tithe Commissioners for England and Wales to shew cause why a writ of prohibition should not issue to prohibit them from confirming the instrument of apportionment of the rent-charges of the parish of Appledore in Kent. It was ordered by the rule that notice thereof should be given to the attorney for the landowners of the said parish, and to the impropiator and his lessee, and the vicar of the said parish. The following facts appeared on affidavits for and against the rule:—The parish of Appledore, in the Weald of Kent, lies partly in Romney Marsh, and partly on uplands adjoining, and comprises about 474 acres of arable land, 2,209 of pasture or meadow, and sixty-eight of woodland, besides glebe lands, waste, &c. By custom no tithes are payable in the district of the Weald for woodland. The tithes of corn and grain in the parish are payable in kind, and belong to the Archbishop of Canterbury, who is the impropriate rector, and to his lessees. No other tithes in the parish are payable in kind; but moduses of 6d. and 1s. per acre are paid to the vicar in lieu of all tithes, except those of corn and grain. The assistant Tithe Commissioner made his award (September 2nd, 1841), fixing the annual sum of 210*l.* as the rent-charge payable to the Archbishop or his lessees, in lieu of the tithes of corn and grain, and 98*l.* 8*s.* 4*d.* as the rent-charge payable to the vicar, in lieu of all vicarial tithes and moduses. The charges were ascertained according to the average value of the tithes of corn and grain, and the amount of the moduses respectively received in the parish for seven years preceding Christmas 1835. The Commissioners confirmed the award.

It appeared, in point of fact, and was found by the award, that the pasture lands in the parish of Appledore are, for the most part, ancient pasture or meadow, particularly those in Romney Marsh, which have been in grass from time immemorial. The Dean and Chapter of Canterbury are the owners of 107 acres of pasture land in the marsh, which are known by the name of Mean Lands, and are demised by them to Sir John E. Honeywood, by lease, dated the 30th of June 1842, for twenty-one years,

renewable in the usual manner, at the yearly rent of 10*l.* 10*s.* A modus of 1*s.* per acre had been immemorially paid to the vicar for the tithes of these lands, and no other tithe, or payment in lieu of tithe, whatsoever.

After confirmation of the award, a valuer was appointed under section 53, who made an apportionment of the rent-charge among the lands in the parish, and therein charged part of the immemorial pasture lands, including those demised to Sir J. E. Honeywood, not only with the amount of the moduses, but with a further sum of 1*s.* per acre to be paid to the impropriate rector or his lessees, as part of the gross rent-charge of 210*l.*, awarded in lieu of the tithes of corn and grain.

Sir J. E. Honeywood and other landowners, objecting to the apportionment, were heard before two assistant Commissioners, at meetings called for the purpose, under section 61, and contended that the valuer had no jurisdiction or power to charge the pasture lands with any sum beyond the amount of the moduses. The valuer contended, that he had pursued the directions of the Tithe Commutation Act, and apportioned, in the cases objected to, according to the average produce and productive quality of the lands; and where it seemed to him that the productive quality admitted of its being arable, and there was a reasonable probability of the grass being so converted into arable, he had fixed, in respect of such probability, a small portion of the rectorial rent-charge on such lands accordingly. Evidence was adduced, on the part of Sir J. E. Honeywood, to shew that the pasture land in the marsh was not likely to be converted into arable, and that breaking it up for that purpose would not be advantageous; but the owners of arable land, who were satisfied with the apportionment, produced evidence to a contrary effect. The Assistant Tithe Commissioners were of opinion that the apportionment was made on just principles, and then reported to the Tithe Commissioners accordingly; but, on the request of the objectors, the parties were finally heard (the 24th of May 1844) at Somerset House, before the Tithe Commissioners themselves, who (referring to the evidence taken by the assistant Commissioners) gave a written judgment (which was annexed to the affidavits) in favour of

the apportionment; and as that judgment embodies the facts proved, and the arguments adduced before the Commissioners, and which were further deposed to in the affidavits for and against the rule, it is given at length.

"In the case of Appledore we have three parties complaining of the apportionment—one party complains that the apportionment has not given the full benefit of a *modus* to the owner of grounds of which that *modus* protects all the produce, except corn and grain. This is a parochial *modus*, and would in the same manner protect the lands actually arable if they grew other produce than corn and grain. In cases where it is clearly improbable that the grass lands will ever be ploughed up, we think the amount of the *modus* only ought to be apportioned on them; but in this case we are of opinion that the apportioner, in the execution of his duty of allowing the full benefit of this *modus* to all the parties entitled to it, was justified in laying a small sum in addition to the *modus* on lands actually in grass, and that the owners of the lands now in grass get their full share of the benefit of this *modus*, when they are protected from ever paying more than the *modus*, with a very slight addition, whatever may be the future produce of their soil. The second party complains that his lands can never be ploughed up, or produce corn or grain, and therefore ought not to be charged, permanently, with anything more than the *modus* it is to be protected by when in grass. He states that his lands can never be ploughed up: first, because he holds under a lease from the Dean and Chapter of Canterbury, which makes it penal in him to plough without their licence; and, secondly, because such licence can never legally be given, since that supposes the dean and chapter to be parties to waste. We assume waste to be the doing some act which is prejudicial to the inheritance. On the evidence before us, we believe that there are qualities of land in Appledore, the ploughing up a portion of which would add to the permanent value of the estate; and we are not disposed to consider such an operation necessarily waste. It would be waste, perhaps, in the tenant to plough up without licence; but when he ploughs up with the deliberate licence of the lessor, it ceases, it appears to

us, under such circumstances, to be waste. It is contended that the dean and chapter have no right to grant such licence. It has not been made clear to us that a licence granted under such circumstances, in which the inheritance would be benefited, and not injured, is an illegal licence when granted by a dean and chapter. And, as the law is not clear as to its being illegal, a long and, as far as it appears to us, unquestioned practice can be adduced in favour of its legality. It is not disputed that the tenants of the dean and chapter have been in the habit of ploughing under licence from their lessors. We decide, therefore, that if an addition to the *modus* was proper on other grounds, it was not improper simply because the lands were held under the Dean and Chapter of Canterbury by a lease which made it penal to plough without their licence. Sir John Honeywood, a third party, complains, that, supposing the preceding questions disposed of, still no addition to the *modus* ought to be apportioned on his lands, because from their quality and position it is grossly improbable that they will ever be ploughed, or had the Tithe Act not passed, would ever have produced any titheable produce not covered by the *modus*. On this point a great body of evidence was produced before the assistant Commissioners, of which their minutes are now before us. It consists of testimony as to opinion, and testimony as to facts. The testimony as to opinion appears to us to be pretty equally balanced: witnesses, many of them well known to us as men of skill and character, have deposed, some that they believe it grossly improbable that any part of Romney Marsh will ever be ploughed up; others that they consider it highly probable that a portion of it, of a peculiar quality and description, will be ploughed up. If we put aside, however, these conflicting opinions, and look only to the testimony as to facts, it appears to us to be clearly established that there is a portion of Romney Marsh, not a very large one perhaps, which it is found desirable and profitable to plough up; that there is a tendency to plough, distinctly established, now; and that tendency becomes greater whenever the tithe commutation is finally settled, and the fear of tithe in kind got rid of. It further appears to us that that portion of Sir John Honeywood's

estate to which the apportioner has assigned a rent-charge in addition to the modus, is, for its quality and position, to be ranked among the lands which there is a tendency in the marsh to plough. The addition made to the modus might be in excess; but we were not called upon to examine that: it was admitted that, if any addition at all was to be made to the modus, the addition actually made was not unreasonable in amount. Taking the whole case therefore into consideration, we shall confirm the apportionment, if we are not forbidden to do so by a superior court."

*Sir F. Thesiger and Buller*, for the Tithe Commissioners.—The Tithe Commissioners do not wish to object that prohibition will not lie; but they contend that they have exercised a discretion given them by the act, and that the owners of the pasture land cannot be considered aggrieved. Suppose they broke up the pasture land immediately after the award, they would have to pay tithe in kind.

[COLERIDGE, J.—Sect. 33. provides, that the lands shall have the full benefit of every modus, &c. and of every exemption from a non-liability to tithes.]

The conversion of pasture into arable must be taken for the purpose of the argument to be beneficial; and after the case of *The Duke of St. Albans v. Skipworth* (1) it cannot be contended to be waste—*Co. Litt.* p. 53, b; and the lessee under the dean and chapter of Canterbury might so convert it with the consent of the lessors. An ecclesiastical corporation aggregate is not within the statutes—*Marlbridge* (52 Hen. 3. c. 23), Gloucester (6 Edw. 1. c. 5), Westmoreland (1 stat. 13 Edw. 1. c. 52). As to waste, the dean and chapter would not be liable—*The Dean and Chapter of Worcester's case* (2).

[LORD DENMAN, C.J.—It is very doubtful whether we can interfere by prohibition.]

The Tithe Commissioners are desirous of having the opinion of this Court.

*Hugh Hill*, for the arable landowners.—Prohibition does not lie; and if there be any doubt on that point, the Court will order the parties to declare in prohibition. The 95th section takes away the *certiorari*, and the 45th section gives a particular mode

of appeal, with the sole and exclusive jurisdiction, to a particular tribunal. To grant a prohibition would be to repeal these clauses in the act of parliament—*The King v. Higgins* (3), *Griffin v. Ellis* (4), *Hall v.*

(3) *The King v. Higgins*.—In Michaelmas Term 1843,—

*Sir G. Lewin* had obtained a rule calling on the Justices of Herefordshire to shew cause why a writ of prohibition should not issue to restrain them from further proceeding on a conviction of one Higgins, for unlawfully taking fish in water in which E. B. had a private right of fishery. It appeared by the affidavits, that Higgins being brought before the magistrates on a charge of unlawfully fishing in a private fishery, under the statute 7 & 8 Geo. 4. c. 39. s. 4, claimed a right to fish in the water in question: first, as being a public fishery; secondly, as having a right to fish there, as being a copyholder. The magistrates proceeded to hear the case, and fined him in 30s., and costs, refusing to go into evidence as to the right claimed by him, and not requiring E. B. to produce his title-deeds, but proceeding on the general statements of witnesses as to his right to the fishery.

*Kelly* shewed cause.—The magistrates had jurisdiction; and, if so, prohibition will not lie.

The Court called on—

*Lewin*, contra.—The statute gives no power of appeal, and provides that the proceedings shall not be removed by *certiorari*. If this Court will not interfere by prohibition, the party is without remedy—*The Queen v. Burnaby*, 2 Lord Raym. 900.

[COLERIDGE, J.—The refusal of the magistrates to go into evidence of the defendant's right to fish might amount to misconduct; but how does it affect the question of jurisdiction?]

If the defendant claimed to fish as of right, the Justices had no jurisdiction to try the right; and affidavits may be used to shew circumstances taking away their jurisdiction—*The Queen v. Bolton*, 1 Q.B. Rep. 66; s.c. 10 Law J. Rep. (n.s.) M.C. 49. In *The Queen v. Burnaby*, which was a similar case Lord Holt says, "As the conviction is come hither, no prohibition can go; whereas, upon putting in such a suggestion as this while the conviction remained below, the parties might have a prohibition after conviction to stay the Justices from proceeding upon it, for without doubt if the defendant had but a colour of title the Justices had no jurisdiction in the cause."

LORD DENMAN, C.J.—Nobody else ever said it, and I should doubt very much if Lord Holt ever did; and if he did say so, he has been expressly overruled. By making this rule absolute, we should in effect repeal the clause of the statute which takes away the *certiorari*.

COLERIDGE, J.—The magistrates are to inquire whether the party did unlawfully fish; and that they have done. It cannot be contended that they had no jurisdiction to inquire into this. The case of *The Queen v. Bolton* does not apply.

Rule discharged, with costs.

(4) 11 Ad. & El. 743; s.c. 9 Law J. Rep. (n.s.) Q.B. 127.

(1) 14 Law J. Rep. (n.s.) Chanc. 247.

(2) 6 Rep. 37, a.

very on sale or return. The cause came on for trial, at the Sittings at Guildhall after Hilary term 1843, when the cause and all matters in difference were referred to an arbitrator. Evidence was given at the arbitration on the part of the then plaintiff (the present defendant Samuel) of the transaction on Friday, the 10th of September 1841, and of the payment of 500*l.* for the stock of watches, &c., and of an agreement by C. Rowlands, that he would be responsible for their safety as long as they were left on the premises, and also for any that might be subsequently sent there. On the other hand, the then defendant, C. Rowlands, called various witnesses (most of them being parties subsequently indicted) who swore that Rowlands had said that he would not be responsible for them for more than twenty-four hours, and that they could not remain on the premises longer than that time, as he was to give up the premises to one Solomon on the Monday following; and that Samuel had promised T. Rowlands 10*l.* per cent. on all that should be sold before Monday morning. And it was further sworn by two witnesses, that on the Monday following, the 13th of September, the plaintiff (Samuel) himself came and removed the goods. The arbitrator in January 1844 made his award in favour of Rowlands, the defendant in that action. Mr. Samuel afterwards, thinking he had reason to be satisfied that he was at Brighton from the time of the sale on the Friday until the Wednesday following (the 15th of September), and consequently, that he could not have removed the goods on the Monday, charged the now plaintiff and his witnesses with conspiring to defraud him and to impose on the arbitrator. An indictment was accordingly preferred at the Central Criminal Court against Mr. C. Rowlands and the other parties already mentioned: the substance of which indictment is set out in the declaration in this cause.

The indictment was afterwards removed by *certiorari* into this court, and came on for trial at the Sittings after Michaelmas term 1844, when the defendants were acquitted; and the present action was commenced in June 1845.

On the trial of the present action, evidence was called to prove what took place at the

reference, and also at the trial of the indictment, and a friend of Samuel deposed to the fact that Mr. Samuel was at Brighton from Friday the 10th to Wednesday the 15th of September.

The witness, D. Rowlands, was also called for the plaintiff, who deposed that he was assistant to the plaintiff, C. Rowlands, and that about three weeks after the 10th of September 1841, he saw Samuel at Rowland's shop in Regent Street, that C. Rowlands said, "I understand that you and my son Thomas are doing business together in Leadenhall Street." Samuel said they were. C. Rowlands said, "Recollect it is not my business." Samuel said, "I think he does very well, and I would trust him to 1,000*l.*" C. Rowlands said, "Recollect I must have my rent, whether it is his business or yours: take care and keep the accounts regular; I don't consider him one of the brightest of us."

It was further proved that the costs of the defence of the seven defendants in the indictment amounted to 442*l.* 10*s.* 8*d.*, the whole of which had been paid by the plaintiff; and with respect to this it was objected that the plaintiff could not recover more than he could prove to have been incurred for his own costs. At the close of the plaintiff's case it was contended, on behalf of the defendant, that there was no evidence of want of probable cause. The Judge, however, decided that there was evidence to go to the jury; and witnesses were called for the defendant, who swore that Samuel was at Brighton from the 10th till after the 15th of September 1841, and that at that time it took more than four hours to perform the journey from Brighton to London, and that during the period in question he was not absent for four hours.

The learned Judge directed the jury that there were two questions for them. First, whether there was any fact which authorized Samuel to make the charge he did. That on the case of the plaintiff there was, in his opinion, absence of reasonable and probable cause. That the defendant had, however, called witnesses, and it was for them to say, on the facts, whether Mr. Samuel was proved to have been at Brighton the whole of Monday the 13th. If so, they must find for the defendant. If not, they were

to say, on the whole case, whether Samuel acted *bond fide* or maliciously, and that malice would include an attempt to extort money by means of threats of a criminal charge; and that they might give the amount of the bill of costs of defending the indictment if the bill was a fair one. The jury having returned a verdict for the plaintiff, damages 900*l.*—

*Montagu Chambers* moved for a new trial, on the ground of misdirection.—There were several circumstances in this case which would have been good ground for finding that the defendant had reasonable and probable cause for the indictment. First, if Mr. Samuel was at Brighton the whole of the 13th, or during so much of that day as would have rendered it impossible for him to have been in London, that no doubt would have been reasonable and probable cause. This the Judge left to the jury; but he should have further directed them to consider whether he could have been in London at the time the goods were taken. But, secondly, if Mr. Samuel had good reason for a *bond fide* belief, and did *bond fide* believe that he was not in London on the Monday, that would be reasonable and probable cause. Thirdly, if Samuel believed that Mr. Rowlands intentionally concealed from him that his son was not to be trusted, and thereby induced Samuel to leave the goods in his custody, this was also reasonable and probable cause for indicting for a conspiracy to defraud. Fourthly, if Mr. Rowlands did intentionally conceal the bad character (of which there was no doubt) of his son Thomas, and intended to deceive Samuel, when he said “he is not one of the brightest of us,” that would also be reasonable and probable cause. The Judge should have left to the jury every fact that would amount to reasonable and probable cause, and then have taken their opinion as to those facts—*Panton v. Williams* (1). Fifthly, the jury should not have been directed to give the costs incurred by all the seven defendants in the indictment as damages in an action brought by one of them. No liability to pay the whole, by the present plaintiff, was made out; and he cannot

recover as damages what he paid as a volunteer.

LORD DENMAN, C.J.—On the question of absence of reasonable and probable cause, I cannot say that I entirely concur in the judgment in *Panton v. Williams*. Great difficulties are thrown on Judges by the decision in that case. I think it is for the Judge to tell the jury whether or not the facts alleged by the defendant, in answer to an action, amount to reasonable and probable cause. He must do this on a review of all the circumstances; and it seems to me impossible to lay down any general law or rule by which he is to be guided in each particular case. That which would be strong evidence as against persons in one condition or state of circumstances might be no evidence at all in another. I think, therefore, we must look to the circumstances of each particular case, and give our opinion accordingly. In consequence, however, of that decision, I have always endeavoured to bring each fact to the notice of the jury as well as the nature of the case would admit. In this case, however, I think there has been no misdirection. It is said that certain of the facts proved were themselves enough to make out reasonable and probable cause, and the Judge should have directed the jury accordingly: it is said that the son's want of integrity was, by the father, kept back from the defendant; but I think that that is not a probable cause in fact or in law; besides, there is no proof that the father knew it. It is said indeed, that, on a particular occasion, the father uses a particular expression, “that he is not one of the brightest,” with an intention to mislead; but I think what was there said was enough to put the defendant on his guard: and it is to be remembered that a conspiracy should be established in order to make that which was said evidence at all. With regard to the evidence adduced by the defendant as to a specific fact, the Judge was quite right in telling the jury, that according as they found the fact one way or the other, there was or there was not probable cause; but a Judge is not, I think, to tell the jury that they are to find a sort of special verdict upon every point, and then to proceed to give the law on the facts so found. As to the

(1) 2 Q.B. Rep. 191; s.c. 10 Law J. Rep. (N.S.) Exch. 545.

costs, I am of opinion that if two or more persons are indicted for a conspiracy, and one of them employs an attorney for his defence, which he has a perfect right to do, and that attorney goes to him alone, and he thereby incurs the whole costs, he may recover them. How, indeed, can any separate account or apportionment be made in respect of witnesses or counsel's fees? Any one interested in a joint indictment may be the sole paymaster and recover as damages what he has paid. The rule must be refused.

COLERIDGE, J.—I am of the same opinion, and would only add on the question of reasonable and probable cause, that giving the utmost weight to the facts relied upon they do not amount to reasonable or probable cause for the indictment. On the subject of the costs I should be unwilling to lay down a general rule. There can be no doubt that in the case of an indictment for a conspiracy, where all rely on the same matter of defence, any one may be liable for, and pay and subsequently recover, all the costs; but if different grounds of defence were relied on, such as *alibi*, for instance, the same rule would not apply.

WIGHTMAN, J. and ERLE, J. concurred.

*Rule refused (2).*

1847. }  
Nov. 18, 25. } SPOONER v. PAYNE.

*Practice.—Execution—Rule of Court—Judgment—1 & 2 Vict. c. 110. s. 18.—Sci. fa.*

*A writ of execution may issue on a rule of court (1 & 2 Vict. c. 110. s. 18.) after the expiration of a year and a day, without a sci. fa. or any application to the Court.*

In the present term a rule had been obtained by—

*Manning, Serj.* (in the matter of the arbitration between the above parties) calling upon James Spooner to shew cause "why the writ of *ca. sa.* issued in this cause should not be set aside, and why the defendant should not be discharged out of the custody

of the keeper of the Queen's Prison as to the execution in this matter."

The rule was granted on the affidavit of the defendant; from which it appeared that a rule had been obtained by him for setting aside the award made in the cause, which rule was discharged with costs, which were taxed at 23*l.* 1*s.*, the Master's allocatur bearing date the 7th of February 1845, and that on the 17th of November 1846 he was arrested on a *ca. sa.*, no *sci. fa.* having issued on the allocatur.

*Whitehurst and Miller* shewed cause (Nov. 18).—The ground of this motion is that execution was issued on the order of Court, after the expiration of a year and a day, without a *scire facias*; but a rule or order of Court is not a record, which is "a memorial or remembrance in rolls of parchment of the proceedings or acts of courts of justice, being of such incontrovertible verity as not to admit of averment, plea, or proof to the contrary"—*Co. Litt.* p. 260, *a*, *Steph. Pl.* n. 11. app. p. 18; and in practice a *scire facias* never has issued on a rule of court. No judgment is signed on it, and it has its operation in favour of creditors by virtue of stat. 1 & 2 Vict. c. 110. s. 18. It is said that that statute provides, that decrees and orders of the courts of equity and rules of the courts of common law for the payment of money should have the effect of judgments in the superior courts. That, however, does not make them judgments for all purposes, or equivalent to judgments—*Cetti v. Bartlett* (1), *Farmer v. Mottram* (2). Besides, assuming the *sci. fa.* to be necessary, the writ of *ca. sa.* cannot be treated as a nullity, because no *sci. fa.* has issued—*Blanchenay v. Burt* (3), *Mortimer v. Piggot* (4), *Sandon v. Proctor* (5), *Benn v. Greatwood* (6); and the defendant must be put to his writ of error. At all events, this application is too late.

*Manning, Serj.*, contra.—The plaintiff's own position, that no record exists, meets

(1) 9 Mee. & Wels. 840; s. c. 11 Law J. Rep. (n.s.) Exch. 293.

(2) 6 Man. & Gr. 684; s. c. 13 Law J. Rep. (n.s.) C.P. 10.

(3) 4 Q.B. Rep. 707; s. c. 12 Law J. Rep. (n.s.) Q.B. 291.

(4) 4 Ad. & El. 363, n.

(5) 7 B. & C. 800; s. c. 6 Law J. Rep. K.B. 138.

(6) 6 Scott, N.R. 891.

(2) See *Mitchell v. Williams*, 11 Mee. & Wels. 205; s. c. 12 Law J. Rep. (n.s.) Exch. 193.

the objection as to the necessity of a writ of error. In cases of attachment the practice is to grant a rule *nisi* if four terms have elapsed. A *sci. fa.* is an analogous proceeding, being a writ *nisi*, and necessary therefore in this case. In moving for a rule *nisi* for an attachment an affidavit that the money is unpaid is necessary. *Blanchenay v. Burt* was an action of trespass against the parties who executed a writ of *ca. sa.* after the year and a day. That case shews, if anything, that an application might have been successfully made to discharge the defendant out of custody. The same may be said of *Reynolds v. Newton* (7), and *Parsons v. Loyd* (8). The cases are collected in *Chit. Arch.* (last edit.) 1013.

[*ERLE, J.* referred to *Goodtitle d. Murrell v. Badtittle* (9).]

In *Hodson v. Warrington* (10) the Court of Chancery refused to allow a plaintiff to issue execution on a judgment in the petty bag without a *sci. fa.*, though the delay was the act of the defendant. *Patrick v. Johnson* (11) was an action of trespass, but it was there held that execution after the year, though not void, was voidable on error. This application is in the nature of error, which will not lie. In *Russell's case* (12) it was held, that execution after a year and a day was a void execution, and not only avoidable by error; and the defendant was discharged by reason that "it was no execution, and the plaintiff may have *sci. fa.* when he will." The circumstance that if it had been the case of a judgment instead of an order the defect would have been sufficiently material to have been the ground of error, is of itself a strong argument for the necessity of a *sci. fa.*

[*LORD DENMAN, C.J.*—We certainly cannot see at present that any *sci. fa.* can be necessary; but it is desirable to inquire as to the practice of the other courts with respect to the necessity of an application to keep the proceedings alive after the expiration of a year.]

*Cur. adv. vult.*

(7) 1 Q.B. Rep. 525 ; s.c. 10 Law J. Rep. (N.S.) Q.B. 182.

(8) 3 Wils. 341.

(9) 9 Dowl. P.C. 1009.

(10) 3 P. Wms. 36.

(11) 3 Lev. 403.

(12) 4 Leon, 197.

*LORD DENMAN, C.J.* subsequently (Nov. 25) delivered the judgment of the Court.—This defendant obtained a rule for discharging him from imprisonment under a *ca. sa.*, because it had issued, on a rule of court requiring him to pay money, under 1 & 2 Vict. c. 110. s. 18. without a *sci. fa.* or special leave of the Court. We are of opinion that no *sci. fa.* or special leave is made necessary by that act, or by any legal principle, and we learn that according to the practice now existing the proceedings are regular, and we discharge the rule.

*Rule discharged.*

1847. }  
Dec. 7, 11. }

*BARBER v. LEMON.*

*Bill of Exchange—Pleading—Traverse—Immaterial Averment.*

*To a declaration in debt by the drawer against the acceptor of a bill of exchange, and on an account stated, the defendant pleaded that the bill was indorsed by the plaintiff to M. D, who then became, and thence hitherto remained the holder thereof. Replication, that the plaintiff was the holder of the bill at the commencement of the suit, absque hoc that M. D, from the time of the indorsement hitherto remained the holder thereof:—Held, (on special demurrer) that the replication was not too large, and also that the plaintiff was at liberty to traverse the material allegation in the plea, and was not bound to state specially how he re-acquired the bill from M. D.*

*Debt.* The first count was on a bill of exchange, drawn by the plaintiff upon, and accepted by the defendant, for 9*l.* 19*s.*, payable two months after date to the plaintiff's order. Second count, for money due upon an account stated.

First plea to the first count of the declaration, that, after the said bill of exchange was drawn and accepted, and before the same became due, and before the commencement of this suit, to wit, on &c., the plaintiff then being the holder of the said bill, as such drawer thereof, indorsed and delivered the same to a certain person carrying on business under the name, style, and firm of



Mark Davis & Son, who then became, and thence afterwards, to wit, thence hitherto, remained the holders of the said bill by virtue of such indorsement thereof as last aforesaid.

Second plea to the second count, that the account therein stated was stated between the plaintiff as the drawer, and the defendant as the acceptor of the said bill in the declaration mentioned, and not otherwise, and of and concerning no other item or matter than the liability of the defendant to pay the plaintiff, as such drawer, the amount of the said bill, according to the tenour and effect thereof and of his, the defendant's, said acceptance; and the defendant saith, that afterwards, and before the commencement of this suit, and while the plaintiff was the holder of the said bill as such drawer thereof, to wit, on &c., the plaintiff, for valuable consideration in that behalf, that is to say, for a large and sufficient sum of money, to wit, a sum equal to the amount of the said bill, and all causes of action arising out of, upon, or in respect of the same, indorsed and delivered the said bill to certain persons carrying on business under the name, style, and firm of Mark Davis & Son, and from whom the plaintiff then received the said sum in satisfaction of the amount of the said bill and of all causes of action arising out of, upon, or in respect of the same; and that the said Mark Davis & Son then became, and thence, afterwards, to wit, thence hitherto, remained and were the holders of the said bill by virtue of such indorsement.

The plaintiff replied to each of these pleas that, at the time of the commencement of this suit, the plaintiff was the holder of the said bill; without this, that the said persons in the plea mentioned, from the time the said bill was so indorsed and delivered to them as in that plea mentioned *hitherto*, remained the holders thereof, *modo et forma*, concluding to the country.

The defendant demurred specially, on the ground that the replication to the first plea did not shew any right of action in debt accruing to the plaintiff after he had indorsed the bill; that it was not shewn in what way the plaintiff re-acquired the bill; that it was consistent with the replication that he may have held it at the time of suit as bailee (in which case he would

have no right of action at all), or as indorsee (in which case he could not sue in debt); that it did not appear that the plaintiff did not receive the bill from the indorsees after the defendant had satisfied them; that the traverse was too large, as it puts in issue that the persons named in the plea were holders at the time of pleading, whereas it would be sufficient if they were holders at the time of suit; and that the replication was a departure.

The replication to the second plea was objected to for the same reasons, and also on the ground that it admitted the statement in that plea, that the original right of action which accrued on an account stated before the bill was indorsed to the third parties, was extinguished by that indorsement, the plaintiff having, by indorsing the bill, assigned with it the debt in respect of which the account was stated; and that if any subsequent account was stated with the plaintiff after he became again the holder of the bill, it should have been new assigned.

*Fortescue*, in support of the demurrer (Dec. 7).—These pleas shew that the bill was indorsed away by the plaintiff, and so give a distinct answer to the declaration; the replications should have stated how the bill was re-acquired by the plaintiff. *Bartlett v. Benson* (1) shews that such a plea *prima facie* displaces the title of the plaintiff to sue on the bill: and if he has acquired a fresh title he ought to state it specially. *Schild v. Kilpin* (2) is also in point. Secondly, the replications are bad for carrying on the traverse to the time of plea pleaded. *Basan v. Arnold* (3) has expressly decided this point. Thirdly, the replication should have stated that the plaintiff was *indorsee* as well as holder of the bill at the commencement of the suit, otherwise he is not shewn to have any title to sue on the bill. It was held in *Cunliffe v. Whitehead* (4) that an averment that a bill was delivered was not equivalent to an allegation that it was indorsed.

*Crompton*, contra.—The replications only

(1) 14 Mee. & Wels. 733; s.c. 15 Law J. Rep. (N.S.) Exch. 23.

(2) 8 Ibid. 673; s.c. 10 Law J. Rep. (N.S.) Exch. 422.

(3) 6 Ibid. 559; s.c. 9 Law J. Rep. (N.S.) Exch. 189.

(4) 3 Bing. N.C. 828; s.c. 6 Law J. Rep. (N.S.) C.P. 255.

put in issue the allegations in the pleas, and the second plea does not allege that the indorsement over by the plaintiff took place before the bill became due, and is therefore no answer to the declaration. But the replications answer all the essential parts of the pleas, which consist of two parts; either of which being answered, the plaintiff is remitted to his original title. The point that debt will not lie, does not therefore arise, for it is not a new title, but the old one on which the plaintiff is suing. The very form suggested in *Fraser v. Welch* (5) has been here adopted. It was necessary that the plea, besides the indorsement to Davis & Son, should state that they were still holders; and therefore the replication correctly denies that they were still holders: that is the substance of the replication, and it is immaterial whether the traverse is common or special. The allegation *modo et formâ* applies the traverse to the substantial and material part of the plea—*Steph. Plead.* 215, 274.

[WIGHTMAN, J.—*Modo et formâ* puts in issue what is alleged in the plea, and therefore this replication puts in issue the fact of these persons being holders at the time of plea pleaded.]

[PATTESON, J.—This replication seems to me worse than that in *Basan v. Arnold*. "Hitherto" seems to refer to the time of replication.]

*Basan v. Arnold* has been virtually overruled in the Exchequer Chamber by *Palmer v. Gooden* (6), which decides that if immaterial matter is alleged in the plea, it may be included in the traverse. At most, therefore, this is only surplusage, and the replication is not demurred to on that ground. As to the objection, that the mode in which the plaintiff re-acquired the bill should have been stated, *Fraser v. Welch* shews that to be unnecessary. But, at all events, the second plea admits a good cause of action on the account stated. After pleading over, it must be assumed that the plaintiff became the holder of the bill before it was due, and that the account was stated during the currency of the bill: if so, there was a vested cause of

action, which could not be divested by the indorsement over. The debt arising out of the statement of the account cannot be assigned at law.

*Fortescue*, in reply.—The second plea avers, that all the accounting which ever took place was in respect of the bill. The bill being assignable by law, the debt which arises in respect of it must be also assignable, otherwise, the bill itself will in effect cease to be assignable; and the substance of the plea is, that the bill and debt were both assigned over, and that the plaintiff has no right to sue for either. If that be so, the same question arises on both the pleas and replications. The doctrine of *Palmer v. Gooden* does not apply; there, the plea contained an impossible allegation, entry upon tolls, and the replication was assumed not to take issue on it. Here, however, it is quite possible that Davis & Son may have been holders up to the time of pleading, and that being traversed renders the replication bad. But the replication should have shewn how the plaintiff re-acquired a title to the bill, so as to enable the defendant to set up any equities to which it was liable in his hands.

[ERLE, J.—The plaintiff is stated to be the holder at the commencement of the suit: the presumption is, that the holder of a negotiable instrument has title.]

If the plaintiff has acquired a new title, there is no privity between the parties, and debt will not lie.

*Cur. adv. vult.*

The judgment of the Court (7) was now (Dec. 11.) delivered by—

LORD DENMAN, C.J.—In this case the plaintiff declared in debt as drawer of a bill of exchange payable to his own order against the acceptor, with a count upon an account stated. The defendant pleaded to the count upon the bill that it was indorsed by the plaintiff to certain persons "who then became and thence hitherto remained the holders thereof." The plaintiff replied that he was the holder at the commencement of the suit; without this, that the said persons mentioned in the plea "from the time of the indorsement hitherto remained the

(5) 8 Mea. & Wels. 629; a. c. 10 Law J. Rep. (n.s.) Exch. 378.

(6) Ibid. 890; a. c. 11 Law J. Rep. (n.s.) Exch. 424.

(7) Lord Denman, C.J., Patteson, J., Wightman, J., and Erle, J.

holders thereof." To this traverse there was a demurrer, and several causes were specially assigned. It was contended for the defendant that the plaintiff, instead of traversing the allegation of the persons named in the plea being the holders, should have shewn by his replication how the bill which he admits to have been indorsed and delivered to those persons came back to him again. We are clearly of opinion that there is nothing in this objection, and that a traverse was the only mode of pleading that could be adopted by the plaintiff, as he could not plead in confession and avoidance without admitting that the persons named in the plea were the holders at the time of the commencement of the suit. The special matter could only have been stated by way of inducement, and the replication must have concluded with a traverse of that which was admitted to be a material and necessary averment in the plea. The point indeed was expressly decided in *Fraser v. Welsh*, and the correct form of replication given, which is the same in substance as that in the present case. But it was also contended by the plaintiff that the traverse was too large, and put in issue immaterial and irrelevant matter, for it denied that the persons named in the plea were the holders "from the time of the indorsement hitherto," using the very terms of the plea, which included a time posterior to the commencement of the suit. We should be extremely unwilling to give effect to such an objection, unless compelled to do so by the strict rules of pleading, but we do not think that we are so compelled. The only material part of the allegation is, that the persons named in the plea were holders at the time the suit was commenced; and as stated by the defendant himself in his demurrer, it would be sufficient in order to support the allegation in the plea to shew that such persons were the holders at the time of the commencement of the suit. If so, such proof would be sufficient if the defendant had joined issue upon the traverse, and he could therefore sustain no inconvenience by the largeness of it. In *Palmer v. Gooden*, in the Exchequer Chamber, a similar objection was taken to including immaterial matter in a traverse, but the objection was overruled, and Tindal, C.J. in pronouncing the judgment says, "A party does not make an issue upon the sub-

stantial matter to be tried by the jury bad merely because he includes in it something of total surplusage and immateriality." This case appears to us to be a direct authority against the objection. Upon the argument the defendant relied upon the case of *Basan v. Arnold*; but it may be observed that that case is distinguished from this in its circumstances, for the traverse there was "without this, that any other person is the holder thereof in manner and form." The only matter directly put in issue by that traverse was whether the person was the holder at the time of plea pleaded, which was obviously insufficient. Similar objections were made to the replication to a special plea to the account stated, but we are of opinion that such objections cannot be sustained for the reasons already given. Our judgment therefore is for the plaintiff.

*Judgment for the plaintiff.*

1847. }  
May 22. } THE QUEEN v. SCHLESINGER.

*Perjury—Trial—Execution of Writ of Trial before Secondary—Assignment of Perjury in respect of Matter of Belief—Materiality—Issue.*

1. *Where a trial has been had before the Secondary of London, it is properly described as being had before the sheriff, to whom the writ is directed.*

2. *Where two or more issues are joined on the record on such trial, it is properly alleged that they came on to be tried, though only one may have been tried in fact.*

3. *Perjury may be assigned as to what a man has sworn that he thought or believed; the difficulty, if any, being in the proof of the assignment.*

4. *A witness having sworn at a trial that he did not write certain words in the presence of D, it is a good assignment of perjury that he did write them in the presence of D. The presence of D. may be a fact as material as the writing of the words.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 29.]

1847. }  
Dec. 7. } WEBSTER v. WATTS.

*Trespass—Pleading—Material Allegation—Defence of Possession—Breach of the Peace.*

To trespass for assault and imprisonment the defendant pleaded secondly, to the assault, that he was possessed of a dwelling-house; that the plaintiff was making a noise and disturbance there; and that the defendant *molliter manus imposuit* to turn him out; fourthly, to the assault and imprisonment, that the defendant was possessed of a tavern or alehouse, and the plaintiff conducted himself in a rude and quarrelsome manner in it, and assaulted the defendant and others, and afterwards and before, &c. remained standing in the street near the door of the house, using loud, menacing and disgusting language to the defendant and his family, who was within hearing, and by reason thereof many persons congregated about the house and made a riot and disturbance; and at the time when, &c. the plaintiff was causing persons to congregate in breach of the peace, whereupon the defendant, after requesting him to go, gave him in charge to a police officer.

To the second plea, the plaintiff replied, that the house was a common alehouse, and that the plaintiff was lawfully drinking there, wherefore he refused to depart; and that the defendant of his own wrong committed the trespasses:—Held, on demurrer to this replication that it was insufficient, as it must be taken to admit that the plaintiff was making a noise and disturbance, and was in that case no answer to the plea.

Held also, on demurrer to the fourth plea, that it was good, as sufficiently shewing matter amounting to a breach of the peace by the plaintiff.

Trespass for assaulting and striking the plaintiff, and seizing and pulling him, and forcing and compelling him to go as a prisoner and in custody from and out of a certain public house into, through and along divers public streets, &c., to a police station, and there then imprisoning the plaintiff, and keeping and detaining him in prison for a long space of time, &c.

Second plea (to the assaulting, striking,

and seizing and pulling, &c.), that the defendant, before, &c., was lawfully possessed of a certain dwelling-house, with the appurtenances, situate, &c., and being so possessed thereof, the plaintiff just before, &c. to wit, &c., was unlawfully in the said dwelling-house, and with force and arms, &c. made a noise and disturbance therein, and continued in the said dwelling-house against the will of the defendant, making such noise and disturbance, and disturbing and disquieting the defendant and his family; and thereupon the defendant requested the plaintiff to cease making such noise and disturbance, and to depart, &c., which the plaintiff refused to do, wherefore the defendant *molliter manus imposuit* to turn him out, and in so doing committed the trespasses to which this plea is pleaded.

Fourth plea (to all the trespasses in the declaration), that the defendant just before and at, &c., was lawfully possessed of a certain house, being a tavern or alehouse, situate, &c.; and that the plaintiff, before, &c., to wit, &c., entered and came into the said house of the defendant, and then made a great noise and disturbance therein, and behaved and conducted himself in a rude, quarrelsome, and uncivil manner towards the defendant and divers and very many persons, and then and there assaulted, bruised, and ill-treated the defendant and divers and many persons then being in the said house, and afterwards and before any of the said times when, &c., to wit, &c., the plaintiff stood and thence continually up to and at the time of his being removed as hereinafter mentioned, remained standing and stood in the common Queen's highway near to and opposite the door of the said house, and while he so stood there made a great noise and disturbance in the said common Queen's highway, near to and opposite the door of the said house, and used loud, menacing and disgusting language to the defendant and his family, then being within the said house and within hearing of him; and that by reason of the aforesaid conduct of the plaintiff while he so stood as aforesaid, divers persons congregated in the common Queen's highway, near to and opposite the door of the said house, and made a great noise and disturbance near to and opposite the door of the said house, in breach, &c. and to the obstruction of the business carried on by

the defendant in his said house, and to the obstruction of the said common Queen's highway there; and that at the time of the plaintiff's being removed as hereinafter mentioned, the plaintiff persisted in so standing near to and opposite the door of the said house making a great noise and disturbance, and using such language as aforesaid; and by reason of his so standing as aforesaid was causing divers and very many people to congregate in the said common Queen's highway, opposite and near to the door of the said house, in breach, &c. and to the great obstruction of the business carried on by the defendant in the said house, and to the great obstruction of the said common Queen's highway there, although before the plaintiff was removed as hereinafter mentioned, and while he was so standing in the common Queen's highway as aforesaid making such noise, &c., and before he was given in charge by the defendant as hereinafter mentioned, to wit, on &c., was requested by the defendant to go and depart from where he so stood, and to cease from making such noise and disturbance, and from using such language as aforesaid; wherefore the defendant, in order to restore and preserve the peace, and to get rid of the nuisance so occasioned as aforesaid by the plaintiff, just before and at the said times when, &c., to wit, on &c., gave the plaintiff in charge to one John Cotterell, then being a constable and peace officer of our Lady the Queen, and then requested the said John Cotterell to remove the plaintiff from where he so stood, and deal with him according to law; and the said John Cotterell so being such said constable and peace officer, did remove the plaintiff from where he then so stood, and took him to the prison or police station in the declaration mentioned, and detained him there for a short time, to wit, &c., to the end that he might be dealt with according to law, and examined by one of the Justices of our Lady the Queen concerning the premises; and the said John Cotterell, so then being such constable, at the said times when, &c., for the purpose of so doing and in so doing committed the trespasses in the declaration mentioned.

Replication to the second plea—That the said dwelling-house in the said second plea mentioned was, before &c., a common

inn, victualling-house and ale-house, and the plaintiff was before and at the time when he was requested by the defendant as in the second plea mentioned, lawfully in the said dwelling-house as a guest, lawfully drinking and consuming liquors, which he, the plaintiff, had just before, to wit, on &c., purchased of and paid for to the defendant, then being the keeper of the said inn, ale-house and victualling-house, to be drunk and consumed there, such time being a lawful and reasonable and proper time in that behalf; wherefore the plaintiff did refuse to depart from and out of the said dwelling-house so being such common inn, ale-house and victualling-house when he was so requested by the defendant, as he lawfully might for the cause aforesaid, and the defendant of his own wrong committed the trespasses in manner and form as in the declaration in that behalf alleged. Verification.

Demurrer to the fourth plea, assigning for cause, that although the fourth plea is pleaded to, and professes to answer all the trespasses in the declaration, it does not confess, avoid, or in any way answer part thereof, (to wit) that the defendant forced and compelled the plaintiff to go as a prisoner, and in custody from and out of a certain public house into divers streets and highways.

Demurrer to replication to second plea, assigning for causes, first, that the said replication is an argumentative traverse of the defendant's being possessed of the dwelling-house at the time and in the manner therein mentioned. Secondly, that the said replication is an argumentative denial of the defendant's being entitled to the exclusive possession of the dwelling-house in the time and in the manner therein mentioned. Thirdly, that the said replication is an argumentative traverse of the plaintiff's making the noise and disturbance, and disturbing and disquieting the defendant and his family in the peaceable and quiet possession and enjoyment of his said dwelling-house at the time and in the manner in the said second plea mentioned. Fourthly, that the said replication asserts that the plaintiff was such guest, and drinking and consuming liquors in the manner and at the times therein mentioned; and also asserts that the defendant, of his own wrong, committed the trespasses mentioned, and that the said replication is

on that account double. Fifthly, that it does not appear from the said replication with sufficient certainty, how it was that the defendant of his own wrong committed the trespasses, or how it was wrong for the defendant to commit those trespasses. Sixthly, that it does not appear from the said replication, with sufficient certainty, whether the plaintiff intends to assert therein that the defendant committed the trespasses without the cause by him in his said second plea alleged. Seventhly, that it is uncertain whether or no the said replication intends to assert that the defendant committed the trespasses without the cause mentioned in that plea, and also under the circumstances set forth in the said replication, or whether it intends to assert that it was wrong of the defendant to commit those trespasses, because of the matters stated in the said second plea not being true, or because of the circumstances set forth in the said replication.

Joinders in demurrer.

*Pearson*, in support of the replication to the second plea, and the demurrer to the fourth.—The second plea is merely pleaded to the assault and battery, leaving out all statement of imprisonment: it is a good answer to so much as it professes to answer; and there was no necessity for saying any thing about noise and disturbance, since a person has a right to turn another out of his house under any circumstances. That may be considered as struck out, and need not be noticed in pleading—2 *Saund.* 638, b, n. 1. The replication, therefore, did not allude to it, and the defendant might have rejoined the noise and disturbance, the rejoinder being in the nature of a new assignment—*Taylor v. Cole* (1), *Monprivatt v. Smith* (2), *Sayre v. Lord Rochford* (3), *King v. Phippard* (4).

[WIGHTMAN, J.—You seem to make the averment that the defendant was making noise and disturbance, material by passing it over—*Six Carpenters case* (5).]

Then the fourth plea is clearly bad, as it shews that the house was a tavern and alehouse, and shews no application to the

plaintiff to go out—*Price v. Seeley* (6), where all the cases are collected, *Baynes v. Brewster* (7), *Green v. Bartram* (8), *Wheeler v. Whiting* (9), *Grant v. Moser* (10), *Timothy v. Simpson* (11). The obstruction and nuisance as alleged is not sufficient to justify the giving the plaintiff in charge—*Ingle v. Bell* (12), *Cohen v. Huskisson* (13); and it is not averred that the constable had view of the breach of the peace—*Reece v. Taylor* (14), *Wheeler v. Whiting*.

[ERLE, J.—I think it must be taken that the breach of the peace was in sight of the constable, as the plaintiff is alleged to be committing a breach of the peace at the very time he is removed by the constable.]

*T. Jones*.—*Cohen v. Huskisson* is a decisive authority in favour of the defendant, as the plea expressly avers as much as was there held to amount to a breach of the peace. And it is not made a ground of special demurrer that a breach of the peace is not sufficiently shewn. Then the replication to the fourth plea is informal, as it amounts to an argumentative traverse of the defendant's exclusive possession of the house, which is *prima facie* sufficiently averred in the plea—*Monks v. Dykes* (15). If the house is not to be taken to be a public house, the disturbance is material; and if it is, then the traverse is argumentative. The replication to the second plea is double, as it contains matter in avoidance, and also a statement that the defendant of his own wrong arrested the trespasser.

*Pearson*, in reply.—The words "of his own wrong" do not amount to a replication *de injuriâ*, unless the replication proceeds with the averment, that it was without the cause

(6) 10 Cl. & Fin. 28.

(7) 2 Q.B. Rep. 375; s. c. 11 Law J. Rep. (n.s.) M.C. 5.

(8) 4 Car. & Pay. 308.

(9) 9 Ibid. 262.

(10) 5 Man. & Gr. 123; s. c. 12 Law J. Rep. (n.s.) C.P. 146.

(11) 1 Cr. M. & R. 757; s. c. 4 Law J. Rep. (n.s.) Exch. 81.

(12) 1 Mee. & Wels. 516; s. c. 5 Law J. Rep. (n.s.) M.C. 85.

(13) 2 Ibid. 477; s. c. 6 Law J. Rep. (n.s.) M.C. 133.

(14) 4 Nev. & Man. 469; s. c. 4 Law J. Rep. (n.s.) K.B. 74.

(15) 4 Mee. & Wels. 567; s. c. 8 Law J. Rep. (n.s.) Exch. 73.

(1) 3 Term Rep. 292.

(2) 2 Campb. 175.

(3) 2 W. Black. 11, 65.

(4) Carth. 280.

(5) 8 Rep. 146.

&c.—*Searle v. Darford* (16). There was no such possession by the defendant as entitled him to turn the plaintiff out. As to the breach of the peace, it is not said that the plaintiff committed any, but that persons congregated in breach of the peace.

LORD DENMAN, C.J.—The plaintiff complains that he has been assaulted and improperly turned out of the defendant's house and imprisoned. The second plea is, that the plaintiff misconducted himself in the defendant's house, and created a noise and disturbance, and was requested to leave it, and justifies the assaulting him in turning him out. The plaintiff, by his replication, sets up his right to be in the defendant's house, as it was a public house, and that he was drinking there at a proper hour, and that the defendant, of his own wrong, committed the trespass. Assuming that the plaintiff had a right to be in the public house so long as he conducted himself properly, I think the replication is bad, as the plaintiff does not say that he was conducting himself properly. The replication goes on to allege that the defendant, of his own wrong, turned him out: it may be, that the particular words used cannot be considered as negating the cause alleged, and the case in *Lutwyche* bears this out. The fourth plea is the imprisonment.—[His Lordship stated the substance of the plea.]—It is stated that the plaintiff stood at the door of the house, causing a number of persons to congregate together. It is said that the plaintiff is not alleged as doing anything which amounts to an offence; but it is a matter of the defence of right of quiet possession. We should endanger the peace of society if we did not recognize the right of a police officer to interfere under such circumstances; and if so, he was properly set in motion by the defendant.

WIGHTMAN, J.—I am of the same opinion. I think the defendant is entitled to judgment on both pleas. As to the second plea, I think that the replication gave no answer to it on the facts which the replication admits.—[His Lordship read the second plea.]—The replication alleges that the dwelling-house is a public house, and

the plaintiff had lawfully entered and was drinking there. If the plea had stated no more than possession and entry by the plaintiff, it might have been perhaps well contended that the replication contained an answer, but here the plea alleges that the plaintiff was making a noise and disturbance; that is not answered by the replication: it stands therefore admitted on the record, that the plaintiff was making a noise and disturbance; and it is contended that this should have been rejoined; but it is not necessary to rejoin matter which already appears to be admitted on looking at the whole pleadings. I have had some doubt about the fourth plea, but I think, on the authority of *Cohen v. Huskisson*, that the plaintiff was guilty of a public nuisance, and that the officer must be taken to have had a view of this, as the plaintiff was, at the time he was taken, in the act of committing the nuisance complained of.

ERLE, J.—I think the plaintiff ought to have replied *de injurid* to the second plea. The facts in the commencement of that plea amount to an allegation that the plaintiff was, at the time, a trespasser, and if the defendant must have proved that the plaintiff was in the house without his consent or leave, and unlawfully making a disturbance, the plea is good, and the replication does not answer the material part of it. I think also the fourth plea is good. If any act amounts to a breach of the peace, and the policeman has view of it, he may take the party committing the act into custody. There is, in this case, no averment of an assault; but it is said that the plaintiff did certain acts, occasioning a breach of the peace, and no doubt the acts alleged might amount to a breach of the peace. I would not say that merely making a noise in the street could be so considered; but no man can fail to see that the matters alleged here might of themselves amount to a breach of the peace: and I have already observed that the policeman who takes him in the act must be considered as having a view of that which is being done.

*Judgment for the defendant.*

BAIL COURT. { THE QUEEN v. THE JUSTICES  
OF LANCASHIRE.  
1847. { BATLEY, CHESHIRE, v. ASH-  
Nov. 11, 13. { TON-UNDER-LYNE, LANCA-  
SHIRE.

*Appeal, Notice and Grounds of—Mandamus.*

*Where an appeal against an order of removal has been entered and respited to the following Sessions, that Court has power further to respite the hearing of the appeal, although no notice or grounds of appeal have, prior to such sessions, been served upon the respondents.*

*Therefore, where, under the above circumstances, the Sessions had refused to further respite the appeal, although it appeared that in the exercise of their discretion, they would have done so if they had considered that they had the power, this Court granted a mandamus, commanding the Justices to hear the appeal.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 45.]

1847. {  
Nov. 27; { ROBBINS v. FENNEL AND  
Dec. 11. { OTHERS.

*Attorney—London Agent—Money had and received—Privy—Wrongful Detainer of Money—Summary Jurisdiction.*

*A, who was the London agent of S. & J, attorneys in the country, by their directions issued a fi. fa. and warrant to levy on the goods of a debtor in Wilts, at the suit of one of their clients, referring the officer to S. and J. for instructions. The officer not being able to meet with S. & J. paid the amount of the levy to the under-sheriff, who without any instructions from S. & J. remitted the money to A, in London, whose name was indorsed on the warrant. A. refused to pay the money over to the client, claiming to apply it in reduction of the general balance due from S. & J. for agency business:—Held, that on these facts there was no privy of contract to support an action by the client against A. for money had and received to his use.*

*But it appearing that the money had been paid in the first instance to the town agent under a mistake, and retained by him against the express directions of S. & J, the Court made absolute a rule obtained by the client to compel the town agent to refund the money.*

*Assumpsit for money had and received and on an account stated.*

*Plea—Non assumpsit and issue thereon.*

*The cause was tried, before Platt, B. at the Wiltshire Summer Assizes, 1846, when it appeared that the action was brought to recover 166l. 3s. from the defendants under the following circumstances:—On the 10th of May 1846 the defendants Messrs. Fennell & Co. as the London agents of Messrs. Slade & Jones, attorneys at Devizes, and by their instructions issued a fi. fa. in an action of Robbins v. Heath, indorsed to levy 157l. 5s., and on the following day lodged it with the town agents of the under-sheriff of Wilts, with instructions to them to issue a warrant to the officer at Melksham, to whom they also wrote directing him to go to Slade & Jones immediately on receipt of the warrant for instructions. On the 14th of May the officer levied 166l. 3s., and having afterwards called at the office of Slade & Jones, but not finding them at home, he forwarded the amount to the under-sheriff at Salisbury, according to the regular course of his duty. The under-sheriff, without any instructions from Slade & Jones, remitted the amount to the defendants Messrs. Fennell & Co., whose names were indorsed on the warrant as agents to Slade & Jones, it appearing to be the practice of the sheriff's office to remit the proceeds of executions to the London agent if the warrant was granted in London. Application was made to the defendants to pay over this money under an authority from the plaintiff and from Slade & Jones, but the defendants replied that they had applied it towards a balance due to them from Slade & Jones for agency business, and refused to pay it over to the plaintiff. No evidence was given at the trial of the existence of any debt from Slade & Jones to the defendants. At the close of the plaintiff's case the defendants' counsel claimed a nonsuit on the ground that there was no privy shewn to exist*



between the plaintiff and the defendants—*Stephens v. Badcock* (1) and *Cobb v. Becke* (2) were referred to. The learned Judge reserved leave to the defendants to move to enter a nonsuit on this objection, and the plaintiff had a verdict for 166*l.* 3*s.*

*Crowder*, in the ensuing term, obtained a rule *nisi* accordingly, or for a new trial.

*Montague Smith* and *Taprell* shewed cause (Nov. 27).—This case falls directly within the rule in *Moody v. Spencer* (3), that money received by the town agent in the course of the suit from the opposite party for his client, is received to the use of the client. *Cobb v. Becke* differed in its circumstances, but expressly recognizes *Moody v. Spencer*. It is there said, "If Cobb (the client) had transmitted the money direct to the defendants, or if he had desired Dalby (the country attorney) to transmit it to them specifically, and they had received it as from Cobb, and not as from Dalby, doubtless they would have become Cobb's agents, and accountable to him for the appropriation of it."

[COLERIDGE, J.—This never was the client's money, as it was in *Moody v. Spencer*.]

It was money paid specifically on a particular account, and not generally; the plaintiff has, therefore, a right to recover it. It is not necessary there should be a strict privity; the plaintiff might have recovered the amount of the levy from the sheriff as money had and received, if it had not been paid over. *Calland v. Lloyd* (4) is in point. *Stephens v. Badcock* will be relied on; but there the receipt by the clerk to the attorney was held to be a receipt by the attorney himself, to whom alone the defendant was accountable. *White v. the Royal Exchange Assurance Company* (5) affirms the principle, that an agent cannot set up against the party to the cause his own claim against the country attorney.

(1) 3 B. & Ad. 355; s. c. 1 Law J. Rep. (N.S.) K.B. 75.

(2) 6 Q.B. Rep. 930; s. c. 14 Law J. Rep. (N.S.) Q.B. 108.

(3) 2 Dowl. & Ryl. 6; s. c. 1 Law J. Rep. K.B. 1.

(4) 6 Mees. & Wels. 26; s. c. 9 Law J. Rep. (N.S.) Esch. 56.

(5) 1 Bing. 20.

[WIGHTMAN, J.—Could these defendants have pleaded a set-off for a debt due to them from the country attorney?]

They could have no lien on the money received by them for the general balance due—*Maaness v. Henderson* (6), *Story on Agency*, s. 387. *Yates v. Freckleton* (7) shews that the payment in this case was a good payment to the client. *Goode v. Jones* (8) is a direct authority in this case.

[WIGHTMAN, J.—That is hardly reconcilable with *Cobb v. Becke*. *Williams v. Everett* (9) and *Lilly v. Hays* (10) lay down the rule that where an agent receives money on account of a third party, he continues liable to his principal until he enters into some binding engagement to pay it to the third party.]

There, no relation subsisted between the plaintiff and defendant; here, the defendants issued the warrant as agents for the plaintiff. There must be some privity between the client and the town agents. The acts of the agent are, as against the opposite party, the acts of the client—*Griffiths v. Williams* (11). Primarily, the country attorney is liable to the agent, but the client may become so—*Scrace v. Whittington* (12).

[LORD DENMAN, C.J.—Admitting that to be so, it does not make the defendants agents of the plaintiff, but of Slade & Jones.]

There was a case of *Hanby v. Cassin* (13) in the Exchequer two days ago, where on an application against a town agent, who had received the amount of a judgment debt, and claimed to set off a debt due to him from the country attorney, the Court held that he could not do so, but must be considered as agent of the client. But even if the defendants received the money contrary to their duty, the plaintiff may still waive the tort and treat it as money received to his use—*Down v. Halling* (14), *Buchanan*

(6) 1 East, 335.

(7) 2 Dougl. 623.

(8) Peake, N.P.C. 177.

(9) 14 East, 582.

(10) 5 Ad. & El. 548; s. c. 6 Law J. Rep. (N.S.) K.B. 5.

(11) 1 Term Rep. 710.

(12) 2 B. & C. 11; s. c. 1 Law J. Rep. K.B. 221.

(13) Not reported.

(14) 4 B. & C. 330; s. c. 3 Law J. Rep. K.B. 234.

*v. Findlay* (15), *Clarke v. Shee* (16), *Littlewood v. Williams* (17).

[COLERIDGE, J.—If the receipt is wrongful, the plaintiff may also treat the payment to the defendants as wrongful, and maintain an action for money had and received against the sheriff.]

That may be a consequence; but it does not shew that he may not recover this money from the defendants.

*Crowder* (*Butt* was with him), *contra*.—This rule was obtained on the authority of *Stephens v. Badcock* and *Bamford v. Shuttleworth* (18), which shew that to maintain this action, there must be privity of contract between the parties; and it lies on the plaintiff to shew anything in this particular case which takes it out of the general rule of law. *Moody v. Spencer* is unquestionably to some extent an authority in favour of the action; but it is not found reported in any other book besides *Dowling & Ryland*, and must be considered at least doubtful law. The case of *Hanby v. Cassin*, referred to, was an application, as it seems, to the summary jurisdiction of the Court, and decides nothing as to the present question.

[LORD DENMAN, C.J.—At present we do not think it necessary to hear you further; but we will inquire into that case in the Exchequer before deciding the present rule.]

*Cur. adv. vult.*

The judgment of the Court (19) was (Dec. 11,) delivered by—

LORD DENMAN, C.J.—This case appeared to us, after it had been fully argued, to be almost identical with *Cobb v. Becke*, which we distinguished, in delivering our opinion, from *Moody v. Spencer*. The distinction is not perhaps a very satisfactory one, but if these two cases are at variance, we give the preference to that which is not only much later in point of time, but which underwent much greater consideration. We delayed our decision, because the Court of Exchequer was said to have recently taken

a different view of the general doctrine, which is undoubtedly of very great importance. And we have made inquiry on the subject, and are indebted for a report of the proceeding in *Hanby v. Cassin*, to the last number of the *Law Times*, which we have reason to think correct. This is the marginal note: "When a London agent has been instructed by the attorney in the country to commence an action, and he receives the money from the defendant in the suit, and instead of paying it over in cash to the country attorney, puts it to his account, which is afterwards settled, the Court will nevertheless compel the London agent to pay the money again to the principal (the plaintiff in the action), as the payment to the attorney is payment to him in the character of an attorney, and as the agent of the plaintiff." We can easily conceive the town agent making himself liable to the client for particular sums, and that the Court may be desirous of inferring such liability from circumstances for the purpose of exercising its summary jurisdiction over its officers, to enforce justice according to the equity of each individual case. But, when the client, as in this case, appears as plaintiff in an action for money had and received, and the defendant pleads non assumpsit, there can be no recovery unless the law will imply a contract to pay on request from the relation which the several parties bear towards each other. The client who employs the attorney is answerable to him for costs, and in case of negligence or misconduct must come upon him for redress. He is entitled to credit for all sums the attorney may happen to owe him, and though he probably knows that the business must be carried on by a town agent, his payment for it to such agent is no discharge to him against the attorney—*Yates v. Freckleton*. In like manner, the attorney employs and is liable to the town agent, who knows nothing of the client but his name, and is not even to that extent known by him. The town agent could not maintain an action for work and labour against the plaintiff by whom he was *not* employed, and the rights and liabilities of the parties in such a case would be reciprocal. Some expressions fell from Lord Hardwicke (20)

(15) 9 B. & C. 747; s. c. 7 Law J. Rep. (n.s.) K.B. 314.

(16) Cowp. 199.

(17) 6 Taunt. 277.

(18) 11 Ad. & El. 926.

(19) Lord Denman, C.J., Coleridge, J. and Wightman, J.

(20) Taylor v. Lewis, 2 Ves. sen. 111.

which describe the mutual relation of the three characters very clearly. The six clerk in Chancery refused to file a certificate till his fees were paid, but his Lordship mentioned an order which establishes that the six clerk cannot come on the client or the solicitor, but must come on the sixty clerk for his fees. With him (the sixty clerk) is the client or solicitor to have privity or connexion, so that payment to him is conclusive to the six clerk, and he is not obliged to pay twice, having paid the proper hand. The practice has been since, that the sixty clerk has taken upon himself to pay the six clerk, between whom and the client all intercourse is cut off. This being the state of things, as one of two innocent parties must suffer by the misconduct of a third, and we are driven to inquire where the legal liability resides, we cannot help saying, in conformity to former cases and to the principle of *Williams v. Everett* so often lately recognized, that it results from the privity existing between the two parties. It is remarkable, that the decision from which we find ourselves compelled to dissent appears to have been made without reference to the late case of *Cobb v. Becke* or any other authority.

*Rule absolute to enter a nonsuit.*

In Hilary term, *M. Smith* obtained a rule calling upon Messrs. Fennell & Co. to shew cause why they should not pay over to the plaintiff the sum of 166*l.* 3*s.*, after deducting their costs. The affidavits on which this rule was founded, besides the facts stated in the preceding case, set out the following letters:—

"From Slade & Jones to the Under-sheriff.

"Devises, 16th May 1846.

"*Robbins v. Heath*.—The officer informs me that he has remitted you the amount of debt and our costs herein. We shall feel obliged by your remitting us your cheque for the same at your earliest convenience."

"From the Under-sheriff to Slade & Jones.

"Salisbury, May 18, 1846.

"Dear Sirs.—*Robbins v. Heath*.—The amount of levy, &c. herein (166*l.* 3*s.*) was forwarded to Messrs. Fennell & Co., your agents, by Saturday evening's post."

"From Messrs. Fennell & Co. to Slade & Jones.

"Bedford Row, 18th May 1846.

"Dear Sirs.—*Robbins v. Heath*.—We have had remitted to us, through Williams & Co., the sum of 166*l.* 3*s.* \* \* \* You had better let us know what we are to do with the money remitted us by the under-sheriff."

"From the Same to the Same.

"Bedford Row, 23rd May 1846.

"Dear Sirs.—*Robbins v. Heath*.—We are really surprised at your asking us to remit the amount received in this matter. We have applied it in part liquidation of the large balance due from you, and therefore cannot think of remitting any portion of it."

The letter of Slade & Jones, to which this was a reply, was not stated in the affidavits on either side.

*Crowder and Butt* now shewed cause.—The application cannot be maintained without shewing some privity between the client and town agent: in fact, this is an attempt to agitate again the question decided in *Robbins v. Fennell*. If new facts can be produced a fresh action should be brought. *Ex parte Jones* (21), and *Gray v. Kirby* (22) were cited.

*M. Smith* and *Taprell*, contra.—This application to the summary authority of the Court does not depend upon privity; but the Court will see whether Fennell & Co. are retaining money to which they have no right. This motion is not in opposition to, but a consequence of, the decision in *Robbins v. Fennell*.

[*LORD DENMAN, C.J.*—We did not there intend to draw any distinction in favour of summary applications, except where there is fraud.]

The fact of retaining money paid by mistake, and without any authority from Slade & Jones, does amount to fraud—*In re Ann Oliver* (23), *Yates v. Freckleton*. The Courts frequently interfere against an attorney where there is no privity, and where no action would lie: compelling a steward to hand over documents received by him in his capacity of attorney, and obliging an attorney to return the premium to an articulated clerk who has broken his contract are

(21) 2 Dowl. P.C. 161.

(22) *Ibid.* 601.

(23) 2 Ad. & El. 620.

familiar instances. *Ex parte Jones* was a case arising out of the negligence of the agent. *Gray v. Turvey* was an application against a country attorney, who was compelled to pay.

LORD DENMAN, C.J.—After some consideration I think this is one of the cases contemplated by us in our former decision, and that the client may compel the town agent to refund this money, which did not come to his hands in his character of town agent, but out of the regular course of business; for they write to ask what they are to do with it; the answer to that letter is not brought before us, but the reply of the agents is set out, and that pretty clearly shews what the answer must have been. On this short state of facts, I think the money was evidently received by Fennell & Co. by mistake; and if so, it ought not to be applied towards payment of the balance due to them from Slade & Jones. My only doubt is, as there has been a trial, whether we ought to allow the plaintiff to come on the agents except by a fresh action; but I think, on the whole, we are bound to say that this money was received improperly, and therefore ought to be paid over to the client.

PATTESON, J.—If there had been no special circumstances to render the London agent himself liable, I should have thought there was no distinction between an action for money had and received and a special application against the agents. But this money was received by the agents in consequence of the bailiff not finding the person to whom he was bound to pay it, and therefore the under-sheriff sent it up to them. It is remarkable that these persons do not give us the answer received from Slade & Jones, but it is manifest from their reply that they did not assent to its being placed against their account. The nonsuit was right in the action, for there was no privity; but such an application as the present need not rest on privity, but will turn on the special circumstances brought before us.

COLERIDGE, J. and WIGHTMAN, J. concurred.

LORD DENMAN, C.J. added—I am not sure that if these facts had been proved at the trial, the action might not have lain, on

the ground of a wrongful detainer of the money by Fennell & Co.

*Rule absolute, with costs.*

1847. }  
Nov. 17, 20. } THE QUEEN v. CHADWICK.

*Bigamy—Marriage with deceased Wife's Sister—"Prohibited Degrees"—5 & 6 Will. 4. c. 54, 32 Hen. 8. c. 38, 25 Hen. 8. c. 22, 28 Hen. 8. c. 7.*

*The 5 & 6 Will. 4. c. 54. renders absolutely void all marriages solemnized after the time of its passing between persons within the prohibited degrees, and which were previously voidable only by sentence of the Ecclesiastical Court pronounced during the life of both parties.*

*Therefore, a marriage with a deceased wife's sister contracted after the passing of that act is absolutely void.*

*The "prohibited degrees of consanguinity and affinity," in 5 & 6 Will. 4. c. 54. refer to the decisions of the Ecclesiastical Courts at that time.*

*"The degrees prohibited by God's law" in 32 Hen. 8. c. 38. are those enumerated in 25 Hen. 8. c. 22, and 28 Hen. 8. c. 7.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 33.]

1847. }  
Nov. 4, 25. } SIMPSON v. MARGETSON AND ANOTHER.

*Contract—Words, Evidence to explain—"Calendar" or "Lunar" Month.*

*The construction of a contract, and the meaning of particular words used in it, is for the Judge, except in cases where there is evidence that a particular word was used in a sense peculiar to a particular trade or business, or that its meaning depends on the usage of a particular place.*

*Where it was agreed that the plaintiff, an auctioneer, should receive a certain amount of commission in case a sale of a certain estate should be effected "within two months" of a given day:—Held, that "months" prima facie meant lunar months, and that the subsequent conduct of the parties was not to*

*be looked at to shew that it meant calendar months.*

*Quære—whether evidence was admissible to shew that, according to the usage of auctioneers, "month" was considered as meaning calendar month.*

Assumpsit for work and labour and on an account stated.

Plea as to all except 22*l.* 5*s.* non assumpsit, and payment of that sum into court. The plaintiff by his particulars claimed—

	<i>£.</i>	<i>s.</i>	<i>d.</i>
For work, labour, and services on the sale of the Cove estate and commission thereon at 1 <i>l.</i> per cent. on 40,050 <i>l.</i> the purchase-money.....	400	10	0
Paid for surveys and plans .....	25	0	0
	425	10	0

At the trial, before Wightman, J., at the Sittings in London, after Trinity term, 1846, it appeared that the plaintiff, who was an auctioneer, had been employed by the defendants in the sale of the Cove estate mentioned in the particulars. By various letters which passed between the parties in April 1845, at which time the plaintiff was employed, the terms of engagement were clearly proved to be as follows:—That the plaintiff was to be paid 1*l.* per cent. on the amount at which the estate might be sold, such commission to include every expense incident to the sale, such commission to obtain whether the estate was sold by private contract before the sale, by auction on the day of sale, or by private contract after the day of the sale by auction; but it was to be understood that "if the estate was not sold within two months after the day of auction the plaintiff was to receive one-half per cent only."

The estate was advertised for sale by auction on the 6th of August 1845. On that day it was put up at the auction mart, and was bought in, there being no bidding higher than 34,000*l.* On the 2nd of October it was sold by private contract for 40,050*l.*

On the 11th of December 1845 the plaintiff wrote to the defendants claiming the 1*l.* per cent. commission, and received the following letter in answer:—

"Bungay, Dec. 12.

"Dear Sir,—When will you be at Halesworth that we may come over to see you and

liquidate your claim. If we remit through our bankers they will charge you 3*l.* or so for commission, which perhaps you may not like to pay. Yours truly, Margetson and Hartup."

Subsequently, however, the defendants, who acted for executors, refused to pay more than one-half per cent. on the ground that the sale did not take place within two months from the day of auction; the 2nd of October being one day more than two lunar months from the 6th of August. The particulars of sale were in evidence at the trial, and one of the conditions of sale was, that the purchaser should, within one "calendar month" from the delivery of the abstract of title, send to the vendor's solicitor a statement in writing of his objections (if any) to the title, &c. It was contended, on the part of the defendants, that the word "month," in the correspondence, must be taken to mean "lunar month." On the part of the plaintiffs, evidence was tendered of auctioneers and other persons, to shew that the word "month," in contracts of this description was, in the trade, considered as meaning "calendar month." This evidence was objected to, and subsequently withdrawn. The Judge thought that the meaning of the word "month" was rather a question of law than fact, and remarked on the circumstance of the words "calendar month" being used in the conditions of sale; but left the question to the jury, on the various documents, and the verdict passed for the plaintiff, leave being reserved for the defendants to move to enter a nonsuit or verdict for them.

*Watson*, in Michaelmas term, 1846, moved for a rule nisi, accordingly, and cited *The Bishop of Peterborough v. Catesby* (1), *Barksdale v. Morgan* (2), *Jocelyn v. Hawkins* (3), *Titus v. Lady Preston* (4).

A rule having been granted,—

*Byles, Serj.* and *Unthank* shewed cause (Nov. 4).—First, the meaning of the word "month," in a mercantile contract, is a question of fact; it is one of those words which, in these matters, has a technical or peculiar signification—*Smith v. Wil-*

- (1) Cro. Jac. 167.
- (2) 4 Mod. 185.
- (3) 1 Stra. 446.
- (4) Ibid. 652.

son (5), *Hutchison v. Bowker* (6), and the jury have found a verdict on the evidence, which was not objected to, of the letters and other documents relating to the contract. In *Lang v. Gale* (7), which was the case of an agreement for the sale of land, it was held that the intention of the contracting parties was to be looked to, to decide whether "a month" was to be taken to mean a "lunar" or a "calendar" month: here the letters and admissions shewed that both parties considered that a "calendar month" was intended. But even if the question be one of law, this is a mercantile contract, and therefore "month" means "calendar month"—*The Queen v. the Inhabitants of Chawton* (8), *Jolly v. Young* (9), *Hipswell v. Knight* (10), *Webb v. Fairmaner* (11), *Titus v. Lady Preston*, which was subsequent to the case of *Jocelyn v. Hawkins*. In *Cockell v. Gray* (12), it was held that a statement on the record that the defendant covenanted to pay a sum in twelve months was no variance from the covenant proved, which was to pay in twelve calendar months—*The Bishop of Peterborough v. Catesby*. In *The King v. Cussens* (13), it was held that the word "month," in the statute 13 Hen. 4. c. 7. meant "an almanac month," and was not confined to twenty-eight days—*Haigh v. Brooks* (14), *Dyke v. Sweeting* (15), *Neilson v. Harford* (16), *Seton v. Slade* (17). In notices to quit, "six months" means neither lunar nor calendar months, but the space from one quarter day to the next but one. Words are construed with reference to the subject-matter of the instrument in which they occur, as "equally to

be divided"—*Fisher v. Wigg* (18), *Mallan v. May* (19), *Ditcham v. Chivis* (20), *Beckford v. Crutwell* (21). But here, as any ambiguity which exists in the contract is latent, it may be explained by the subsequent acts of the parties—*Bourne v. Gatliff* (22), *Clayton v. Gregson* (23).

[COLERIDGE, J.—What evidence raises the ambiguity here?]

Perhaps this case does not fall strictly within the principle of either patent or latent ambiguity; but it more nearly resembles the latter.

*Watson*, in support of the rule.—The general rule is, that in construing all contracts and acts of parties "month" means lunar month—*Com. Dig. 'Ann.' B.* The exceptions to the rule are: first, where it can be collected from the context that the parties meant calendar months; secondly, in matters ecclesiastical "month" means calendar month; and thirdly, where a particular mercantile usage has given the word a different meaning in a contract shewn to be entered into with reference to that usage, that meaning will be adopted. *Lang v. Gale* and *The Queen v. Chawton* are instances of the first class. The cases of bills of exchange and of lading fall within the last exception as to usage. But here no evidence of any usage was given.

[COLERIDGE, J. referred to *Webb v. Fairmaner*.]

If a custom were shewn applicable to all contracts of this kind, it would undoubtedly regulate this contract, but not otherwise—*Jocelyn v. Hawkins*. The rule in sales of estates is that laid down in *Sugd. Vendor and Purchaser*, p. 361, that the meaning of the word depends on the context.

[LORD DENMAN, C.J.—The effect of the letters went to the jury, and they found that calendar months were meant. How can the defendant come here after that?]

[WIGHTMAN, J.—Mr. Watson contended that I was to decide the question. I thought it was for the jury, and left it to them.]

(5) 3 B. & Ad. 728; s. c. 1 Law J. Rep. (n.s.) K.B. 194.

(6) 5 Mee. & Wels. 535; s. c. 9 Law J. Rep. (n.s.) Exch. 24.

(7) 1 Man. & Selw. 111.

(8) 1 Q.B. Rep. 247; s. c. 10 Law J. Rep. (n.s.) M.C. 55.

(9) 1 Esp. 186.

(10) 1 You. & Coll. 419; s. c. 4 Law J. Rep. (n.s.) Ex. Eq. 52.

(11) 3 Mee. & Wels. 473; s. c. 7 Law J. Rep. (n.s.) Exch. 140.

(12) 3 Brod. & Bing. 186.

(13) 1 Sid. 186.

(14) 10 Ad. & El. 309; s. c. 9 Law J. Rep. (n.s.) Q.B. 90.

(15) Willes, 585.

(16) 3 Mee. & Wels. 806; s. c. 11 Law J. Rep. (n.s.) Exch. 20.

(17) 7 Ves. 265.

(18) 1 P. Wms. 14.

(19) 13 Mee. & Wels. 511; s. c. 14 Law J. Rep. (n.s.) Exch. 48.

(20) 4 Bing. 706; s. c. 6 Law J. Rep. C.P. 176.

(21) 1 Moo. & Rob. 187.

(22) 11 Cl. & Fin. 45.

(23) 5 Ad. & El. 302.

The Judge was bound to decide on the meaning of the contract, and could not look beyond the contract for that purpose; these letters were put in with a different view, and being admissible for that purpose, they could not be objected to on the score of irrelevancy to the contract.

[COLERIDGE, J.—Could he not look at the conditions of sale?]

Not for the purpose of construing the contract. The question whether, a document takes a case out of the Statute of Limitations is a matter of law, and for the Judge to decide.

[ERLE, J.—Surely, in that case, a subsequent admission of liability would be evidence of the intention of a party when the document was written, if it were ambiguous.]

It is submitted that no extraneous evidence can be received for that purpose. But further, this evidence, if admissible, does not at all affect the meaning of the contract.

*Cur. adv. vult.*

LORD DENMAN, C.J. now (Nov. 25) delivered the judgment of the Court.—The plaintiff, an auctioneer, claimed commission upon the sale of an estate under a contract for the payment thereof, if the sale should be within two months after an auction; the sale was not within two lunar months, but was within two calendar months after the auction. A letter from the plaintiff, claiming the commission, and an answer from the defendant, apparently admitting his liability, were in evidence; the plaintiff proposed to call witnesses to prove that according to the usage in the business of auctioneers, "months" signified *calendar months*, but, on objection, withdrew the evidence. The learned Judge directed the jury to find for the plaintiff, if in their judgment on this evidence the parties to the contract intended by "months" *calendar months*, and the verdict was for the plaintiff.

The defendants obtained a rule to enter a nonsuit according to the leave reserved, or for a new trial, and have contended, that month in temporal matters means *lunar month*, unless either from the context or from the usage in a trade, business, or place, it is made to appear that the parties intended another meaning; that there was no such evidence

here; that other extrinsic evidence was inadmissible, and that it was, therefore, the duty of the Judge to have construed the contract, and decided against the plaintiff. The plaintiff has adduced various decisions to support the verdict, but we are of opinion that he has not succeeded. It is clear that the construction of a written contract, subject to the exceptions mentioned below, is for the Judge. It is also clear that "months" denote in law lunar months, unless there is admissible evidence of an intention in the parties using the word to denote calendar months. If the context shows that calendar months were intended, the Judge may adopt that construction—*Lang v. Gale* and *The Queen v. Chawton*. If the surrounding circumstances at the time the instrument was made shew that the parties intended to use the word not in its primary or strict sense, but in some secondary meaning, the Judge may construe it from such circumstances, according to the intention of the parties—*Goldshede v. Swan* (24), *Walker v. Hunter* (25), *Bacon's Maxims*, 10, and the examples there given, *Mallan v. May* and *Beckford v. Crutwell*. If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense—*Smith v. Wilson*, *Grant v. Maddox* (26), *Jolly v. Young*. If the meaning of a word depends upon the usage of the place, where anything under the instrument is to be done, evidence of such usage must be left to the jury—*Robertson v. Jackson* (27), *Bourne v. Gatliff*. Also the jury may have to give the meaning of some technical words. But the present case is not within either of the above principles, nor can we find any authority for saying that the conduct of the parties to a written contract is alone admissible evidence to withdraw the construction of a word therein of a settled primary meaning from the Judge, and to transfer it to the jury.

(24) 1 Exch. Rep. 154; a.c. 16 Law J. Rep. (n.s.) Exch. 284.

(25) 2 Com. B. 324; a.c. 15 Law J. Rep. (n.s.) C.P. 12.

(26) 16 Law J. Rep. (n.s.) Exch. 227.

(27) 2 Com. B. 412; a.c. 15 Law J. Rep. (n.s.) C.P. 28.

Some cases were cited, where the word "month" has been stated by Judges to mean calendar and not lunar month, without express reference to the context or circumstances. But those cases appear to be decided on some other point; and the dicta which are reported are observations collateral to the judgment—*Dyke v. Sweeting*, *Hipswell v. Knight*, *Webb v. Fairmaner*.

Although the evidence that was given does not appear to us sufficient to support the verdict, yet as evidence was withdrawn which may be important, we think that the plaintiff should have an opportunity of again tendering it; and, therefore, make the rule absolute for a new trial.

*Rule absolute for a new trial.*

1847. } THE QUEEN v. THE MAYOR, &c.  
Jan. 27; } OF THE BOROUGH OF BIR-  
July 13. } MINGHAM.

*Corporation—Cost of Maintenance of Prisoners in County Gaol—5 & 6 Vict. c. 98. — County Rate—Purchase of Gaol by County—5 & 6 Vict. c. 110.*

In April 1839, prior to the grant of a separate Court of Quarter Sessions to the borough of Birmingham, situate within the county of Warwick, a resolution was come to, and duly entered in the minutes of the town council, for paying the sum of 11d. per head per day for one year, for the maintenance of the borough prisoners in the county gaol and house of correction, there being no gaol or house of correction in the borough, and this resolution was agreed to by the county Justices. In September 1839, after the grant of the Court of Quarter Sessions, an account was made out and allowed on the above principle. In January 1841 the county Justices resolved that the borough Justices had no power to commit to the county house of correction, and such prisoners were detained at expense and inconvenience to the borough, till county Justices could attend to commit them.

In consequence of doubts as to the validity of the charter of the borough of B, and other circumstances, no other accounts were sent in, in reference to the above charges, till September 1842, when an account was sent in to the council charging for prisoners confined in

the gaol and house of correction, at the rate of 11d. per head up to the 30th of June 1842. The statute 5 & 6 Vict. c. 98. passed on the 10th of August 1842:—Held, that in pursuance of that statute such accounts were rightly altered, so as to charge the actual expense of the borough prisoners instead of the 11d. per head per day—the statute rendering the borough liable to such charge of the actual expenses, both prospectively and retrospectively, and that no deduction could be made in respect of the prisoners committed by the borough Justices to the county house of correction, subsequently to January 1841.

The statute 5 & 6 Vict. c. 110. provided that the gaol of the city of Coventry should be a gaol of the county of Warwick, to be purchased and paid for by the county out of the monies in the hands of the treasurer:—Held, that the borough of Birmingham, which had a separate Court of Quarter Sessions, was liable to pay its proportion of the county rate for the purchase of the gaol.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 56.]

1847. }  
Nov. 16; } MALDEN v. FYSON.  
Dec. 7. }

*Vendor and Purchaser—Costs of Bill for Specific Performance—Damages.*

The plaintiff contracted for the purchase of an estate from the defendant; the plaintiff's solicitor made objections to the title as disclosed by the abstract; the defendant affirmed it to be good, and threatened to resell the estate if the plaintiff did not complete. The plaintiff afterwards filed a bill for a specific performance against the defendant: the defendant, by his answer, still contended that the title was good. The Master (to whom it was referred) reported that the defendant could not make a good title according to the terms of the contract, and the plaintiff's bill was, thereupon, dismissed, without costs:—Held, that the plaintiff could not recover against the defendant in an action at law his costs of the Chancery suit.

Assumpsit for 238l. 13s. 5d., claimed as



damages on the contract hereinafter mentioned, by reason of the defendant having failed to make a good title to the lands therein referred to.

Plea—Payment of 100*l.* into court, and that the plaintiff had sustained no damages *ultra* that sum.

Replication, that the plaintiff had sustained damages *ultra* that sum.

At the trial, before Patterson, J., at the Sittings in Middlesex, in Michaelmas term, 1846, a verdict was taken for the plaintiff, damages 138*l.* 13*s.* 5*d.*, subject to the opinion of the Court on the following

#### CASE.

On the 13th of August 1842, a contract was entered into between the plaintiff and the defendant, whereby the defendant agreed to sell and the plaintiff agreed to purchase certain lands and premises at the price of 350*l.*, subject to certain conditions of sale annexed to the contract. The plaintiff immediately on the execution of the contract paid to the defendant 35*l.* in part of the purchase-money. The plaintiff's solicitor objected to the title as disclosed by the abstract, and called for further evidence in support of it. The defendant's solicitor insisted that the title was unobjectionable, regard being had to the conditions of sale. Several letters passed, and interviews took place between the solicitors of the respective parties upon the subject, and at length, on the 24th of April 1843, the defendant, by his solicitor, gave the plaintiff notice that unless he did, within eight days, complete the purchase, he would proceed to re-sell the property, and that if there should be any deficiency occasioned by such second sale, he would proceed to recover it from the plaintiff, pursuant to the terms of the contract. On the 2nd of May 1843, the plaintiff, by his solicitor, gave the defendant notice of his intention to file a bill against him to compel him specifically to perform the contract of the 13th of August 1842, and also for an injunction to restrain him from selling or conveying away the property, and that if he did sell it or convey any part of it, he would be held responsible for so doing, and for all costs and expenses occasioned thereby. On the 3rd of May 1843, the plaintiff filed a bill in the Court of Chancery against the defendant, praying for a specific per-

formance of the said contract, for an abatement from the purchase-money, in respect of certain taxes charged on the lands comprised in the particulars of sale, and for an injunction to restrain the defendant from selling, conveying, or disposing of the property. On the 13th of July 1843, the defendant filed his answer to the said bill, in which (amongst other things) it was stated, that ever since the contract was entered into he had alleged, and that he did still allege, that he possessed and could shew a good title to the said premises so sold to the plaintiff as aforesaid, such as by the terms of the contract he was bound to do, but not further or otherwise. The bill was amended, and a further answer was filed by the defendant on the 26th of October 1843. Witnesses were examined on the 7th of February 1844, and the cause came on for hearing before his Lordship the Master of the Rolls on the 8th of July 1844, when a decree was made referring it to the Master of the Court in rotation to inquire and state to the Court whether the defendant could make a good title to the premises comprised in the said agreement, having regard to the terms of the said agreement. On the 18th of November 1845, Master Dowdeswell reported that the defendant could not make a good title to the said premises.

That report was subsequently confirmed by the Court; and on the 15th of March 1846, an order was made by the Master of the Rolls, whereby his Lordship did order that the plaintiff's bill should stand dismissed out of court, without costs.

It is the practice of the Court of Chancery when a bill for a specific performance of a contract is dismissed, owing to the inability of the defendant to perform it, to dismiss such bill without costs.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in the present action any part of the costs incurred by him in instituting and prosecuting the said suit in Chancery.

If the Court should be of opinion that the plaintiff was so entitled, then the bill of costs of the plaintiff's solicitor was to be taxed in such manner as the Court should direct, and whatever sum was taxed off (after allowing to the plaintiff the costs of taxation), to be deducted from the said sum of 138*l.* 13*s.* 5*d.*, and the verdict found for the plaintiff was to

stand for the residue. If the Court should be of a contrary opinion, then the verdict was to be entered for the defendant.

It was agreed that the pleadings, as well as the various documents referred to, should be considered as forming part of the case.

The plaintiff's points were, that, under the circumstances stated in the case, he is entitled to recover the costs incurred by him, as above mentioned.

The defendant's points were, that, under the circumstances stated in the case, the plaintiff is not entitled to recover the costs incurred by him in instituting and prosecuting the suit in Chancery mentioned in the case, or any part of such costs, the instituting and prosecuting such suits not being a necessary consequence of the breach of contract, for which the action was brought.

*Maistry*, for the plaintiff (Nov. 16).

—The plaintiff is entitled to recover these costs as damages for the inconvenience and loss he has sustained. The defendant covenanted to make a good title; and the reason for dismissing the plaintiff's bill was not that the plaintiff had not a right to require a good title, but that a specific performance would be useless to him if no better title were given. This was not the ordinary case of a bill for specific performance. The plaintiff had a right to file his bill, but the Court of Chancery could not do him perfect justice. Both parties here were wrong; but the plaintiff ought to get his costs out of the defendant's pocket in some way or other.

[WIGHTMAN, J.—Why did the plaintiff file a bill if the defendant had no title?]

The goodness of the title was mere matter of opinion. The defendant, by his answer, pledges his oath to his belief that the title is good. It only turns out to be worthless on the investigation before the Master. *Hopkins v. Graxebrook* (1) is an authority that where a vendor holds out an estate as his own which really is not so, he must pay the loss occasioned by his misrepresentation — *Sherry v. Oke* (2).

[WIGHTMAN, J.—If you are right, you will succeed in the Chancery suit.]

The plaintiff has acted *bond fide*, and

(1) 6 B. & C. 31; a. c. 5 Law J. Rep. K.B. 65.

(2) 3 Dowl. P.C. 349.

does not want to be off the bargain, but the defendant will not complete. In *Walker v. Moore* (3) the principle of law now contended for was not disputed; but the plaintiff failed, because he had sustained damage by reason of his prematurely contracting for the sale of that which he had contracted to purchase: that case was decided on the authority of *Jones v. Dyke* (4). In *Hodges v. Lord Lichfield* (5), the plaintiff attempted to recover the extra costs of a Chancery suit where a bill for a specific performance, filed by the defendant, had been dismissed with costs. There is nothing new in point of principle in one Court giving as damages costs which the party has been put to in prosecuting or defending an action brought in another: costs in error are so recoverable—*Nowell v. Roake* (6). In *Hathaway v. Barrow* (7) the principle was not disputed; but there the plaintiff was in a condition to recover his costs in the court of equity. *Grace v. Morgan* (8) was a claim for extra costs, and was decided on the authority of *Hodges v. Lord Lichfield*.

*Martin*, contra.—This is the first time such costs have been sought to be recovered in an action at law. First, these costs are too remote to be considered as damages. Secondly, assuming that in any case such costs might be recovered, still in this instance the plaintiff went into the court of equity of his own wrong, and must be taken to know the law. Thirdly, at all events, the claim is entirely put an end to by the judgment of the court of equity which dismissed the bill without costs. In *Sherry v. Oke* the damages recovered were occasioned directly by the breach of the defendant's contract. In *Hopkins v. Graxebrook* the case was put on the ground of the loss of a bargain sustained by the plaintiff, just as in the ordinary case of the sale of a chattel. The same may be said of *Jones v. Dyke*, where the plaintiff was put to loss in consequence of the defendant's contracting to sell an estate having no authority to do so. *Hathaway v. Barrow* is in the

(3) 10 B. & C. 416; a. c. 8 Law J. Rep. K.B. 459.

(4) Sugd. 'Vendor & Purchaser,' App. 11th edit. 1078.

(5) 1 Bing. N.C. 492.

(6) 7 B. & C. 404; a. c. 6 Law J. Rep. K.B. 26.

(7) 1 Campb. 151.

(8) 2 Bing. N.C. 534; a. c. 5 Law J. Rep. (N.S.) C.P. 180.

defendant's favour. *Nowell v. Roake* stands on a distinct ground. The lessor of the plaintiff has always been held entitled to recover the costs of the ejectment in an action for mesne profits, it being the only mode in which he can do so. *Grace v. Morgan* only decides that extra costs are not recoverable. All the heads of damage for breach of an agreement to make a good title are given in *Sugd. Vend. and Purch.*, 11th edit. p. 428; but this is not alluded to. A title may be good or bad; but in either case the vendor only professes to sell it such as it is. When the defendant insisted that he was right, the plaintiff might have made a stand and left the defendant to file his bill; but he has no right to go into a court of equity for his own benefit at the vendor's expense.

[LORD DENMAN, C.J.—It is not quite clear that the defendant did all in his power to make a title; at all events, he was in the wrong, and it cannot be said that the plaintiff had not as much right to file a bill in equity as the defendant.]

The defendant never objected to convey, and the rule of the court of equity is not to give costs in such cases as this.

[WIGHTMAN, J.—On looking at the bill and answer, it appears that both the plaintiff and the defendant in fact rely on the same title: when the plaintiff filed his bill he may not have been aware that the defendant could not improve the title.]

But he was wrong. The defendant has stated the entire truth in his answer. In *Loton v. Devereux* (9), it was held, that where a judgment on which a defendant had been taken in execution had been set aside without costs, such costs could not be recovered as damages in an action of trespass. That case cannot in principle be distinguished from the present.

*Manisty*, in reply.—The courts of equity never dismiss a bill on payment of costs; they dismiss it with or without costs: by costs not being given the question is left open. In *Loton v. Devereux* this Court had already adjudicated on the question of costs, and decided that none were to be paid. *Hodges v. Lord Lichfield* is the converse of the present case.

*Cur. adv. vult.*

(9) 3 B. & Ad. 343; a. c. 1 Law J. Rep. K.B. 103.

The judgment of the Court was now (Dec. 7,) delivered by—

LORD DENMAN, C.J.—The special case found that the plaintiff had become the purchaser at an auction of an estate, the defendant's property, and, after paying the deposit, was dissatisfied with the title disclosed on the defendant's abstract. The defendant always insisted upon the sufficiency of his title, and of the evidence tendered to establish it. Under this persuasion, he threatened the plaintiff with a re-sale, and an action for not completing his purchase, in which he said he should seek to recover the difference between the price at which the estate had been knocked down to the plaintiff at the auction, and that which it might fetch on such re-sale.

In this state of things the plaintiff filed his bill against the defendant in the Court of Chancery, to enforce a specific performance of his agreement to sell the estate. The defendant in his answer professed his readiness to do so, and produced his title, with evidence. The question, whether he could make a good title was referred to a Master in Chancery, who reported to the Court that he was unable to do so; the bill was dismissed by the Master of the Rolls without costs to either party.

It does not appear whether the title then produced was the same as that which the plaintiff had previously seen and objected to. The dismissal of the bill was a matter of course, when the defendant appeared to want the power to perform his contract; and the refusal of costs to the defendant seems to have been required by justice, as the plaintiff's failure in his suit was occasioned by the defendant's incompetency to fulfil his own engagement. But the plaintiff has brought this action to recover (amongst other things) the costs to which he was put in the prosecution of his unsuccessful suit. Some of us thought it might be important, in one view of the case, to inquire into the practice of Chancery, and we cannot find or hear of any decision compelling the defendant to pay costs where the bill is dismissed in such a suit. We cannot, however, believe that the Court of Chancery does not possess the power to award costs to a plaintiff, under circumstances involving fraud in any part of the negotiation; but without

frand the rule appears to be inflexible, that the unsuccessful plaintiff, though not liable to costs, does not recover them in Chancery.

The plaintiff asserts that these costs are the natural consequences of the defendant's breach of contract, coupled with his threat to re-sell the estate, and, as such, are recoverable. He rests his claim on the practice of Chancery, which, he contends, systematically lays these costs out of its consideration, and leaves them to be recovered in the action at law, for the damages resulting from that breach of contract, and urges that if he cannot so make good his loss at the expense of him who caused it he has no remedy. On the other hand, the general rule is set up, that the right to costs must always be considered as finally settled in the court where the question is adjudicated on, to which it is accessory. Several cases were quoted to this effect; and this principle was admitted in general to apply, so that if any costs were awarded, nothing beyond the sum taxed, according to the rules of the court, could be recovered as damages; or if costs were expressly withheld, by an adjudication in the particular case, none would be recoverable by suit in any other court. We are of opinion that this case falls within the same principle—the general rule of the Court of Chancery. A Court having full discretion must be taken to be intended to apply itself to an adjudication in every particular case which falls within it. In the case of *Hodges v. the Earl of Lichfield*, in which the plaintiff claimed as damages the extra costs of a suit for specific performance, Tindal, C.J. says, "The extra costs are not a damage which is a necessary consequence of a breach of this contract. The filing a bill for enforcing specific performance is one degree removed, and the plaintiff must take the consequences of the suit as in other cases." The case cited from the appendix to *Sugden's Vendor and Purchaser*, may perhaps admit of the explanation offered by that eminent Judge before named. At any rate, that case is a solitary decision at *Nisi Prius*, though the same state of facts must have existed frequently, and have founded innumerable claims to similar redress.

*Judgment for the defendant.*

1847. }  
June 5, 14; } THE QUEEN v. THE INHAB-  
Dec. 11. } ITANTS OF STAINFORTH.

*Apprenticeship, Settlement by*—54 Geo. 3. c. 107.—*Execution by Officers of Township—Order for Binding—Evidence*—56 Geo. 3. c. 139.—*Allowance—Jurisdiction.*

*A parish apprentice was bound by indenture executed by A. B, churchwarden of the township of L, and by C. D, one of the overseers of the same township:—Held, sufficient under 54 Geo. 3. c. 107. s. 2.*

*The indenture, which was duly allowed by two Justices under 56 Geo. 3. c. 139. s. 1, recited that it was made by virtue of an order under the hands and seals of A. L. and J. N. C, Justices of the Peace in and for the county, &c., made in pursuance of the statute in such case made and provided, and bearing date, &c.—Held to be good primary evidence of the order for binding, which was not produced.*

*The allowance of an indenture of apprenticeship by Justices under 56 Geo. 3. c. 139. s. 1, need not appear on the face of it to be made within their jurisdiction.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 25.]

1847. }  
Dec. 9, 11. } FILLITER v. PHIPPARD.

*Negligence—Accidental Fire—Statute* 6 Ann. c. 31.—14 Geo. 3. c. 78.

*The declaration alleged that the plaintiff was possessed of close A, and the defendant of close B; and that the defendant wrongfully lighted a fire in close B, at a time when by reason of the state of the wind and weather it was dangerous to do so, and that through the negligence of the defendant, the fire extended itself from close B. to close A, and destroyed the hedges, gates, &c.:—Held, on motion in arrest of judgment, that the action would well lie; and that the defendant was not relieved from liability by stat. 6 Ann. c. 31. and 14 Geo. 3. c. 78, which must be taken to apply to fires which are the result of chance, or are incapable of being traced to any cause, but not to fires*

*which, though they may be accidental, as contradistinguished from wilful, are occasioned by negligence or want of reasonable care.*

Case. The declaration stated for that whereas the plaintiff, before and at the time of the committing of the grievances, &c. by the defendant, was lawfully possessed of a certain close of land called and known as Trigon Hill, situate and being contiguous and next adjoining to a certain other close of land of the defendant, called and known as Cary, situate and being, &c. and then in the actual occupation and possession of the defendant, and during all the time aforesaid the plaintiff was also lawfully possessed of certain hedges, fences, gates, &c. then respectively standing and being in and upon the aforesaid close of the plaintiff, and also of certain trees, &c. then respectively standing, growing, and being in and upon the aforesaid close of the plaintiff, and thereupon it became and was the duty of the defendant not to commit the grievances hereinafter mentioned. Yet the defendant, well knowing the premises, and not regarding his said duty, but contriving, &c. to injure and aggrieve the plaintiff, heretofore, to wit, on &c., wrongfully lighted and kept and caused and procured to be lighted and kept in and upon his said close (to wit, upon that part of it called and known as Cary Heath), a certain fire in such a careless, negligent, and improper manner, and at a time when by reason of the then state of the wind and weather it was dangerous so to do, to wit, on the day and year aforesaid, that by and through the mere negligence, carelessness, and improper conduct of the defendant and his servants in that behalf, and for want of due and proper care and caution on his and their part, the said fire then, to wit, &c., extended itself from and out of the said close of the defendant, to, into, and upon the aforesaid close of the plaintiff, and to, into, and upon the said hedges, &c. of the plaintiff, and thereby the hedges, &c. respectively of the plaintiff of the value, &c. then became ignited and caught fire, and were then respectively much burnt, damaged, and destroyed, and by means of the premises the plaintiff's close became damaged, &c., and by means of the premises the plaintiff, in order to prevent the said fire from extending and

doing further and greater damage to his said close and property, was then forced and obliged to pay divers sums of money, to wit, &c., in and about extinguishing the said fire, and staying and preventing the further progress and extension thereof to other parts of the said close and property of the plaintiff.

First plea, not guilty. There was also another plea, on which no question arose.

At the trial, before Cresswell, J., at the Spring Assizes for Dorsetshire, in 1847, the plaintiff recovered a verdict for 7*l.* damages.

In Easter term—

*Kinglake, Serj.* obtained a rule *nisi* to arrest the judgment, on the ground, that though at common law such an action might be maintainable, yet that since the statutes 6 Ann. c. 31. and 14 Geo. 3. c. 78. s. 86. no action could be brought for damage occasioned by a fire which was the result of accident (as distinguished from design), though there might have been negligence—*Vaughan v. Menlove* (1), *Lord Canterbury v. the Attorney General* (2), *Turbervil v. Stamp* (3).

*Barstow* shewed cause (Dec. 9.)—The argument on the other side must go to the extent, that the statutes referred to put an end to all liability for negligent fires of any kind, though the liability at common law is not disputed. It is said that the construction put on statute 6 Anne, c. 31 (4), in 1 *Black. Com.* 451, is recognized by Lord

(1) 3 Bing. N.C. 476; s.c. 6 Law J. Rep. (N.S.) C.P. 92.

(2) 1 Phil. 306; s.c. 12 Law J. Rep. (N.S.) Chanc. 281.

(3) 1 Salk. 13.

(4) The statute 6 Ann. c. 31. was repealed by statute 12 Geo. 3. c. 73. s. 46, which was also repealed by 14 Geo. 3. c. 78. s. 101. By the latter statute, however, (see sec. 101.) the above act of 6 Ann. c. 31. continues repealed. The statute 14 Geo. 3. c. 78, intituled "An act for the further and better regulation of buildings and party walls, and for more effectually preventing mischief by fire, within the cities of London and Westminster, and the liberties thereof, and other parishes within the weekly bills of mortality, &c., and for indemnifying builders and other persons against the penalties to which they are or may be liable for erecting buildings within the limits aforesaid contrary to law;" after reciting that fires often happen by the negligence and carelessness of servants, enacts, "That if any menial or other servant or servants through negligence or carelessness, shall

Lyndhurst, in *Lord Canterbury v. the Queen* (5), but the operation of the acts of parliament referred to, was clearly intended to be local, and to be confined to the limits over which the building acts extend. The facts stated on this record exclude altogether the supposition that the fire was accidental, as distinguished from carelessness or negligence; and the objection now raised was not suggested in *Piggot v. the Eastern Counties Railway* (6), where the plaintiff obtained a verdict.

*Kinglake, Serj. and Stock, contra.*—It is admitted that at common law an action might be brought for damage arising from a negligent fire: what, then, was the difficulty which the statutes were passed to remedy? Blackstone, in the passage cited, evidently refers to the statute of Anne, as altering the common law; and in *Lord Canterbury v. the Queen*, Lord Lyndhurst, in his judgment, expresses an opinion directly on this very point. In cases where fires are lighted by servants the original lighting, in the case of domestic fires, is an intentional lighting, and yet the statute contemplated the exemption of the master in such cases—*Richards v. Easto* (7). The fallacy lies in confining the term “accidental” to fires which commenced by accident; this was a fire accidentally occasioned by the defendant’s servant. The statute says nothing about steam-engines.

*Barstow, in reply.*—In *Lord Canterbury’s* case the Lord Chancellor could not have

meant to say that he never had known of such an action. The statute of 6 Anne, as well as that subsequently passed, was only meant to extend to the particular limits expressed in them.

*Cur. adv. vult.*

The judgment of the Court was now (Dec. 11) delivered by—

LORD DENMAN, C.J.—This was a motion in arrest of judgment on a declaration stating (with some other particulars) that the plaintiff was possessed of a close, in which certain hedges and gates were standing, and several trees growing; that defendant was possessed of an adjoining close; that defendant made and kept a fire in his close in such a negligent manner, and at a time when, by reason of the then state of the wind and weather, it was dangerous and improper so to do; that through the negligence and improper conduct of himself and his servants, and for want of due care and caution, the said fire extended itself out of his close into the plaintiff’s, and the plaintiff’s trees, hedges, fences, &c. were burnt and destroyed. The ancient law or rather custom of England appears to have been that a person in whose house a fire originated, which afterwards spread to his neighbour’s property and destroyed it, must make good the loss; and it is well established that where the fire was occasioned by a servant’s negligence, the owner, the master of the house where it began, was answerable for the consequences to the sufferer. And the case of *Turbervil v. Stamp*, the last decided before the 6th of Anne, makes this plain, and declares the same principle, where the fire originates in the defendant’s close. The act contemplated the probability of fires in cities and towns arising from three causes: the want of water, the imperfection of party walls, and the negligence of servants. The act provided some means for supplying these material defects; but the 3rd section was directed against the moral one, the carelessness or negligence of servants, which, it observes, often causes fires, and it imposes on *the servant* by whose negligence the fire may have been occasioned a fine of 100*L.*, to be distributed among the sufferers at the discretion of the churchwardens, or eighteen

fire or cause to be fired any dwelling-house or out-house, or other building, whether within the limits aforesaid or elsewhere, within the kingdom of Great Britain, such servant or servants being thereof lawfully convicted, &c., shall forfeit and pay the sum of 100*L.* unto the churchwardens, &c. of the parish where such fire shall happen, to be distributed amongst the sufferers by such fire,” &c.

Section 86. “That no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after &c., accidentally begin, nor shall any recompence be made by such person for any damage suffered thereby, any law, usage, &c. to the contrary notwithstanding.”

(5) 12 Law J. Rep. (N.S.) Chanc. 284.

(6) 3 Com. B. 229; s. c. 15 Law J. Rep. (N.S.) C.P. 225.

(7) 15 Moe. & Wels. 117; s. c. 15 Law J. Rep. (N.S.) Exch. 163.

months' imprisonment in case of non-payment. This clause, raising the same sum, whatever the extent of suffering and the number of the sufferers, and inflicting the same penalty to whatever degree the negligence may have been culpable, without any power to lower the fine or shorten the imprisonment, can scarcely be supposed to have undergone much consideration on the part of the legislature. The most usual cause of fires was assumed to be the negligence of servants; and the enactment might operate to induce habits of caution in that important class. The same statute in the 6th section enacts, that after a day named, "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompence be made by such person for any damage suffered or occasioned thereby."

Both provisions seem to have found favour with the legislature, for both were re-enacted by 12 Geo. 3. c. 73. and 14 Geo. 3. c. 78, the latter adding to the words "house or chamber," "stable, barn, or other building," and also the words "on whose estate."

No terms can be more comprehensive. We cannot doubt that Baron Parke, in *Richards v. Easto*, rightly viewed it as a general law. And though the word "estate" is used in a sense very different from that which it bears in the language of the law, it clearly applies to land not built upon, and makes the owner of such land liable in the same manner as it had previously the owner of buildings. The question then is upon the meaning and effect of the word "accidental" here applied to fire. And here a very singular doubt has arisen from the mode in which this enactment is discussed by Sir W. Blackstone in his *Commentaries*. The passage is introduced by that learned writer incidentally as an illustration of the principle on which masters are held responsible for the acts of their servants. "Upon this principle," he observes, "by the common law, if a servant kept his master's fire negligently so that his neighbour's house was burnt down thereby, an action lay against the master, because this negligence happened in his service. But now (he proceeds) the common law is altered by stat. 6 Anne, c. 3. (it should be cap. 31. ss. 3, 6,) which

ordains that no action shall be maintained against any one in whose house or chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's negligence." This reason, by the way, is not stated in the act of parliament, and must be allowed to be very far from satisfactory, because the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers; besides, making servants punishable for fires resulting from their negligence is no exemption of masters from responsibility for the same fault: for fires which accidentally begin are not fires produced by negligence. It would therefore appear that Blackstone had drawn a conclusion from the enactment cited which it by no means sustains.

Lord Lyndhurst, however, has in some degree sanctioned by his high authority the inference thus drawn by Blackstone, in the remarks by which he prefaced his decision against Lord Canterbury's petition of right in 1 *Phillips's Reports*. We must, however, observe, that those remarks are wholly unnecessary for the decision to which he came, and indeed are stated rather as arguments with which that petitioner would have to contend if his cause had come to a hearing on the merits, than as expressing a deliberate opinion.

It is true that in strictness the word "accidental" may be employed in contradistinction to "wilful," and so the same fire might both begin accidentally and be the result of negligence, but it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters; and when we find it used in statutes which do not speak of wilful fires, but make an important provision with respect to such as are accidental, and consider how great a change in the law would be affected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, we must say that we think the plaintiff's construction much the more reasonable of the two.

Lord Lyndhurst remarked on the absence of decisions on this point; yet he mentions two cases, both surely entitled to great

weight: one, tried before Alderson, B., in Berks; the other, before Patteson, J., in Salop, which latter was very fully discussed on a rule to shew cause, and decided by the whole Court of Common Pleas. In both these cases, a plaintiff recovered damages for a fire spreading to his corn from the defendant's field, through the negligence of the defendant and his servants. His Lordship says, that the 14 Geo. 3. c. 78. escaped notice on those occasions. But if we ask how it came to be overlooked, since it would have furnished a complete and easy defence, the only answer can be the universal impression of the eminent lawyers

both at the bar and on the bench, who took part in the argument and judgment, that the clause in the Building Act, respecting accidental fires, cannot apply to such as are produced by negligence.

It may be further observed with reference to the doctrine, that the exemption given by this enactment cannot apply. Its words suppose the fire to begin accidentally on the estate of him from whose estate it spreads. Now, this fire did not begin accidentally, but was knowingly lighted by the defendant himself.

*Judgment for the plaintiff.*

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END OF MICHAELMAS TERM, 1847.

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# CASES ARGUED AND DETERMINED

IN THE

## Court of Queen's Bench.

HILARY TERM, 11 VICTORIÆ.

1848. }  
Jan. 11. } PENNIAL V. HARBORNE.

*Vendor and Purchaser—Title—Lease—  
Forfeiture—Covenant to insure.*

*In an action by a purchaser against a vendor of leasehold premises, for breach of contract in failing to make out a good title, it appeared that the premises were demised by A, B, and C. to J. S, who assigned to the defendant. The lease contained a covenant by the lessee to insure the premises in the joint names of the lessors, with a proviso for re-entry on breach of covenant by the lessee. The premises were insured in the joint names of A, B, C, and the defendant:—Held, that this was not a good performance of the covenant to insure; and that the defendant being bound to shew a good lease, the liability to have the lease avoided by the landlord was a valid objection to the title.*

**Assumpsit.** The first count stated, that in consideration of 50*l.* paid by way of deposit, and the further sum of 1,450*l.* to be paid to the defendant, as thereafter mentioned, for the absolute purchase of an unexpired term in the lease of a dwelling-house, house adjoining, and cottages, known by the name of the White Swan, &c., and the goodwill thereof, the defendant promised the plaintiff to furnish and adduce

a proper title, and well and effectually to assign to him the said lease and goodwill for the remainder of the term; and it was agreed that if either party should refuse or neglect to perform his part of the said agreement, he should pay to the other on demand 200*l.*, which was agreed to be the damages ascertained and fixed on breach of any part of the said agreement, and in case of default by the plaintiff, that the deposit money paid by him should be forfeited in part of such damages; that although the plaintiff had always performed and fulfilled all things on the plaintiff's part, and was, on &c., ready and willing to perform and fulfil all things in the said agreement contained on his part to be performed and fulfilled, and to pay the residue of the purchase-money, and to complete the said purchase, whereof the defendant had notice, and was requested by the plaintiff to furnish and adduce a proper title to the said premises, yet that the defendant did not nor would, when so requested, or at any time before or since, furnish or adduce a proper title to the said premises, but had neglected so to do, by reason whereof the plaintiff had been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and had been put to great expense in endeavouring to procure such title as aforesaid, and to get the said purchase completed, and had lost all gains and profits which he

might and would otherwise have made and acquired from employing the money so paid by him as a deposit, and other monies provided and kept by him for the completion of the said purchase. There were also counts for money had and received, and on an account stated.

*Pleas*—Non assumpsit; secondly, to the first count, that the plaintiff was not ready and willing to pay the remainder of the said purchase-money and to complete the said purchase, *modo et formâ*; thirdly, to the first count, that the defendant did, when requested by the plaintiff, and within a reasonable time in that behalf, furnish and adduce a proper title to the said premises. Issues thereon.

This cause was tried, before Lord Denman, C.J., at the Sittings at Guildhall, after Michaelmas term, 1846, when it appeared that the action was brought to recover 50*l.*, being the deposit paid by the plaintiff to the defendant, on the 26th of March 1846, with interest thereon, at 5*l.* per cent., and 40*l.* for costs incurred in investigating the title and otherwise, and 200*l.* as the ascertained damages for breach of the agreement declared on in the first count. The facts proved were as follows:—The premises in question were, by a deed of the 18th of April 1845, demised by W. W. Gretton, S. A. Wright, and W. K. Gretton (trustees acting under the will of J. Gretton, deceased), to one Belton, for sixty-one years, from the 29th of September 1844. This deed contained a covenant by the lessee to insure in the Licensed Victuallers' Fire Office, London, or if such office should be discontinued then in some public office for assurance in London or Westminster to be approved of by the lessors, in the joint names of W. W. Gretton, S. A. Wright, and W. K. Gretton, their heirs and assigns, the dwelling-house in 1,000*l.*, the house adjoining in 400*l.*, and the cottages in 300*l.* There was also a clause providing that any money recovered from the insurance office should be laid out in rebuilding the premises, and a condition of re-entry by the lessors for breach of any of the covenants. This term was, on the 14th of June 1845, assigned by Belton to the defendant. It appeared that, from the date of the original lease up to the 7th of June following, the only subsisting insurance was one in the joint names of

William Belton, W. W. Gretton, S. A. Wright, and J. Wilson, for 1,400*l.* viz: 1,000*l.* on the dwelling-house, and 400*l.* on the house adjoining; and that on the 7th of June 1845, an insurance was effected in the proper sums on all the premises, but in the joint names of W. W. Gretton, S. A. Wright, W. K. Gretton, and the defendant. The defendant contracted to sell his premises to the plaintiff, by an agreement, dated the 26th of March 1846, and which was in the terms of the first count. It was objected, for the defendant, that no good title was shewn by reason of a breach of the covenant in the lease—no insurance at all having been in existence between the 18th of April and the 7th of June 1845 on the cottages, and also that the insurance of the 7th of June was effected in the wrong names. The Lord Chief Justice directed the jury to find a verdict for the plaintiff for 50*l.*, the amount of the deposit paid, and for the costs of investigating the title, to be taxed by the Master, reserving leave to the defendant to enter a nonsuit or a verdict. A rule having been obtained accordingly,—

*Martin and Voules* now shewed cause.—The contract was for the sale of the remainder of the term granted to Belton, and the defendant was bound to shew a good title to it; but by reason of the breach of covenant to insure the landlord had a right to re-enter at any moment. There are two defects: the insurance was not in the right sum, nor in the proper names.

[COLERIDGE, J.—At the time of the contract there was an insurance covering all the premises in the proper sum.]

That will not prevent the landlord availing himself of his right of re-entry consequent on the prior breach. Suppose the landlord had brought ejectment, the subsequent insurance would have been no answer—1 *Wms. Saund.* 288, *Doe d. Muston v. Gladwin* (1). Then, it will be argued by the other side that the 14 Geo. 3. c. 78. s. 83. operates upon this covenant; but the provisions of the Building Act will not affect an express contract entered into between the parties, which was that the insurance should be effected in the joint names of the lessors. The effect of this insurance would be to put the money recovered from the office in the

(1) 6 Q.B. Rep. 953; s. c. 14 Law J. Rep. (n.s.) Q.B. 189.

hands of the defendant if he survived the lessors.

[COLERIDGE, J.—The covenant is literally but not substantially complied with on that account; but then it is said the statute operates to prevent the lessee getting any personal benefit.]

There is not even a literal compliance; a contract to do an act with A. is not complied with by doing it with A. and B.—*Wetherell v. Langstone* (2). But the statute only applies to frauds in occupiers of premises: that appears from the preamble.

[LORD DENMAN, C.J.—It is, any ill-minded persons.]

*Knowles* and *Miller*, in support of the rule.—First, as to the amount of the policy: this is not a question of forfeiture between landlord and tenant as in *Doe d. Muston v. Gladwin*. The Court must look whether the title has been at all damaged by this accidental omission to insure for two months, not whether there possibly might have been a forfeiture. Nothing has been shewn in favour of the lessors intending to avoid the lease; and looking to what has been done, it is submitted that there was a proper insurance in this respect within a reasonable time, which is sufficient, as the covenant specifies no time at which the insurance is to be effected.

[LORD DENMAN, C.J.—I very much doubt whether a man can be said to make a good title to premises out of which the purchaser is liable to be turned at any moment.]

Then as to the names inserted in the policy. The covenant does not provide for the insurance being in the names of the lessors only. This is a good compliance according to the intent of the covenant. There is a stipulation among the defendant's covenants that any insurance money recovered shall be expended in repairing the premises; that amounts to a covenant by the defendant that it shall be so expended, and he had a right to have his name inserted in the policy in order that he might see it so applied.

[PATTESON, J.—That proviso does not say by whom the money is to be so applied.]

The object and intent of 14 Geo. 3. c. 78. was to give any persons interested in the

premises burnt down a right to have the money applied in rebuilding. *Vernon v. Smith* (3) decides that the statute is not confined to cases of fraud.

LORD DENMAN, C.J.—I think there is no distinction between the case of an action to recover a deposit by a purchaser, and that of a landlord seeking to recover against his tenant for a forfeiture, for if a tenant agreeing to sell his interest cannot do so on account of a breach of a covenant which amounts to a forfeiture of his lease, he cannot make a good title. Has then the tenant in this case complied with his covenant so as to protect him from an ejectment by his landlord? Two objections are made: one that there was no insurance at all to the extent of 300*l.* for a considerable period of time—whether longer or shorter is, I apprehend, immaterial. The other is, that a party who stipulates that a particular thing shall be done with A. does not comply with it by doing it with A. and B; the person who is added may receive the money in case of fire, or he may release the office from an action to which they might be liable. I think the statute has no application at all; it says when any person has insured, any other person interested in the premises may recover the money: but that does not make any difference to those who have become covenantors; at least this mode of insuring might impose very considerable difficulty. A particular thing agreed for has not been done, as the insurance has been effected in another name.

PATTESON, J.—This rule ought to be discharged, on the ground that the defendant had not in truth the interest which he contracted to sell, as the landlord of the premises might have insisted on the forfeiture for non-insurance within the terms of the covenant. It is said that it is not the same question between landlord and tenant, and between vendor and purchaser; but I cannot see how when a person agrees to sell me a lease, he means anything else than a lease which, when I get it, will protect me against all the world. Then it comes to this, whether the landlord could have maintained ejectment for a breach of the covenant in this case. It is said, the point as to the cottages not having been

(2) Exch. Ch.—Not reported.

(3) 5 B. & Ald. 1.

insured, was not raised at the trial; and if it had, it might have been answered. I do not know how that is; but it is no use sending the case to a new trial, unless the Court think that the insurance in the names of the three is a compliance with the covenant. Though the word "only" is not inserted, it is the same thing as if it were. By putting in other names, it is rendered very difficult for those entitled to enforce the covenant. Those who are added may defeat the remedy: that by itself is enough to shew that this is not a compliance with the covenant. I do not think the statute much affects the case; it says that any person who is entitled to an interest in the premises, may call on the office not to pay the money to him, but to lay it out in repairing the premises. There may be a difficulty in doing this; and the covenant seems to provide for this in its terms. It is said it is a covenant of the lessee, and not of the lessor, and it goes on to provide that the money shall be laid out in repairing the premises; but it does not say by whom. I think the meaning is, that the lessee shall insure in the names of the lessors; and it is agreed that the money recovered shall be laid out in rebuilding; it is rather a covenant to this effect on the part of the lessors; it seems to be an express covenant on the part of the lessee to insure in the names of the lessors; that was broken, and there was, therefore, a forfeiture impending over the defendant.

COLERIDGE, J.—I am of the same opinion on both points. Mr. Knowles was not well-founded in his argument that there was a distinction between this case and that of a landlord and tenant, but there being an agreement that the vendor has a good title, he cannot perform that agreement if his lessor has a right to enter and avoid the lease. It is suggested that the lessors had a right to re-enter, for two reasons: first, because from April to June, two cottages remained uninsured; and, secondly, that the insurance which comprises the whole of the premises, was effected in the wrong names. It is argued, on the first point, that the intention of the parties was that no new insurance should be made until the expiration of the existing insurance in June; be it so; that may be the case with regard to the part of the property already insured, but it

cannot apply to the cottages; if the lessee had effected a separate insurance on them alone in April, it would, I think, have been a compliance with the covenant. If that be not so, it must be contended that half of the property was intended to remain uninsured during this period. But then it is said that the covenant had been performed within a reasonable time, which it is contended was sufficient, as it could not be performed *instantly*. I agree that a reasonable performance is enough; but leaving the property uninsured for six weeks or three months is not a reasonable performance. We must lay down a general rule, and cannot hold that it will do to leave premises uninsured for so long a time as this. I think, therefore, this would be no answer to an action of ejectment by the landlord. With regard to the second point, that of the insurance being in the wrong names, I agree with the rest of the Court: the statute is referred to as remedying the difficulty; but when parties make a covenant they do not intend to leave the matter to be settled collaterally, by reference to the provisions of a statute; but they seek to provide by their covenant for all cases which may occur. It may well have been intended that the insurance should be in the names of the landlords alone, in order to enable them to get the money.

WIGHTMAN, J. concurred.

*Rule discharged.* (4)

1848. }  
Jan. 18. } TOLHURST v. NOTLEY.

*Pleading—De Injuriâ—Fraud.*

*To a declaration against the maker of a promissory note, indorsed by W. to the plaintiff, the defendant pleaded a set-off due to him from W. before the indorsement to the plaintiff, and that W. in order to deprive the defendant of his set-off, fraudulently indorsed to the plaintiff, in order to enable the plaintiff to sue on the said note as agent of W, and that there was no consideration for the indorsement to the plaintiff, and that the plaintiff sued as agent of W. according to the said fraud. Replication, de injuriâ:*

(4) See *Wheeler v. Wright*, 7 Mee. & Wels. 359; a. c. 10 Law J. Rep. (n.s.) Exch. 130.

—*Held good, as the substance of the plea was, that the indorsement to the plaintiff was fraudulent.*

Assumpsit by indorsee of a promissory note made by the defendant for payment to the order of George Webb, 45*l.*, four months after date, and indorsed by Webb to the plaintiff.

Third plea—And for a further plea, the defendant says, that before and at the time of indorsing the said promissory note by the said G. Webb to the plaintiff as in the declaration mentioned, and from thence until and at the commencement of this suit, the said G. Webb was and from thence hitherto hath been and still is indebted to the defendant in a sum of money, to wit, 100*l.*, for the work and labour, care, &c. [stating the nature of the set-off], which sum of money so due from the said G. Webb to the defendant equals the monies due on the said promissory note, and all damages sustained by reason of the non-payment thereof. And the defendant further says, that the said G. Webb, whilst the said money was due and unpaid to the defendant, and after the said note became due, to wit, on the 1st day of June, A.D. 1847, in order to deprive the defendant of his right of set-off in respect of the afore-said debts so due to the defendant, did in fraud of the defendant and in collusion with the plaintiff indorse the said note to the plaintiff, in order to enable the plaintiff to sue the defendant on the said note for the use and benefit of the said G. Webb; and that there never was any value or consideration for the said indorsement. And the defendant further says, that the plaintiff hath commenced and now maintains this action as agent of the said G. Webb for his use and benefit, according to the said fraud and collusion. And the defendant is ready and willing, and hereby offers to set off and allow to the said G. Webb, and to the plaintiff, the full amount of the damages sustained by reason of the non-payment of the said promissory note, out of and against the said sum of money so due from the said G. Webb to the defendant, according to the form of the statute, &c. Verification.

Replication, *de injuriâ*.

The defendant demurred to the replication. On an application by the plaintiff at

chambers, Erle, J. set aside the demurrer as frivolous.

*Barstow* now moved for a rule *nisi* to rescind the order of the learned Judge.—This plea is in substance a plea of set-off against Webb, as whose agent the plaintiff sues. The case therefore falls directly within the rule laid down in *Purchell v. Satter* (1), and the replication *de injuriâ* is inadmissible.

[ERLE, J.—The plea sets up a collusive transfer by Webb to the plaintiff, and I thought myself bound by a recent decision of the Court of Exchequer (2), that wherever fraud is set up as the defence, *de injuriâ* may be replied.]

All about the fraud is quite unnecessary to the defence, and might well have been omitted. In considering whether this replication is good or not, the Court will look to the essence of the plea.

LORD DENMAN, C.J.—The defendant is enabled by this replication to prove the truth of his plea. As laid down by the Exchequer, *de injuriâ* is a good replication wherever fraud is the essence of the plea. It is said the defendant here has a case independently of any fraud, but he has made fraud a part of his defence, and therefore we ought not to go out of the general rule in this instance.

PATTERSON, J.—Part of the cause alleged in this plea is, that the transaction between Webb and the plaintiff was fraudulent. Whether that was a necessary part of the defence we need not now decide; but this matter having been inserted in the plea, the replication *de injuriâ* is surely good.

ERLE, J.—The replication *de injuriâ* enables a defendant, who has a real and substantial defence, to put it to the jury; and I always think a demurrer to such a replication shews that the defendant has not a substantial case. Then, whenever there is a solemn decision of one of the superior courts in favour of any particular pleading, I consider a demurrer to such a pleading as frivolous. Now, this case comes directly within the terms of the case in the Exchequer, and therefore I set the demurrer aside. This does the defendant no harm, for if he

(1) 1 Q.B. Rep. 219; s.c. 11 Law J. Rep. (N.S.) Exch. 433.

(2) *Bennett v. Bull*, 11 Jur. 1067. See *Cowper v. Garbett*, 13 Mee. & Wels. 33; s.c. 13 Law J. Rep. (N.S.) Exch. 354.

has a real defence he may prove it. Whether a plea alleging a right of set-off against a former party to the note is good or not, we need not decide at present. This case rests only on the fraud, which is the essence of the plea, and therefore the replication is good.

*Rule refused.*

1848. } DOE *dem.* CRAWLEY v. MARY  
Jan. 20, 21. } GUTTERIDGE.

Stamp—3 Geo. 4. c. 117.—*Mortgage—New Security.*

*By deed between E. B. (mortgagee) of the first part, M. G. (devisee for life under will of mortgagor) of the second part, and J. G. (devisee in remainder in fee) of the third part, reciting an original mortgage for 1,000 years, to secure 150l. and interest, in consideration of 350l. (being 165l., the amount due for principal and interest due on the original mortgage, and 185l. further advance), paid by the lessor of the plaintiff, all the parties assigned the premises comprised in the original mortgage to her for the residue of the term of 1,000 years, subject to a proviso for redemption on payment of the whole sum of 350l. at a different day from that named in the original mortgage, and M. G. and J. G. entered into a fresh covenant to pay the whole 350l. at the time mentioned in the proviso:—Held, that this deed required to be stamped with an ad valorem stamp, as upon a new mortgage for 185l., and also with a deed stamp, as the covenant by the devisees, for payment of the old as well as the new advance created a fresh security.*

Ejectment by assignee of a mortgage under an indenture, dated the 7th of September 1844, between E. L. Brickwood of the first part; the defendant (widow of J. Gutteridge and devisee for life of the premises) of the second part; and J. Gutteridge (only son and devisee in fee expectant on the decease of the defendant) of the third part: by which, after reciting (*inter alia*) a mortgage, dated the 25th of September 1838, for 1,000 years, by J. Gutteridge, deceased, to E. Brickwood, for 150l., and the death of J. Gutteridge, after having bequeathed the mortgaged premises to the defendant for life, and to his son,

J. Gutteridge, in fee; and also that there was due to Brickwood 165l. for principal and interest; and that the defendant and J. Gutteridge, the son, had requested the lessor of the plaintiff to advance the sum of 350l. to enable them to pay off the 165l. and for other occasions; in consideration of the payment by the lessor of the plaintiff of 165l. to Brickwood, and of 185l. to the defendant and J. Gutteridge, Brickwood assigned, and J. Gutteridge assigned and confirmed to the lessor of the plaintiff, the premises comprised in the original mortgage for the residue of the term of 1,000 years, subject to a proviso for redemption on payment of the whole sum of 350l. to the lessor of the plaintiff, by the defendant and J. Gutteridge, on the 7th of March 1845. Covenant, by the defendant and J. Gutteridge, for payment of 350l. and interest, on the same day.

The cause was tried, before Pollock, C.B., at the Spring Assizes for the county of Bedford, 1847, when the deed of transfer was produced, stamped on the first skin with an *ad valorem* stamp of 4l. and on the second skin with a 1l. follower; it was admitted that the deed contained above forty-five folios. An objection was raised by the defendant that the deed was insufficiently stamped. The plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that this objection ought to prevail.

A rule having been accordingly obtained,—

*Byles, Serj. and Prendergast* now (Jan. 20) shewed cause.—It is admitted that the deed contained words requiring two followers, but it is contended that it only required an *ad valorem* stamp of 3l.; and if so, the whole amount paid is sufficient, the denomination of stamp being immaterial. The effect of the deed is an assignment of the original mortgage with an additional charge of 185l. Under 3 Geo. 4. c. 117. s. 2, therefore, the *ad valorem* duty is payable only in respect of the further charge.

[WIGHTMAN, J.—*Martin v. Baxter* (1) decides that this only applies to additional charges between the same parties.]

*Doe d. Bartley v. Gray* (2) is in point.

(1) 5 Bing. 160; s.c. 6 Law J. Rep. C.P. 242.

(2) 3 Ad. & El. 89; s.c. 4 Law J. Rep. (N.S.) K.B. 197.

There a mortgage for 1,000 years to secure 150*l.* was assigned to secure 350*l.*, 200*l.* additional being advanced by the assignee, and the original mortgagor by the same deed released the fee to secure the 350*l.*, and it was held that the deed was liable to an *ad valorem* duty on the 200*l.*, and a progressive duty of 1*l.*, but did not require to be stamped as a fresh mortgage for 350*l.* in consequence of the conveyance of the fee. *Doe d. Barnes v. Rowe* (3) is to the same effect, and also decides that no deed stamp is necessary. *Doe d. Snell v. Tom* (4) and *Doe d. Bowman v. Lewis* (5) are also in favour of the plaintiff. *Lant v. Peace* (6) will probably be cited on the other side, but there, besides the transfer and further charge of 1,000*l.*, other land was mortgaged as a security for the whole 1,400*l.* advanced, and it was held that the deed required an *ad valorem* stamp on the 1,000*l.*, and also a deed stamp upon the fresh security. *Brown v. Pegg* (7) will also be relied on, where the conveyance of the fee was held to create a new security and to render a deed stamp necessary; but that is in direct contradiction to *Doe d. Bartley v. Gray*. *Humberstone v. Jones* (8) is the last case on this subject, but there the power of sale given by the deed was held to amount to a new security. No doubt the Court there relied upon the fact of there being a covenant to pay the original and subsequent advance at different times from those in the first deed, but that must always occur in an assignment of a mortgage. The provision in 55 Geo. 3. c. 184. schd. 'Mortgage,' seems to have been overlooked, which directs that in "all other cases where a mortgage or other instrument hereby charged with the *ad valorem* duty on mortgages, shall be contained in one and the same deed or writing with any other matter or thing (except what shall be incident to such mortgage or other instrument), such deed or writing shall be charged

with the same duties (except the progressive duty) as such mortgage or other instrument and such other matter or thing would have been separately charged with if contained in separate deeds or writings." Here the covenant to pay is incident to the further charge.

[PATTESON, J.—In *Doe d. Bartley v. Gray* there was a 1*l.* 15*s.* deed stamp in addition to the *ad valorem* duty.]

But no decision is given as to its necessity. The case turns upon the conveyance of the fee not creating an additional security. Here there is nothing which can amount to a new security.

[PATTESON, J.—Surely there was a covenant by fresh persons.]

That is so apparently; but the widow and son, who covenant in the second deed together, represent the whole fee which was in the original mortgagor. As to the principle of construing the Stamp Acts, *Warrington v. Furber* (9) and *Tomkins v. Ashby* (10) were referred to.

*O'Malley and Peacock*, in support of the rule, (Jan. 21).—The estate, subject to the mortgage, was devised by J. Gutteridge to his widow, Mary Gutteridge, for life, with remainder to his son, J. Gutteridge, in fee. The deed in question is between the original mortgagee and the tenants for life and in remainder, who all assign to the lessor of the plaintiff in consideration of a loan of 350*l.*, 185*l.* of which is a new advance. The time for redemption and for payment of the money under the covenant is different from that in the original mortgage, and both tenant for life and in fee covenant severally for payment of the whole sum. These facts bring the case directly within the principle of *Brown v. Pegg* and *Humberstone v. Jones*; it is in fact a fresh mortgage for 350*l.* The assignment by the original mortgagee was merely an additional security, like getting in an outstanding term; if so, the deed requires a 4*l.* *ad valorem* stamp besides progressive stamps. But it is not necessary to go so far as this, for admitting it to be an assignment of the old mortgage and a further advance, there is an additional security created, and therefore a deed stamp is required besides the *ad valorem* duty on the further

(3) 4 Bing. N.C. 737.

(4) 4 Q.B. Rep. 615; s. c. 12 Law J. Rep. (N.S.) Q.B. 264.

(5) 13 Mees. & Wels. 241; s. c. 13 Law J. Rep. (N.S.) Exch. 200.

(6) 8 Ad. & El. 248; s. c. 7 Law J. Rep. (N.S.) Q.B. 135.

(7) 6 Q.B. Rep. 1; s. c. 13 Law J. Rep. (N.S.) Q.B. 270.

(8) 16 Law J. Rep. (N.S.) Exch. 293.

(9) 8 East, 242.

(10) 6 B. & C. 541; s. c. 5 Law J. Rep. K.B. 246.

advance. In *Dee d. Bartley v. Gray* the Court expressly abstained from deciding whether a deed stamp is necessary in such a case. In *Dee d. Barnes v. Rowe* no deed stamp was necessary, as there was no new security given. Then, *Last v. Peace* and *Brown v. Pegg* expressly decide that if there is new security a deed stamp is necessary. The question then arises, what constitutes a new security? In *Last v. Peace* fresh land was included: in *Brown v. Pegg* there was the conveyance of the fee, and it is difficult to see how that could make a different security. Then, in *Humberstone v. Jones* there was no conveyance of the fee, but the covenant to pay covered both the additional and original advance, and was for payment at different days, and a power of sale was introduced. But it is said, these are incidents to the mortgage for the further advance: conceding that to be so as to the power of sale and the covenant to pay the further advance, it cannot apply to the covenant for payment of the whole debt and the power for redemption at different times. This is the view taken in 5 *Jarvis's Conveyancing* (by Sweet., p. 541, where it is said, that as the transfer-deed commonly contains a covenant to pay the extra debt, or some other additional matter extraneous to the instrument considered as a transfer of the mortgage properly so called, it is then rendered liable to the additional stamp. The 3 Geo. 4 c. 117. s. 2. did not intend in all cases of a further advance to do away with the deed stamp, otherwise parties would get an advance of 1*l.* and pay the 1*l.* duty or that instead of 1*l.* 1*5s.* deed stamp. But here also, there are two fresh covenants, and their personal representations are bound by the second deed: this clearly gives a new security, just as much as if without any assignment of the mortgage a new covenant was second into with the mortgagee by the tenant for life and in remainder.

PATTON, J.—I presume the former covenant by the mortgagee bound his heirs, and therefore since his devisees under the statute. These new covenants were, therefore, in some sort liable before.

They were only liable so far as they are acts by their new trustees: but by their new trustees they become liable, whether they have acts or not.

LORD DENMAN, C.J.—A new mode of liability is the same thing as if a new party had been introduced by the deed; and for this reason I think the stamp was insufficient.

PATTON, J.—The tenant for life and remainder-man were not originally bound, except *sub modo*; but here is a covenant binding them absolutely to pay not only the fresh advance, but the former debt also. I need not go into the cases cited; but I think they are all capable of being reconciled; except, perhaps, *Dee d. Barnes v. Rowe*, where the Lord Chief Justice seems rather to have mistaken the decision in *Dee d. Bartley v. Gray*, in which it was contended that there ought to be not only an *ad valorem* stamp, but a transfer stamp, and a deed stamp besides. But the point as to the deed stamp was not material, for the Court considered whether there was any transfer stamp, which differs from a deed stamp in this respect, that although it is the same as a deed stamp for the first skin, it is different in the following skins. Therefore the Court found it necessary only to consider whether a transfer stamp was required. Now there was a 1*l.* 1*5s.* stamp. There, therefore, the Court did not decide the point as to a deed stamp being essential. That case, therefore, does not apply here, which falls directly within *Brown v. Pegg* and *Humberstone v. Jones*.

COLLINGS, J. *discreet*.

WIGHTMAN, J.—It is unnecessary to consider the point, whether a simple transfer is subject to a deed stamp in all cases, for here is a new security by persons who, though they might have been liable as representatives of the mortgagee if they had acted, yet made themselves personally liable on their covenant, which is in respect of the former mortgage debt. The rule therefore must be absolute.

*By the way*, asked that the rule might be drawn up for a new term upon payment of costs.

*Rule absolute accordingly.*



BAIL COURT. }  
 1847. } THE QUEEN v. THE JUSTICES  
 Jan. 27. } OF CUMBERLAND.

*Railway Company—Corporation—Appointment of Attorney not under Seal—Notice of Appeal.*

*By an act of parliament incorporating a railway company, power was given to the directors to "appoint and displace any of the officers of the company":—Held, that the appointment of an attorney to the company, under this power, need not be under seal.*

In this case a rule *nisi* had been obtained, calling upon the defendants to shew cause why a writ of mandamus should not issue, directing them to enter continuances and hear an appeal against an assessment to a certain poor-rate, in which the Whitehaven Junction Railway Company were the appellants, and the overseers of the township of Ellenborough were the respondents. Upon the appeal being called on for hearing at the last Michaelmas Quarter Sessions for the county of Cumberland, the notice of appeal was put in by the appellants. Such notice was signed "Armistead and Musgrove, attorneys for the above-named Whitehaven Junction Railway Company." It was thereupon objected by the counsel for the respondents that such notice of appeal was invalid unless a retainer under the seal of the company appointing these gentlemen their attorneys was shewn. This objection prevailed with the Sessions, and the appeal was accordingly dismissed. Against the present rule,

*Cowling and Ramsay* now shewed cause.—By the 4th section of the 41 Geo. 3. c. 23. the notice of appeal against an assessment to a poor-rate is required to be signed "by the person giving the same, or his, her or their attorney on his or their behalf;" the question therefore is, whether any sufficient evidence was given before the Quarter Sessions that the gentlemen signing this notice of appeal were the attorneys of the railway company. The company in question being a corporation can make a valid appointment of an attorney under their seal only—*Com. Dig.* tit. 'Franchise' (F) 13, *Arnold v.*

*the Corporation of Poole* (1). Nor do the provisions of the 83rd section of 7 & 8 Vict. c. lxiv., by which the company was incorporated, prevent this rule of law from applying (2). Besides, in the present case no evidence appears to have been given of any appointment even by parol of these gentlemen as the attorneys of the company.

*Martin* (*Greig* with him), in support of the rule.—It appears from the affidavits that the only objection made at the Sessions and entertained by the Court was, that the appointment should have been under seal.—(He was then stopped by the Court.)

*WIGHTMAN, J.*—I am clearly of opinion that this rule must be made absolute. Although the rule of law undoubtedly is that corporations can only bind themselves by a contract made under their seal in ordinary cases, yet in the present instance an act of parliament expressly gives power to the directors of this corporation to appoint and displace officers and enter into other contracts for them. Such appointments and contracts it is clear need not be made under seal. It has been said in argument now, that no evidence of the appointment as attorneys of the parties who signed the notice of appeal was given at all. Since, however, that objection was not taken at the Quarter Sessions, but only that an appointment under seal should be shewn, it cannot avail the respondents now.

*Rule absolute.*

(1) 4 Man. & Gr. 860; s. c. 12 Law J. Rep. (N.S.) C.P. 97.

(2) Section 83. "And with respect to the exercise of the powers of the company, be it enacted, that the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, &c. and amongst other powers to be exercised by the directors, they may appoint and displace any of the officers of the company. \* \* \* They may enter into contracts for the execution of the works of the company and for all other matters necessary for the transaction of its affairs."

BAIL COURT. }  
 1848. } CORNEWALL v. IVES.  
 Jan. 30. }

*Practice.—Error to reverse Outlawry.*

*It is no ground for setting aside a writ of error coram nobis to reverse an outlawry, that the attorney for the plaintiff in error has not made an affidavit that he has the authority of the outlaw to issue such writ, nor that the outlaw has not entered an appearance to the original action.*

The defendant in this case having been outlawed for not entering an appearance, sued out a writ of error *coram nobis*, to reverse the judgment in outlawry, upon the ground that the defendant was abroad at the time when the writ of *exigent* was awarded and issued against him. In Michaelmas term last a rule *nisi* was obtained, on behalf of the plaintiff, to quash the writ of error, or the allowance thereof, and to set aside all proceedings founded thereon: first, because, previous to the issuing of the writ of error, no affidavit had been made by the attorney of the plaintiff in error, that he was concerned for, or instructed by the plaintiff in error to reverse the outlawry; secondly, because no appearance to the original action had been entered by the plaintiff in error.

*Martin and E. Beavan* shewed cause.—There is nothing in either of the objections which has been taken to this writ of error. It is only in cases where the person outlawed comes to the Court by way of motion to reverse the outlawry that these conditions are imposed upon him. He is then allowed to purchase the favour upon terms—*Plunkett v. Buchanan* (1), *Houlditch v. Swinfen* (2). But this is not applicable to the case where a party stands upon his right to sue out a writ of error. The statute 4 & 5 Will. & Mary, c. 18. s. 3. imposes no such conditions upon him.

*Petersdorff*, contra.—In *Archbold's Practice*, 8th edit. p. 1148, it is laid down that in proceeding to arrest an outlawry by writ of error "an appearance must be entered or bail must be put in and perfected in the same cases and in the same manner as when the outlawry is reversed upon motion."

[ERLE, J.—I do not find any authority cited by Mr. Archbold in support of the passage you have read; nor do I see how any such practice can in principle exist. Suppose a plaintiff in an action had outlawed the defendant without any of the necessary preliminaries having been taken, would it be rational in such a case to make the defendant enter an appearance before he could set aside the outlawry? I can understand that where the defendant wishes to make terms such a condition may be imposed upon him.]

The rule, it is submitted, is, that a person who has been outlawed cannot be heard unless he enters an appearance.

[ERLE, J.—I see by reference to *Mr. Tidd's Forms* (3), that it is not until after the reversal of the outlawry that the defendant's appearance is entered.]

Secondly, it is as necessary for the attorney of the defendant to make an affidavit that he is instructed by his client to sue out the writ of error as if he were seeking to set aside the outlawry upon motion. The cases of *Plunkett v. Buchanan* and *Houlditch v. Swinfen* are applicable to the present case.

ERLE, J.—I retain my first impression that neither of these objections can be allowed to prevail; but, inasmuch as the plaintiff appears to have been misled by a passage in a book of authority, the rule will be discharged without costs.

*Rule discharged, without costs.*

1848. }  
 Feb. 9. } WALKER v. MELLOR.

*Pleading—Reg. Gen. Hil. term, 4 Will. 4. —Goods sold and delivered.*

*In indebitatus assumpsit for goods sold and delivered, the defendant cannot, under non assumpsit, shew that the plaintiff had no legal title to the goods at the time of sale.*

Assumpsit for goods sold and delivered.

Plea (amongst others)—Non assumpsit.

At the trial, before Rolfe, B., at the Liverpool Spring Assizes 1847, the plaintiff proved that the goods in question, bricks,

(1) 3 B. & C. 736; s.c. 3 Law J. Rep. K.B. 106.

(2) 5 Dowl. P.C. 36.

(3) *Tidd's Forms*, 8th edit. p. 58. s. 36.

were sold by the plaintiff to the defendant, in October 28, 1846, under a written agreement, at 19s. per thousand. On the same day the bricks were counted and delivered to the defendant, who put up a bar and lock at the entrance of the field where they were, and also carried away two barge-loads. The defendant proved that, on October 26, 1846, two persons, of the names of Cooke and Webster, had agreed verbally with the plaintiff's wife, who was shewn to have authority to sell them, for the purchase of the bricks in question, at 1l. per thousand. After the sale to the defendant, notice of it was given to Cooke and Webster, who insisted on their bargain, and took forcible possession of the bricks. It was thereupon objected that the plaintiff ought to be nonsuited as he had no title to the bricks at the time of the sale to the defendant. The learned Judge thought this defence, if valid at all, ought to be specially pleaded, but reserved leave to the defendant to move to enter a nonsuit on this ground, and the plaintiff had a verdict. A rule *nisi* having been accordingly obtained,—

*Hugh Hill (Martin was with him) now shewed cause.*—First, these facts constituted no defence, as until the bricks were counted no property passed to Cooke and Webster—*Simmonds v. Swift* (1), *Chitty on Contracts*, p. 377. [No decision was given on this point.] Secondly, this defence ought to be specially pleaded under Reg. Gen. Hil. term, 4 Will, 4, which directs that in an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non assumpsit* shall operate only as a denial of the sale and delivery in point of fact: in *Allen v. Hopkins* (2) there was such a plea.

The Court then called on

*Watson and Tomlinson*, in support of the rule.—There is no express decision on this point, but it is submitted that this defence is admissible under *non assumpsit*; the plaintiff is bound to be prepared with evidence that the goods were his to sell. The old forms of declaration contained the words "goods of the plaintiff."

[*PATTESON, J.*—But those words were always struck out.]

(1) 5 B. & C. 857; a.c. 5 Law J. Rep. K.B. 10.

(2) 13 Mee. & Wels. 94; a.c. 13 Law J. Rep. (n.s.) Exch. 316.

[*LORD DENMAN, C.J.*—Surely against the defendant the goods are assumed to be the plaintiff's property.]

In *Allen v. Hopkins* the plaintiff had, at the time of sale, an apparent title, which was avoided by matter subsequent. This is like the case of a groom selling his master's horse, there put by Lord Abinger.

[*WIGHTMAN, J.*—Is there not here a sale and delivery in fact by the plaintiff?]

There is an ostensible contract and delivery, but by a person who has no authority to sell. Sale and delivery, in the new rule, means a sale and delivery which vests the property and possession in the vendee. Here there being no sale and delivery in fact or in law, the defendant could not confess and avoid.

[*WIGHTMAN, J.*—Section 3. of the rule says that, "in every species of *assumpsit* all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded"; that seems to apply to everything which renders a sale void.]

*LORD DENMAN, C.J.*—I do not know how it can be said that there is no authority on this question, when the new rule is so expressly pointed to a case of this kind. There can be no doubt what is meant by that rule; the object of which was to prevent a defence being started on the plaintiff of which he has no notice, which would occur if in every case of a sale of goods in fact the defendant might, under a plea of *non assumpsit*, in an action for the price, enter into a long discussion as to the title of the seller.

*PATTESON, J.*—I cannot see any difficulty in framing a special plea in this case, for it would confess a sale and delivery in point of fact, and then shew that it was not binding in point of law.

*WIGHTMAN, J.*—This case seems to fall directly within the new rule, for admitting a sale and delivery in fact, it avoids it on account of a defective title in the seller.

*Rule discharged.*

1847. }  
 Nov. 11. } CUMMINGS v. INCE AND  
 1848. } ANOTHER.  
 Jan. 13. }

*Lunatic—Duress—Agreement by Consent of Counsel.*

*The defendants issued a commission of lunacy against the plaintiff; and at the hearing, before the commissioner, an agreement was entered into, that the proceedings should be dropped in consideration of the plaintiff's assigning her property to trustees. This agreement was signed by her counsel; and in order to carry it out, her title deeds were placed in the defendants' hands. On the trial of an issue, as to whether the plaintiff was entitled to the deeds notwithstanding the agreement:—Held, first, that it was not open to the defendants to dispute the title of the plaintiff to the deeds independently of the agreement.*

*Held, secondly, that the agreement was entered into under duress, and was not binding on the plaintiff, notwithstanding the consent of her legal advisers.*

This was a feigned issue, to try whether the plaintiff, Catharine Cummings, was entitled to the possession of certain title deeds and muniments of title, notwithstanding a certain arrangement alleged to have been entered into on the 22nd of September.

It appeared that the plaintiff was a widow, having two daughters, one of whom had married the defendant Ince; and the other had married the other defendant. The plaintiff, who had considerable property in her own right, appeared to have lived on bad terms with her husband; and, in February 1846, during his lifetime, a medical certificate that the plaintiff was insane was signed by a surgeon, who had been called in by the defendant Ince. On the 12th of May 1846, during the absence of her husband, the plaintiff was carried from her house to a mad-house; and the defendants took possession of the deeds, in respect of which the action was brought, being in fact the title deeds of the plaintiff's property. Mr. Cummings afterwards returned to the house, and died there in July, the same year. The

plaintiff was confined in the lunatic asylum from the 12th of May to the 22nd of September.

On the 22nd of August she was served with a notice that a commission of lunacy was issued against her, to be executed on the 29th. The inquiry lasted eight days, and at the expiration of that time, and before the close of the case, it was arranged that the plaintiff should be discharged out of the custody in which she was, on certain terms, amongst others, that she should assign her property to trustees. This arrangement was signed by the counsel on both sides; and in order to carry it out, the deeds were placed in the hands of the solicitors of the defendants.

After her discharge from confinement the plaintiff brought an action of trover against the solicitors for the deeds, and an order was made by a Judge under the Interpleader Act that this issue should be tried, the defendants being parties to it; and it was accordingly tried before Wightman, J., at the sittings after Hilary term, 1847.

The learned Judge left it to the jury to say, whether the apparent consent which must be taken to have existed on the part of the plaintiff to the signature of the agreement on her behalf by her counsel and attorneys, was obtained by the restraint under which she was at the time, and the jury found that it was. The jury, under the learned Judge's direction, thereupon returned a verdict for the plaintiff.

A rule having been obtained for a new trial on the ground of misdirection,

*Cockburn and Hance* shewed cause (Nov. 11).—This rule was obtained on two grounds. First, it is said that the issue raised the question of title as well as the question of the operation of the agreement itself, and that no proof of title was given by the plaintiff; but it is to be observed, that the agreement recites what were the rights of the plaintiff irrespective of the order, and the issue was intended merely to decide the effect of the agreement. Secondly, it is clear that the plaintiff in this case acted under duress. What was effected by means of the imprisonment was something beyond the scope of that legal process under which the plaintiff was arrested—*Fin. Abr.* tit. 'Duress;' *Bac. Abr.* tit. 'Duress.' If the plaintiff had been of sound mind it could not have been

said that there was any consideration whatever for the agreement. The object of the proceedings in lunacy is the protection of the lunatic, and a petition in lunacy cannot be made the means of extorting concessions from the person who is the object of inquiry. The very arrangement supposes the sanity of the plaintiff, and it is clearly void if she was really insane—*Wade v. Simeon* (1), *Longridge v. Dorville* (2), *Smith v. Monteith* (3). Lastly, the agreement, if otherwise binding in law, is clearly contrary to public policy—*Rol. Abr.* tit. 'Duress,' *Ibid.* tit. 'Imprisonment,' *The Duke de Cadaval v. Collins* (4). And if it could be enforced at all, it would only be by a court of equity.

*W. H. Watson, contra.*—The argument on the other side shews that the defendants' construction of the issue is the correct one. It is said that the agreement is void on the face of it; but if so, why was the cause sent down for trial? The question is, whether the plaintiff is not entitled notwithstanding the agreement. The action was originally brought against the attorneys in whose hands the deeds were, and if the plaintiff had proceeded in that action, she must have established by some sort of evidence that she was entitled to the deeds.

[WIGHTMAN, J.—I thought at the time of the trial, and indeed it seemed to be admitted that the plaintiff had a right to the deeds. The question was, as to the effect of the agreement.]

But it is now contended, that the agreement is void on the face of it.

[WIGHTMAN, J.—Not so; but that it is to be taken in connexion with all the facts of the case.]

It resolves itself into a question of duress. The question of public policy was not raised at the trial; and *Lott v. Melville* (5) is decisive to shew that this cannot be treated as duress. The imprisonment was lawful. It is not for the defendant to shew that no duress existed. The agreement was signed

by the plaintiff's counsel, who must be taken to be therefore authorized by her to sign. The party who impeaches such an instrument must shew duress sufficient to avoid it. Besides, the fact of the commission issuing is *prima facie* conclusive as to the lawfulness of the imprisonment—2 *Inst.* 482, *Bac. Abr.* tit. 'Duress,' *Year Book*, 43, edit. 3, B, 6.

[LORD DENMAN, C.J.—But the original object of the commission may have been given up for the mere purpose of procuring the deeds.]

It is important to consider that the imprisonment took place in the husband's lifetime.

[LORD DENMAN, C.J.—If a party was charged with a debt, a bond may be well given to pay for the debt under fear of imprisonment; but the agreement was made under apprehension of imprisonment in a mad-house, which makes a great difference.]

The plaintiff was either sane or insane. If she was sane, then the agreement is of course binding. If insane, then all parties would be anxious that she should be taken care of.

*Cur. adv. vult.*

The judgment of the Court was now (Jan. 13,) delivered by—

LORD DENMAN, C.J. — The question arose on the trial of an issue whether the plaintiff, notwithstanding an arrangement made by her, was entitled to the possession of certain title deeds. We are, in the first place, clearly of opinion with the plaintiff, that her title to the deeds, independently of that arrangement, was not open to inquiry on the trial, and that the meaning of the issue was, whether the arrangement alluded to prevented her from claiming to hold the deeds, though otherwise entitled, as it was by means of that arrangement that they had been handed over by the plaintiff to the defendants. The arrangement was this: the defendants (the plaintiff's daughters) were prosecuting a commission of lunacy against her. On the inquiry into the state of the plaintiff's mind before the Commissioners, after certain witnesses had been examined, it was arranged that the commission should be dropped on the plaintiff giving up the deeds. This arrangement was signed by the counsel

(1) 2 C.B. 548, 564; s.c. 15 Law J. Rep. (n.s.) C.P. 114.

(2) 5 B. & Ald. 117.

(3) 13 Mee. & Wels. 427; s.c. 14 Law J. Rep. (n.s.) Exch. 22.

(4) 4 Ad. & El. 858; s.c. 5 Law J. Rep. (n.s.) K.B. 171.

(5) 3 Man. & Gr. 40; s.c. 10 Law J. Rep. (n.s.) C.P. 279.

attending on both sides. On the trial of this issue, the plaintiff contended that the arrangement was not binding, because obtained by duress. She had been confined at an asylum, where her health and even her state of mind were said to be affected and endangered by the treatment she underwent: the attorney's clerk swore that he believed such to be the probable effect of her remaining so confined, and further that she acceded to the arrangement only from fear of these consequences. The argument for the plaintiff was, that this confinement was illegal, as she was permitted by the arrangement to go at large; but that even if lawful, it was a restraint on her will, which prevented any contract made under that duress from binding her.

On the defendants' side, it was argued that the legal process set in motion for ascertaining the state of the plaintiff's mind was lawful and *bonâ fide*, and that even if ill founded in fact, an arrangement made between the parties pending the inquiry was valid and obligatory; and much stress was laid on the necessity of abiding by engagements made by those who represent the interests of parties litigating in courts of justice, more especially when sanctioned by counsel acting for the benefit of both parties.

Great weight is due to these considerations, which no doubt ought to be held decisive in any ordinary legal proceeding, when both parties are competent and free to exercise their judgment. But where one party is alleged to be a lunatic, and threatened with the consequences of that allegation, the parties cannot be considered as meeting on equal terms. The object of proceeding with a commission of lunacy is to establish incompetency to do reasonable acts, and to take the management of the supposed lunatic's affairs and his person out of his own hands, and lodge them in others appointed without his consent. How then (it may be asked) can those who apply for the commission affirm that the lunatic is able to negotiate an agreement, of which his pecuniary interest and the proper care of his person are the only subjects?

We are of opinion that the defendants cannot maintain the plaintiff's competency in the face of their own proceeding. But

if we can assume that the plaintiff was in possession of her right reason, she was the proper person to retain the deeds then in her power, and ought not to have been deprived of them. And if she was induced to resign them by fear of personal suffering, brought upon her by confinement in a lunatic asylum, by the act of the defendants, the resignation would appear to be brought about by a direct interference with her personal freedom. Is not this truly described as duress? and was the contract which resulted made with her free will? That her counsel exercised a sound discretion, and did the best for their client's interest, we do not for a moment doubt. But they are not invested by any superior power with the power and duty of guardianship over the lunatic, their right to act for her is derived from herself alone; as long as she was at liberty she might authorize them to appear in her behalf, and disprove the imputed insanity; but as she was incompetent (by the hypothesis) to make any contract, she was incompetent to appoint any one to deal for her in relation to her liberty or her property. If, on the other hand, her counsel acted for her, believing her of sound mind, from the same fear of inconvenience and disease, as likely to arise from her confinement, which affected the mind of their principal, their proceeding ought to be considered as enforced by the same duress. Possibly it might have been more for the plaintiff's interest in this case to acquiesce in the arrangement than to question it; but if it is now questioned on grounds which prove it to have no binding force at law, we have no power to change its nature and say that it shall be carried into effect. The case, then, was properly laid before the jury, when they were asked whether the plaintiff made the arrangement with her own free will; and the jury found a true verdict when they negatived that proposition.

We may observe that though the peculiar facts of this case are not assimilated to any former decision, our present opinion does not clash with any, but appears to flow from well-recognized principles: and we may add, that probably some other arrangement may yet be amicably made, more favourable to the interest of the whole family than any triumph in a court of law.

*Rule discharged.*

1847. }  
 Nov. 13. } THE QUEEN v. BELTON.  
 1848. }  
 Jan. 15. }

Quarter Sessions—Licensing Act—  
 9 Geo. 4. c. 61.—Jurisdiction—Power of  
 adjourning—Hearing—Costs.

*The Licensing Act, 9 Geo. 4. c. 61. s. 27, provides, that every person who shall think himself aggrieved, &c. may appeal to the next General or Quarter Sessions of the Peace, &c., unless such sessions shall be holden within twelve days, &c., and in that case to the next subsequent sessions, and not afterwards, and the Court at such sessions shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the Court shall seem meet; and the judgment of the Court shall be final and conclusive to all intents, &c. An order of Sessions, under this act, purported to be made at the General Sessions of the Peace, holden in and for the county of Middlesex, on the 5th of May, and continued by successive adjournments, until the 22nd, and recited that, at the General Quarter Sessions of the Peace, held in April then last, W. B. had exhibited his petition of appeal against the refusal of certain Justices to grant him a licence, at which said Quarter Sessions the said appeal, and the hearing and determination thereof, was adjourned unto "this present General Sessions," and proceeded to adjudge that, "upon hearing, &c., the Court did dismiss the appeal, and affirm the judgment of the Justices, and order and adjudge that the said W. B. should pay to the said Justices 16l. 19s. 2d., for costs, &c." The facts were that, at the April sessions, the appeal was heard, the judgment of the Justices affirmed, and the licence refused:—Held, that by the words of the act of parliament the power of adjudicating on the appeal was confined to the April sessions; and that the order made at the May sessions was, therefore, without jurisdiction.*

*Seamble, also, that, at the April sessions, the appeal had been in point of fact disposed of, and that the order was on that ground also bad.*

[For the report of the above case, see 17. Law J. Rep. (N.s.) M. C.p. 70.]

1848. }  
 Jan. 17, 18. } DOE d. BUDDLE v. LINES.

*Landlord and Tenant—Notice to Quit.*

*The defendant held under a lease from A, for fourteen years and a half from Christmas 1831, and paid rent to A. until the expiration of the lease on June 24, 1846; after that time he continued in possession, and paid rent to the lessor of the plaintiff, who had become entitled to the premises:—Held, that a notice to quit expiring on the 24th of June was good.*

Ejectment to recover a wharf and premises at Paddington, upon a demise dated June 26, 1847.

At the trial, before Coleridge, J., at the Sittings at Westminster during the present term, it appeared that one Taft being possessed of the residue of a term in the premises, underlet them to Messrs. Pitcher & Carter for fourteen years and a half, from Christmas, 1831, who, in 1833, assigned their underlease to the defendant, who entered and paid rent to Taft until the 24th of June 1846, when the underlease from Taft to Pitcher & Carter expired. After this time the defendant continued in possession, and paid rent to the lessor of the plaintiff, who had become entitled to the premises. On the 24th of December 1846, the lessor of the plaintiff served on the defendant a notice to quit on the 24th of June following. Possession not having been given up at that time, the present action was commenced. The defendant's counsel contended, that the notice to quit was erroneous, as it should have expired at Christmas instead of Midsummer. The plaintiff had a verdict, leave being reserved to the defendant to move to enter a verdict upon the above objection.

*Keating (Jan. 17,) moved accordingly.—The tenancy from year to year created by the tenant holding over after the expiration of his term, and paying rent, has reference to the time of the original entry under the lease—Doe d. Robinson v. Dobell (1). There premises were let for a year and six months certain, and it was held that a notice to quit, given with reference to the time*

(1) 1 Q.B. Rep. 806; s. c. 10 Law J. Rep. (N.s.) Q.B. 242.

of the entry, and not to the end of the term, was good : that case necessarily involves the decision that the present notice is bad. In *Doe d. Collins v. Weller* (2), a case of a lease by tenant for life and payment of rent to the remainder-man, the tenancy from year to year so created was calculated with reference to the original entry. That is a much stronger case than the present, as no privity exists between the tenant and the remainder-man until the death of the tenant for life. *Roe d. Jordan v. Ward* (3) is also in point.

[PATTERSON, J.—In those cases rent was received after the term, at one of the quarter days.]

*Berrey v. Lindley* (4) is very similar to this case. There premises were held under a void agreement for five years and a half from Michaelmas 1823 ; before the expiration of that term, a negotiation was entered into for a lease for seven, fourteen, or twenty-one years, at an increased rent ; the lease was never executed, but the defendant continued in possession, paying the increased rent from Michaelmas 1828 ; and it was held, that a notice to quit at Michaelmas was valid. Coltman, J. there says, " If a tenant continues in possession after the expiration of the term, paying the same rent, the presumption of law is, that a tenancy from year to year is created, commencing from the period when the original tenancy commenced." It makes no difference that in that case the original demise was void by the Statute of Frauds, as the tenancy from year to year, arising from the occupation is regulated as to its terms by that agreement—*Doe d. Tilt v. Stratton* (5).

[LORD DENMAN, C.J.—That observation may have been founded on the fact that tenancies generally expire at the same time of the year as they commence.]

That was not so in *Berry v. Lindley*, where the original term expired in the middle of a year.

*Cur. adv. vult.*

On the following day—

LORD DENMAN, C.J., said—We consider

(2) 7 Term Rep. 478.

(3) 1 H. Black. 97.

(4) 3 Man. & Gr. 498 ; s.c. 11 Law J. Rep. (N.S.) C.P. 27.

(5) 4 Bing. 446 ; s.c. 6 Law J. Rep. C.P. 50.

that a tenancy from year to year was created by the payment of rent commencing from the expiration of the defendant's term ; therefore the notice to quit was proper, and consequently the rule will be refused.

*Rule refused.*

1848. }  
Jan. 15. } THE QUEEN v. HAMMERSMITH.

*Order of Removal—Jurisdiction—Metropolitan Police Court—3 & 4 Vict. c. 84.—Settlement—Emancipation.*

An order of removal purported to be made by B. C, "one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell Police Court, within the metropolitan police district" :—Held, that this sufficiently shewed that the Clerkenwell Police Court was a court appointed under the provisions of 3 & 4 Vict. c. 84.

The examinations stated that the pauper's father resided in H. up to the year 1826, when he removed to another parish ; that the pauper resided with his parents in H. as part of their family, and was then under twenty-one ; and that in 1816 the father acquired a settlement in H. :—Held, that nothing appearing to the contrary, it was to be presumed that the pauper was unemancipated in 1816, and took his father's settlement.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 47.]

1848. }  
January. } CHRISTOPHERSON v. BARE.

*Pleading — Assault — Imprisonment — Leave and Licence.*

An assault ex vi termini excludes consent ; therefore, a plea of leave and licence to a declaration charging an assault is bad as amounting to the general issue.

Quære, if it can be pleaded to an action for imprisonment.

The declaration stated that the defendant, on &c., with force and arms, &c., assaulted the plaintiff, and then imprisoned him, and



kept and detained him in prison for a long time, to wit, for one month and twenty-five days, contrary to law, and against the will of the plaintiff, &c.

Plea, that the defendant, at the said several times when, &c., by the leave and licence of the plaintiff to him for that purpose first given and granted, committed the trespasses in the declaration mentioned.

Demurrer as to so much and such part of the plea as relates to the assaulting the plaintiff and imprisoning him, and keeping and detaining him in prison for thirty-three days, parcel &c., on the ground that the plaintiff, having given the defendant leave and licence to commit the trespasses, cannot in law be a justification of the same; and that the plea is an argumentative traverse of the defendant's having imprisoned the plaintiff, and amounts to not guilty, and should have concluded to the country.

Joinder in demurrer.

*O'Malley*, in support of the demurrer.—Absence of consent is necessary to the existence of an assault—*The King v. Banks* (1) and *The King v. Martin* (2). This plea, therefore, does not confess an assault, and amounts to an informal traverse. So again, "imprisonment" implies restraint, but "leave and licence" asserts absence of restraint—*Vin. Abr. 'Imprisonment,'* (A, 1,) *Clarke's case* (3), *Buller's N.P.* 17.

[PATTESON, J.—Suppose a person subject to fits of insanity, knowing one to be about to come on, requests a keeper to restrain him, and afterwards revokes his will to be restrained and brings an action, ought the licence to be pleaded?]

There the person would not be capable during the fit of revoking his will.

*Pearson*, contra.—The plea confesses an assault and imprisonment in fact, which is sufficient to support the declaration; the words "against the will of the plaintiff" being surplusage. The argument on the other side would go to exclude leave and licence as a plea to trespass to goods; but *Milman v. Dolwell* (4) is against that view. The plea only admits what is material in the

declaration. Such a plea as this has been allowed in trespass for criminal conversation.

[PATTESON, J.—The argument is, that assault and imprisonment *ex vi termini* exclude consent.]

In *The King v. Meredith* (5), there is a dictum of Lord Abinger, C.B., that leave and licence may be pleaded to an assault.

[COLERIDGE, J.—In *Dicas v. Lord Brougham* (6), on not guilty, the defendant was allowed to shew that the imprisonment of the plaintiff was a judicial act.]

*Taylor v. Smith* (7) is distinguishable from this case.

[WIGHTMAN, J.—An action for imprisonment will not lie, except it be assumed or shewn to be against the plaintiff's will.]

An agreement to an imprisonment is legal, but not to a battery, for that is a breach of the peace—*Lewis v. Davison* (8), where Parke, J. distinguishes *Allen v. Rescous* (9).

[COLERIDGE, J.—Your plea to be good must answer both the assault and the imprisonment.]

Then the demurrer is insufficient, as it only objects to part of the plea.

[WIGHTMAN, J.—You cannot demur to the form of a demurrer; and if your plea is bad in part, it is bad altogether.]

LORD DENMAN, C.J.—It is not necessary to say whether an imprisonment may be justified under these circumstances; but as to the assault, it is vain to contend that it could exist, except against the will of the party assaulted.

PATTESON, J.—I have great doubts as to the imprisonment, whether it imports that it was against the consent of the party imprisoned; but an assault certainly does import that. The plea seems a direct contradiction of the declaration. I think it amounts to the general issue; and is, therefore, bad.

COLERIDGE, J.—On a declaration charging an assault, the defendant under not guilty may shew that it was not an assault in point of law. If so, this plea justifying

(5) 8 Car. & Pay. 589.

(6) 6 Ibid. 249.

(7) 7 Taunt. 156.

(8) 4 Mea. & Wels. 654; s. c. 8 Law J. Rep. (N.S.) Exch. 78.

(9) 2 Lev. 174.

(1) 8 Car. & Pay. 574.

(2) 9 Ibid. 213.

(3) 5 Rep. 64.

(4) 2 Campb. 378.

on the ground of leave and licence, must amount to the same thing.

WIGHTMAN, J. concurred.

*Judgment for the plaintiff.*

[IN THE EXCHEQUER CHAMBER.]

1847.	}	LINDSAY v. LEIGH.
May 12, 15.		
1848.		
Feb. 2.		

*Master and Servant—4 Geo. 4. c. 34.—*

*Commitment—Form—Conviction—Justice of the Peace.*

*No other instrument is necessary to authorize the detention of a servant sentenced by a Magistrate to imprisonment and hard labour for an offence under the 4 Geo. 4. c. 34. s. 3. than a warrant of commitment, founded on a sufficient information; and the legality of the imprisonment must depend on the legality and sufficiency of that instrument alone.*

*Semble—that such an instrument is an order and not a conviction.*

*Whether such an instrument is to be construed less strictly, as an order, or more strictly, as a conviction, it is bad if it does not shew on the face of it, either that the contract between the master and servant was in writing, in which case a failure to enter into the service is an offence under the act, or that the servant had entered into the service, in which case it is an offence in the servant to absent himself from his service, although the contract is not in writing.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 50.]

[IN THE EXCHEQUER CHAMBER.\*]

1848.	}	DOUGHTY v. BOWMAN AND FULFORD.
Feb. 2.		

*Covenant, Nature of—What runs with the Land—Privity.*

*A, by indenture, demised to B. certain land, and B. covenanted for himself, his*

*heirs, executors, administrators, and assigns, to build certain houses upon such land within two years. B. underlet to C, and covenanted for himself, and his heirs, executors, and administrators, to observe and perform, or effectually to indemnify C. against, the covenants in the first indenture. B. afterwards assigned his reversion to D. A. having entered, and ejected C. by reason of the non-performance of the first-mentioned covenant,—Held, that B.'s covenant with C. did not run with the land, and that D. was not liable to C.*

Error from the Court of Queen's Bench.

*Covenant.* The declaration set out an indenture made between J. Scholefield, of the one part, and E. Burt of the second part, whereby Scholefield demised unto Burt certain lands for a term of years, and whereby Burt covenanted for himself, his executors, and assigns, that he should and would, within the space of two years from the day of the date of the indenture, erect and build upon the piece or parcel of land demised, four or more good and substantial messuages and dwelling-houses, &c. The indenture contained the usual claim of forfeiture for non-performance of the covenant.

The declaration then alleged an entry by Burt, the making of a sub-lease by Burt to the plaintiff, whereby Burt, for himself, his heirs, executors, and administrators, covenanted with the plaintiff that he would during the continuance of the said sub-lease observe and perform or effectually indemnify the plaintiff of and from and against all and singular the provisoes, covenants, and agreements by the above-mentioned indenture to be observed and performed; that the plaintiff entered; and that afterwards Burt assigned all his interest in the reversion to the defendants; that the defendants refused to perform the covenant entered into with Scholefield, to build, &c., but, on the contrary, committed a breach thereof, and refused to indemnify the plaintiff; and that by reason of such breach, Scholefield entered upon the premises, and expelled the plaintiff.

The defendants demurred to this declaration, upon the ground that the covenant declared upon was personal only, and that as assigns they were not bound by it.

\* Coram Parke, B., Alderson, B., Maule, J., Cresswell, J., Platt, B., and Williams, J.

The Court of Queen's Bench, having given judgment for the defendants, the present writ of error was brought. The pleadings in the case are set out in full in the report of the case below (1).

*Crowder (M'Mahon with him)*, for the plaintiff.—The judgment of the Court below ought to be reversed. The covenant entered into by Burt with the plaintiff was one for quiet enjoyment; if so, it bound the assignees of the reversion. It was a covenant falling within the fourth rather than the second resolution in *Spencer's case* (2). In *Vernon v. Smith* (3), a covenant to keep buildings in the city of London insured against fire was held to run with the land.

[WILLIAMS, J.—In that case the assigns were named in the covenant.]

They referred to *Campbell v. Lewis* (4). All the cases upon the subject are collected in the notes to *Spencer's case*, 1 *Smith's Leading Cases*, p. 29.

*Addison*, contra, after referring to *Bac. Abr.* 'Covenant,' B,—*Merrill v. Frame* (5), *Shep. Touch.* 165, and *Line v. Stephenson* (6), was stopped by the Court.

*Crowder*, in reply, cited *Williams v. Burvell* (7).

PARKE, B.—We all think that the judgment of the Queen's Bench should be affirmed. The question is, whether the covenant in the sub-lease by Burt to the plaintiff passed with the reversion to the defendants or not. It has been argued, on behalf of the plaintiff, that this covenant amounted in law to one for quiet enjoyment. Here the covenant which Burt entered into with the plaintiff was in terms that he would perform all the covenants contained in the original demise from Scholefield to him, or effectually indemnify the plaintiff. A covenant to perform covenants is to be construed as if the latter covenants were inserted at full length in the sub-lease, and

applying that test, the covenant which Burt entered into with the plaintiff was to build certain dwelling-houses upon the land demised by Scholefield within the space of two years from the date of the indenture of demise entered into between those parties. This is a description of covenant which, it is clear from the second resolution in *Spencer's case*, does not bind assigns, unless they are expressly named. Again, if the covenant be taken in the alternative, it amounts to nothing more than a covenant to indemnify; and that clearly is not the same thing as a covenant for quiet enjoyment. A covenant to indemnify is much larger than one for quiet enjoyment. Nor can you split a covenant to indemnify into parts. The effect of that would be to make the same covenant both running with the land and collateral to it at the same time, which clearly cannot be. Taken in the alternative, therefore, as a covenant to indemnify, it was a personal covenant only, and did not pass with the reversion. I have now merely stated at greater length the reasons given by Mr. Justice Patteson for his judgment in the Court below.

*Judgment affirmed.*

BAIL COURT.

1848.

Jan. 17, 28.

*Ex parte* THE PARISH OF  
MONKLEIGH.

*Pauper Lunatic*—8 & 9 *Vict. c. 126*.  
ss. 58, 62, 80.—*Proceedings ex parte.*

*It is no ground of objection to an order of Justices adjudicating the settlement of a pauper lunatic, or to an order for the costs of his maintenance, made under the statute 8 & 9 Vict. c. 126, that the proceedings before the Justices were taken ex parte, and without notice to the parish sought to be affected by the orders.*

*Semble—That upon appeal against an order of maintenance made under the above statute, the settlement of the pauper may be put in issue.*

[For the report of the above case, see 17 *Law J. Rep.*, (N.S.) M.C. p. 76.]

(1) 16 *Law J. Rep.* (N.S.) Q.B. 414.

(2) 5 *Rep.* 16.

(3) 5 *B. & Ald.* 1.

(4) 3 *Ibid.* 392.

(5) 4 *Taunt.* 329.

(6) 5 *Bing. N.C.* 183; s. c. 7 *Law J. Rep.* (N.S.) C.P. 263.

(7) 1 *Com. B.* 402; s. c. 14 *Law J. Rep.* (N.S.) C.P. 98.

BAIL COURT. { SLEEMAN AND OTHERS, AS-  
1848. { SIGNEES, v. THE GOVERNORS  
Jan. 21, 28. { AND COMPANY OF THE  
COPPER MINES OF ENG-  
LAND.

*Costs of the Day—Amendment—Informal Record.*

*A cause being called on for trial, after the jury were sworn, it was discovered that the record was defective in not containing a similiter to one of the plaintiff's replications, or any award of the venire, and in consequence of the defendants withholding their consent to an amendment of the record in these respects, the Judge discharged the jury,—Held, that the defendants were not entitled to the costs of the day.*

This cause having been entered for trial at the last Summer Assizes for the county of Brecon, was called on in its order. After the jury had been sworn, it was discovered that the record did not contain any *similiter* to the plaintiffs' replication of *de injuriâ*, nor any award of the *venire*. An application was made to the Judge to allow the record to be amended in these respects; but the counsel for the defendants withholding their consent to this course, the Judge considered that he had no authority to make the amendment *à invitos*, and the jury were accordingly discharged. A rule having been obtained in the course of Michaelmas term last, on behalf of the defendants, for the costs of the day, for not proceeding to trial, a rule *nisi* was subsequently obtained on behalf of the plaintiffs calling upon the defendants to shew cause why the above rule for the costs of the day should not be discharged.

*Chilton and Benson* (Jan. 21) shewed cause.—There is no ground for refusing the defendants the costs of the day. They were bound to attend at the trial by their counsel and witnesses in obedience to the notice of trial; and if, owing to the default of the plaintiffs, the record was in such a state that no valid trial could be had, that is no reason for depriving the defendants of their costs. The defendants were not bound to give their consent to the amendments proposed. In the absence of such consent the authorities are clear that the amendment could not be made; and if not, then that the

cause could not proceed—*Rowlinson v. Roantre* (1), *Adams v. Power* (2), *Bent v. Benyon* (3). They referred also to *Ouchterlony v. Gibson* (4), *Cooke v. Smith* (5), *Cox v. Painter* (6), *Gee v. Swann* (7).

*Evans, Ball, and Davison*, contra.—This rule should be made absolute. As a general rule, where a jury is discharged by the consent of the parties, or by the order of the Judge who presides at the trial, neither party pays the costs of the day incurred by the other side—*Waite v. Spurgin* (8), *Seeley v. Powers* (9), *Everett v. Jones* (10). In the present case all that appears upon the record is, that the jury were discharged by order of the Judge. At any rate these costs may be awarded or not, at the discretion of the Court; and, in the present case, the circumstances are not such as should induce the Court to exercise this discretion in favour of the defendants. They ought to have given their consent to the proposed amendment. The informality upon the record was one by which they could not have been prejudiced—*Ogle v. Moffat* (11), *Mullings v. ———* (12), *The Bishop of Worcester's case* (13), *Child v. Harvey* (14).  
*Cur. adv. vult.*

ERLE, J. now (Jan. 28) delivered his judgment.—This was an application to discharge a rule obtained by the defendants for the costs of the day, for not proceeding to trial. It appears that, on the cause being called on and the jury sworn, it was discovered that an imperfect record had been made up, and the learned Judge who then presided, considering he had no power to make the amendment without the consent of the defendants, which the defendants refused, was compelled to discharge the

- (1) 6 Car. & Pay. 551.
- (2) 7 Ibid. 76.
- (3) 6 Ibid. 217.
- (4) 4 Man. & Gr. 461; s. c. 12 Law J. Rep. (N.S.) C.P. 94.
- (5) 1 Dowl. (N.S.) 861.
- (6) 7 Car. & Pay. 767.
- (7) 9 Mees. & Wels. 685; s. c. 10 Law J. Rep. (N.S.) Exch. 291.
- (8) 4 Dowl. P.C. 575.
- (9) 3 Ibid. 372.
- (10) Norfolk Assizes, 1847.
- (11) Barnes, 133.
- (12) 5 Taunt. 88.
- (13) 1 Salk. 48.
- (14) Ibid.

jury. It is quite clear from the authorities that the Court has a discretion in granting or withholding these costs. As the defendants themselves were the means of preventing this cause being tried by withholding their consent to the Judge making the required amendment, the rule for discharging the rule for the costs of the day will be made absolute.

*Rule absolute.*

[IN THE EXCHEQUER CHAMBER (1).]

1847.  
Nov. 26. }  
1848. } FORD v. BEECH.  
Feb. 3. }

*Contract, Construction of—Suspension of Right of Action—Promissory Note.*

*To a declaration by the payee against the maker of a promissory note, the defendant pleaded that after the note had become due it was agreed between the plaintiff, the defendant, and one A. B, that the said A. B. should, at the request of the plaintiff, pay to the plaintiff in trust for E. B, 200l., for her sole use and benefit, or the sum of 25l. per annum, so long as the sum of 200l. should remain unpaid, and that the rights and causes of action of the plaintiff upon and in respect of the said note should be suspended, so long as the said A. B. should continue to pay the said sum of 25l.; averment, that the said A. B. had paid the said sum, &c. Upon issue joined to a replication traversing such payment by A. B, a verdict was found, and judgment afterwards given for the defendant. On error brought to reverse such judgment,—Held, that the above plea was bad in substance, the legal effect of the agreement therein set out being not to suspend the plaintiff's right of action upon the note, but only to subject him to an action, if he sued contrary to the terms of the agreement.*

*Error from the Court of Queen's Bench (2).*

(1) *Coram Wilde, C.J., Parke, B., Alderson, B., Maule, J., Cresswell, J., Platt, B., and Williams, J.*

(2) The judgment of the Court below will be found reported in 16 Law J. Rep. (n.s.) Q.B. 100. The pleadings upon which the judgment of the Court of Exchequer Chamber was given are sufficiently set out in the judgment of the Court.

The case was argued (Nov. 26) by—  
*Pashley*, for the plaintiff in error, who relied upon the following authorities:—

*Williams on Executors*, 1035.

*Freakley v. Fox*, 9 B. & C. 130; s.c. 7 Law J. Rep. K.B. 148.

*Kearslake v. Morgan*, 5 Term Rep. 513.

*Stedman v. Gooch*, 1 Esp. 5.

*James v. Williams*, 13 Mee. & Wels. 828; s.c. 14 Law J. Rep. (n.s.) Exch. 220.

*Baker v. Walker*, 14 Ibid. 465; s.c. 14 Law J. Rep. (n.s.) Exch. 371.

*Price v. Price*, 16 Ibid. 232; s.c. 16 Law J. Rep. (n.s.) Exch. 99.

*Fearne v. Cochrane*, 16 Law J. Rep. (n.s.) C.P. 161.

*Good v. Cheesman*, 2 B. & Ad. 328; s.c. 9 Law J. Rep. K.B. 234.

*The Sheffield Railway Company v. Woodcock*, 7 Mee. & Wels. 574; s.c. 11 Law J. Rep. (n.s.) Exch. 26.

*Tremeere v. Morison*, 1 Bing. N.C. 89; s.c. 3 Law J. Rep. (n.s.) C.P. 260.

*Stracy v. the Bank of England*, 6 Bing. 754; s.c. 8 Law J. Rep. C.P. 234. 2 Wms. Saund. 47, f.f.

*Thimbleby v. Barron*, 3 Mee. & Wels. 210; s.c. 7 Law J. Rep. (n.s.) Exch. 128.

*Tatlock v. Smith*, 6 Bing. 339; s.c. 8 Law J. Rep. C.P. 54.

2 Wms. Saund. 103, b, and 150, a, (n. 1). *Davis v. Gyde*, 2 Ad. & El. 623; s.c. 4 Law J. Rep. (n.s.) K.B. 84.

*Allies v. Probyn*, 2 Cr. M. & R. 408; s.c. 4 Law J. Rep. (n.s.) Exch. 227.

*Snook v. Mattock*, 5 Ad. & El. 239; s.c. 5 Law J. Rep. (n.s.) K.B. 206.

*Harris v. Reynolds*, 7 Q.B. Rep. 71; s.c. 14 Law J. Rep. (n.s.) Q.B. 241.

*Com. Dig.* 'Accord,' (B, 4.)

*Peytoe's case*, 9 Rep. 79, b.

*Bayley v. Homan*, 3 Bing. N.C. 915; s.c. 6 Law J. Rep. (n.s.) C.P. 309.

*James v. David*, 5 Term Rep. 141.

*Unthank* (Cross with him), for the defendant in error, cited—

*Bolton v. the Bishop of Carlisle*, 2 H. Bl. 260.

*Tatlock v. Smith.*

*Good v. Cheesman.*

*Stracy v. the Bank of England.*

*Simon v. Lloyd*, 2 Cr. M. & R. 187; s.c. 4 Law J. Rep. (n.s.) Exch. 195.

*Com. Dig.* 'Accord,' (B. 4.)

*Case v. Barber*, 2 Sir T. Jones, 158.

*Hyde v. Watts*, 12 Mee. & Wels. 254;

s.c. 13 Law J. Rep. (N.S.) Exch. 41.

*Allies v. Probyn*.

*Cur. adv. vult.*

WILDE, C.J. now (Feb. 3) delivered the judgment of the Court.—This is a writ of error brought to reverse a judgment of her Majesty's Court of Queen's Bench. The declaration is in *assumpsit*, and contains five counts. The first count is upon a promissory note, dated the 28th of May 1839, made by the defendant for the sum of 140*l.* and interest, payable to the plaintiff twelve months after date. The second count is also on a promissory note, made by the defendant, for the sum of 200*l.*, payable, with interest, to the plaintiff, two years after date. It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant, and no question arises in respect of that judgment. The defendant pleaded to the first count, that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and verdicts have been found upon them for the plaintiff. The defendant also pleaded to both the first and second counts, that after the making of the notes in those counts respectively mentioned, and after the second note respectively became due, it was agreed between the plaintiff, the defendant, and one Alfred Beech, that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of 200*l.* for her own sole use and benefit, or the sum of 25*l.* per annum, so long as the sum of 200*l.* should remain unpaid, which sum of 25*l.* should be paid quarterly, as therein mentioned, and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended, so long as he, the said A. B., should continue to pay the said sum of 6*l.* 5*s.* every quarter, the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of 25*l.* quarterly, according to the agreement. The plaintiff, in his replication to this plea, traversed the allegation of the

payments alleged to have been made by A. B. of the annual sum of 25*l.*, and a verdict was found for the defendant upon the issue joined upon that traverse, and judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment upon the ground that, *non obstante veredicto*, upon the matters in the plea judgment ought to have been given for the plaintiff upon both the first and second counts.

The plaintiff has brought his writ of error praying for a reversal of the judgment; and upon the argument before us, the learned counsel for the plaintiff has contended, that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied, but it has been insisted upon the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action, or power to sue for the recovery of the notes mentioned in the first and second counts of the declaration; and that the plea which sets up the agreement in bar of the present action is bad, and furnishes no answer to the action, although such agreement may give the defendant a claim to damages, by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us, that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments, and such agreement has therefore been well pleaded in bar. The question for the decision of the Court is, therefore, what is the legal effect of the agreement between the parties set forth in the plea; that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments, or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages, in the event of his suing contrary to its terms. In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied, namely, that it

ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and that greater regard is to be had to the clear intent of the parties, than to any particular word which they may have used in the expression of their intent; and applying this rule, the question is, what sense and meaning must be given to the word "suspended" used by the parties. It is quite clear, that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and for ever and in all events extinguishing the plaintiff's claim and demand upon the notes, or in other words, that it should operate as a release of the money due upon them. This is plain, from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement. It is a very old and well-established principle of law, that the right to bring a personal action once existing, and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in *Plowden*, 36, "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge for ever;" and in *Lord North v. Butts* (3) it is said, "A thing personal, or action personal suspended for an hour is extinct and gone for ever, when it is by the act and consent of the party himself who has the thing suspended;" and in *Plowden*, 184, it is said, "A personal action once suspended by the act or agreement of the party is always extinct, and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is repeated throughout the text books of authority, and recognized and applied throughout a long course of decisions; and in *Cheetham v. Ward* (4) it is said by Lord Chief Justice Eyre, that the principle is now acknowledged, "that where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged." To con-

strue the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes and an extinction of the debt. It follows that the giving such meaning and effect to the word "suspended" used in the agreement, would be contrary to the intention of the parties; and it is a well approved rule of law, that where parties have used language which admits of two constructions, one contrary to the apparent general intent, and the other consistent with it, the law assumes the latter to be the true construction. A few authorities will suffice in support of this principle. In commenting upon *Littleton*, s. 560, where Littleton says, "If there be lord and tenant, and the tenant grant the tenements to a man for life, with remainder to another in fee, and the lord grant his service to the tenant for life in fee, the services are in suspense during his life, but the heirs of the tenant for life shall have the services after his decease," Lord Coke in p. 313, *b*, says, "It is to be observed, that albeit a grant, as hath been said, may enure by way of release, and a release to the tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant, to the prejudice of any, or against the meaning of the parties, as here it should; for if by construction it should enure to a release, the heirs of the tenant for life should be disinherited of the rent; and, therefore, Littleton here saith that the heirs of the grantee shall have the seignorie after his death." In the present case, if the agreement operates as a release, by reason of a suspension of the right of action by the act of the party, it must be by a consequence of law, inasmuch as there is no express release. And in *Co. Litt.* p. 264 *b*, it is said, "A release in law shall be expounded more favourably according to the intent and meaning of the parties than a release in deed, which is the act of the party, and shall be taken most strongly against himself." The general rules of law for the construction of instruments are clearly laid down by Willes, L.C.J., in *Parkhurst v.*

(3) 2 Dyer, 140, *a*, 39.

(4) 1 Bos. & P. 630.

*Smith* (5), and which is to the effect, that greater regard is to be had to the intention than to the precise words, and this rule is said to have the authority of Littleton, Plowden, Coke, Hobart, and Finch. This principle is recognized and adopted by Gibbs, L.C.J., in *Hutton v. Eyre* (6), and it is also stated and applied by Dallas, L.C.J., and various authorities referred to in *Solly v. Forbes* (7), wherein he states as the result of modern authority, that the Courts look rather to the intention of the parties than to the strict letter, not suffering the latter to defeat the former; and he observed, that "if a deed can operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute, so to construe it as to give effect to the intent," regard being had to the entire deed; and he remarks upon the fallacy of assuming that wherever the word "release" is made use of, it must operate absolutely and unconditionally, though followed by words of qualification. Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made, and that the effect of such agreement on his part was not to suspend his right of action in the mean time, but to subject him to an action for damages, in the event of his suing, contrary to his agreement. The general doctrine of suspension of personal actions appears to be applicable to cases where persons have by their own acts placed themselves in circumstances incompatible with the application of the ordinary legal remedies; the cases generally referred to in the books being where the party to pay and to receive have become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be; such as a creditor making his debtor his executor, or debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue, as to which the authorities are numerous. See *Co. Litt.* p. 264, b, also *Hargrave &*

*Builer's notes, Woodward v. Lord Darcy* (8), *Nedham's case* (9), *Dorchester v. Webb* (10), *Wankford v. Wankford* (11), *Freakly v. Fox* (12), *Williams on Executors*, p. 1035, 2 *Saund.* 47, ff. The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence, a release or extinguishment of the right of action, is where the covenant or promise not to sue is general not to sue at any time; in such cases, in order to avoid circuity of action, the covenant may be pleaded in bar as a release, for the reason assigned in *Smith v. Mapleback* (13), that the damages to be recovered in an action brought for suing contrary to the covenant, would be equal to the debt or sum to be recovered in the action agreed to be forborne. Accordingly, in *Deux v. Jefferies* (14), in debt on obligation, where the defendant pleaded that the plaintiff covenanted that he would not sue before Michaelmas, it was resolved upon demurrer for the plaintiff, for that "it was only a covenant not to sue, and should not enure as a release nor could be pleaded in bar; but the party was put to his writ of covenant, if sued before the time. But if it had been a covenant that he would not sue at all, peradventure it might enure as a release, and be pleaded in bar; but not here; for it never was the intent of the parties to make it a release." There are other authorities to the like effect.

The agreement in the present case, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but cannot have a greater effect; and in the modern case of *Thimbleby v. Barron* (15) it was held, that a covenant not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt. In that case the plaintiff had covenanted that he would not, before the expiration of ten years, demand or compel payment of certain sums of money, nor would take any means or proceedings for

(8) Plowd. 184.

(9) 8 Rep. 135 a.

(10) Cro. Car. 372.

(11) 1 Salk. 299.

(12) 9 B. & C. 130; s. c. 7 Law J. Rep. K.B. 148.

(13) 1 Term Rep. 441.

(14) Cro. Eliz. 352.

(15) 3 Mee. & Wels. 210; s. c. 7 Law J. Rep. (n.s.) Exch. 128.

(5) Willes, 332.

(6) 1 Marshall, 603.

(7) 2 Brod. & B. 38.



obtaining possession or receipt of the same. Lord Abinger, C.B. said, "The breach of the agreement to forbear suing, renders the party liable in damages, but is not pleadable in bar;" and Parke, B. said, "The books are full of authorities against the defendant," and referred to *Ayloffe v. Scrimshire* (16), and judgment was accordingly given for the plaintiff. In 1 *Roll. Abr.* p. 939, s. 2, it is said that "if the obligee covenant not to sue the obligor before such a day, and if he do that the obligor shall plead this as an acquittance; and that the obligation shall be void and of non-effect; this is a suspension of the debt, and by consequence a release." It must be observed that in that case it was expressly covenanted, that in the event of the covenantor suing upon the obligation contrary to his covenant that the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which by consequence was a release. The covenant in that case, therefore, went much beyond a mere covenant not to sue.

By holding the plea in question a valid bar injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross-action to recover damages to the extent of the injury sustained by the defendant by the plaintiff's suing in breach of the agreement, no injustice is done to the defendant, nor is such a construction inconsistent with the class of authorities in which matters have been allowed to be pleaded in bar, in order to avoid circuity of action; because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions (*Smith v. Mapleback*); which does not apply to the present instance, as the damages to which the defendant could be entitled as against the plaintiff by reason of his suing upon the notes before a discontinuance of the quarterly payments, can in no view be assumed to be equal to the plaintiff's demand. Neither is the decision in this case inconsistent with the several cases in which it has been held that a party

(16) *Carth.* 63; *a.c.* 1 *Show.* 46.

accepting a negotiable security, payable in future for and on account of an antecedent demand, cannot, until after such negotiable security has become due and been dishonoured, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favour of the Law Merchant — 2 *Wms. Saund.* 103, *b.* The case of *Stracy v. the Bank of England* was cited on the defendants' behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement without operating as a release or extinguishment; but upon examination it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer, upon request, of certain stock, to which the plaintiff was entitled; the defendants insisted that the plaintiff had, for a good consideration, agreed not to make such a request until he had himself done certain acts, and alleged that the plaintiff, contrary to his agreement, made the request, for the non-compliance with which he brought his action before he had done those acts; the defendants, therefore, contended that such non-compliance was no breach of duty on their part. There was no right of action suspended by the agreement, as it is clear from the case that no request had ever been made to the Bank to transfer the stock, and no means had ever been given to enable the Bank to do so; no name of a transferee having been given at the time when the agreement was made, nor for a long time afterwards; consequently the only right of action the plaintiff ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendants to make the transfer until after he had done the acts mentioned in the agreement; and although the expression of suspending an action was used perhaps inaccurately, yet it is plain that they referred to the right to

call for the transfer of the stock, and to that only. At all events, as a decision upon the point for which the case was cited it could not be supported, as it would be inconsistent with an undoubted principle of law and an undeviating course of authority. In the result, we are of opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it, in favour of the defendant, must be reversed, and a judgment entered for the plaintiff, *non obstante veredicto*.

*Judgment reversed.*

1848. }  
Feb. 3. } DOE d. SNAPE v. NEVELL.

*Devise—Construction—Repugnancy.*

*The Court will construe a will so as to reconcile words which are primâ facie repugnant.*

*Therefore, where a testator devised a messuage and other freeholds by name to his wife for life, remainder to A. in fee; and also devised to his wife in fee "all his real and personal estates both freehold and copyhold, and now surrendered to the uses of my will."—Held, that the word "all" was to be read "all the residue" to satisfy the intention of the testator, and that A. on the death of the wife took the remainder in fee in the estates first devised.*

Ejectment on a demise by the lessor of the plaintiff laid on the 25th of November 1846. By a Judge's order the following case was stated for the opinion of the Court:—

#### CASE.

Thomas Lester being seised in fee of the tenements in question in this cause, which consist of a freehold messuage or dwelling-house, outbuildings, garden and croft, situate in the parish of Yoxall, containing about three quarters of an acre adjoining to a lane called Wood Lane, and being also seised of a piece of copyhold land containing about an acre and a quarter, adjoining and lying open to the said croft, and not fenced or separated therefrom within time of living memory, and the road to and from the copyhold part of the premises being over the freehold

croft, and being also seised of a detached freehold close containing 2 roods 27 perches, heretofore parcel of the late Forest of Needwood, and which, on the inclosure thereof, was allotted to the said Thomas Lester in respect of the said freehold and copyhold property, and being also possessed of some household goods and furniture, and other personal estate, died in August 1819, having duly made and published his last will and testament, in writing, executed and attested so as to pass real estates in the words following, that is to say, "First, I will that all my just debts, funeral expenses, and legacies, and the expense of proving this my will shall be paid and discharged as soon after my decease as they conveniently can. Afterwards I give, devise and bequeath unto my dearly beloved wife, Mary Lester, for and during the term of her natural life, my messuage or dwelling-house, and other buildings belonging to the same, wherein I now inhabit and dwell, and the freehold croft and garden on which the said messuage and other buildings stand, and belonging to the same, lying and being in the parish of Yoxall aforesaid; and from and after her decease I give, devise, and bequeath the aforesaid messuage or dwelling-house, and other buildings, together with the said freehold croft and garden belonging to the same, unto William Sharrott, of Yoxall aforesaid, tailor, Francis Sharrott, of the city of Lichfield, writing clerk, and Harriet Lester, daughter of Moses Lester, of the city of Worcester, tailor, their heirs and assigns for ever, and to be equally divided amongst them. Also I give, devise, and bequeath unto my said wife, Mary Lester, her heirs and assigns for ever, all my real and personal estates whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to the uses of my will, and to have the same at my decease; but if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same, and I do hereby nominate and appoint my said wife, Mary Lester, and Francis Sharrott, of the city of Lichfield, writing clerk, executors of this my last will and testament. In witness, &c. Dated the 8th of February 1810."

On the death of the testator, his wife,

Mary Lester, entered on all his freehold property. She died in November 1835, leaving the lessor of the plaintiff her grand-nephew and heir-at-law, who, on attaining the age of twenty-one years in October 1846, brought the present action to recover the freehold messuage, garden, and croft, Francis Sharratt and the other devisees in remainder having entered on the death of Mary Lester, and enjoyed the same till the time of bringing the action.

The question for the opinion of the Court was, whether the said freehold messuage or dwelling-house, garden and croft passed by the will of the said Thomas Lester to the said William Sharratt, Francis Sharratt, and Harriet Lester, after the death of Mary Lester, or whether the same passed, by the subsequent words of the will, to the testator's wife in fee. If the former, judgment of *nolle prosequi* to be given for the defendant. If the latter, judgment by confession to be given for the plaintiff.

*Whately*, for the lessor of the plaintiff.—The first devise is irreconcilable with the second, and the latter must therefore prevail—*Sims v. Doughty* (1), *Constantine v. Constantine* (2), *Odell v. Crone* (3), *Jarman on Wills*, p. 412, *Shep. Touch.* 402, *Doe d. Spencer v. Pedley* (4). The testator, either from inaccuracy or change of intention, appears to have varied the disposition of his property in more than one particular, as he charges his freehold property with the payment of his debts and legacies in the first part of his will, but he charges the copyhold with the payment of debts only in the latter part.

[WIGHTMAN, J.—But the second devise introduces a new subject-matter by the words “now surrendered to the use of my will.”]

[PATTESON, J.—There appears to be a detached close on which this devise might operate.]

The defendant must contend that the word “all” must be read as if it were “all not hereinbefore devised.”

*Crowder* (*Taprell* was with him), for the

defendant.—Looking at the whole will it is clear that the word “all” in the second devise means all the rest and residue, &c. In *Anon. Dalison*, 93, the following instance is given. “A man seised of land in four counties devises his lands in three of the counties partly to his wife, and the residue to other persons; and by other words in the same will he devises all his lands to his wife to be disposed of after her death for the use and benefit of her son; and by the whole Court nothing passed by those words except the lands in the fourth county not mentioned before in the will.” That is precisely the present case. The last devise is, in fact, a residuary devise—*Holdfast v. Pardoe* (5), *Ulrich v. Litchfield* (6), *Adams v. Clerke* (7).

*Whately*, in reply.

LORD DENMAN, C.J.—The case in *Atkyns* is an authority that the Court will construe a will so as to reconcile devises which may at first seem inconsistent. We must look at the whole, and I think on a reasonable construction the defendant is entitled to our judgment.

PATTESON, J.—There can be no doubt whatever in this case. If there is anything on which the second devise can operate, which I think there is, in that case the words in the first and second devises are clearly reconcilable.

WIGHTMAN, J.—If by any construction the Court can carry out the intension of the testator, they will do it rather than do violence to that intension. Here the testator in the second clause devises all his real and personal estate; and he adds the words “both freehold and copyhold, and now surrendered to the uses of my will.” The question is, whether by this second devise the testator intended to give the whole of his real estate, or the whole that was undisposed of. Unless the word “all” is taken in its most extended sense the devises are not inconsistent; and I think the case in *Dalison* is expressly in point to shew that it may be well taken to mean all that is undisposed of. The case of *Ulrich v. Litchfield* turned principally on the question of the admissibility of parol evidence,

(1) 5 Ves. 243.

(2) 6 Ibid. 102.

(3) 3 Dow. 61.

(4) 1 Mee. & Wels. 675; s. c. 5 Law J. Rep. (n.s.) Exch. 221.

(5) 1 W. Black. 975.

(6) 2 Atk. 372.

(7) 9 Mod. 154.

but the remarks of the Lord Chancellor in that case are important, as he observes that "the charge was on the real estate in case the other should not be sufficient." Here the testator seems to have intended to charge his copyhold estate with the payment of his debts, leaving the freehold untouched.

[IN THE EXCHEQUER CHAMBER.\*]

1846. }  
Dec. 2. } JONES v. ROBIN.  
1847. }  
May 12. }

*Common pur cause de vicinage—Pleading—Custom—Prescription.*

*Common pur cause de vicinage may exist between two proprietors of neighbouring farms, independently of any rights of common on either side—semble.*

*But a claim of such a right by an individual, as annexed or incident to a private estate, cannot be good by custom, but must be pleaded as a prescription in a que estate.*

Error from the Court of Queen's Bench.

Trespass for seizing and distraining sheep.

Plea—justifying the seizure of the sheep as damage feasant, in a farm of J. R. called Tan-y-Graig.

Replication—That the said farm of J. R. called Tan-y-Graig from time immemorial lay contiguous to a farm called Nant Heilyn, from which it never was separated by any fence sufficient to prevent sheep from escaping from one farm to the other; and that the sheep put on Nant Heilyn have from time immemorial been accustomed to escape and ramble therefrom into Tan-y-Graig, and to intermix there, and *vice versa*; and that the plaintiff, being tenant of Nant Heilyn, put the sheep there, which of their own accord, and without his consent, escaped into Tan-y-Graig, &c. The rejoinder was specially demurred to, but the only point arose on the replication (1). The Court of Queen's Bench gave judgment for the de-

fendant, on the demurrer, upon which the plaintiff brought a writ of error, which was argued (Dec. 2, 1846) by—

*Watson*, for the plaintiff in error; and *Hayes*, for the defendant in error.—The arguments were the same as those advanced below, and are noticed in the judgment, which was now (May 12, 1847) delivered by—

PARKE, B.—This case was argued at the Sittings after last Michaelmas term, before my Brothers Alderson, Coltman, Maule, Rolfe, Cresswell, Platt, and myself. It came before us on a writ of error, on a judgment of the Court of Queen's Bench for the defendant, on a demurrer to a rejoinder. [His Lordship then stated the pleadings.] The rejoinder was admitted on the argument here, as it was in the Court of Queen's Bench, to be bad; and the question is, whether the replication was good. It must be considered to be established that a common—or, as it is sometimes called, feeding—*Corbet's case* (2)—*pur cause de vicinage* is not properly a right of common or profit à prendre, but rather an excuse for a trespass—*Co. Litt.* 122. See also the authorities cited in *Wells v. Percy* (3). Lord Coke says "that the person entitled cannot put in his cattle into the adjoining waste; but they must escape into it." Yet in some of the precedents after noticed, as in *Rastell*, 625, b, and *Year Book*, 22 Hen. 6, pl. 51, the turning is stated to be on the adjoining pasture. It must, however, we think, be considered that the law is as stated by Lord Coke. The question then arises, to which the argument before us was mainly addressed, whether it is essential to support such a claim that it should be between persons having rights of common, properly so called, or at least that there should be commoners on both sides, or whether it may exist between two proprietors, whose lands are not subject to common rights; and very ingenious arguments in support of the affirmative of that proposition were used. The Court of Queen's Bench do not appear to have expressed any distinct opinion on this point. If this had been the only question, we think, after a careful considera-

(2) 7 Rep. 5 a.

(3) 1 Bing. N.C. 556; a. c. 4 Law J. Rep. (N.S.) C.P. 144.

\* Before Parke, B., Alderson, B., Coltman, J., Maule, J., Rolfe, B., Cresswell, J., and Platt, B.

(1) See the pleadings, set out at length, 15 Law J. Rep. (N.S.) Q.B. 15.

tion of the arguments, and of the authorities, we should probably have held that it might exist between two proprietors, without commons on either side. The reason of the law, which sanctions a claim of this sort, is either on account of its convenience—it being better to inter-common than that each should watch his own cattle, (7 Edw. 4. c. 26), or to avoid multiplicity of suits (4); and both these reasons apply to owners who inter-pasture as well as to commoners, though as to the latter not to the same degree; and the argument that the right can exist amongst commoners only, because they only are limited in turning cattle on the undivided waste or land, is of no weight, because the alleged usage restricts the right of intercommoning to cattle *duly* turned on, in order to pasture on the land of one proprietor, and therefore limits the number to such as could reasonably be fed on the land in respect of which the right is claimed (*Corbet's case*); and if we refer to the authorities we find that none lay it down to be necessary that there should be rights of common on both sides; and there are several old authorities that the right may be prescribed for by two owners. In the *Year Book*, 22 Hen. 6. pl. 51. is a prescription by the lord of Sale for his freeholders for life, for years, or at will, without any allegation that they had right of common. In *Fitz. Nat. Brev.* 180, it is said, one neighbour may claim common *pur cause de vicinage* in the lands of another neighbour, although he be not lord of the town. In the 7 Edw. 4. c. 26. there is a difference of opinion between the Judges. Coke, C.J. was of opinion that the allegation of a custom for the inhabitants of Sale to inter-common was bad, and that the prescription should be in a *que estate*; and Littleton, J. contrà, that it was enough to plead usage. The necessity of a right of common in the persons pleading the usage is not mentioned. In the case of common of Shack (5), the

owners of common field lands, not the commoners, inter-common—*Corbet's case*. Of modern precedents not many are to be found; that in *Mr. Chitty's Book*, p. 567, from which this replication appears to have been taken, does not mention rights of common. It is followed in the case of *Clarke v. Tinker* (6) in part, right of common being stated on one side and not on the other. That in *Heath v. Elliott* (7) stated the usage to be both for cattle turned on to feed and to use common of pasture. In *Wells v. Pearcy* the usage is said to be for commoners only. In one precedent of the late Mr. Serjeant Williams it is pleaded as a right by custom for cattle depasturing and feeding, not stating in what right; in another an ancient usage for common for cause, &c., for all having either right of pasturage or common of pasture. On the whole, the authorities appear to shew that there is no necessity for commoners on both sides in order to give validity to a claim of common *pur cause de vicinage*, though where such common exists most frequently there are commoners on both sides. But even assuming it to be clearly made out that two private owners of estates may have the right of inter-pasturing, we do not think that such right is properly claimed by this replication. The Court of Queen's Bench held that such a claim in a private estate could not be good by custom; and we entirely agree with them. A custom is the *lex loci*, an ancient local law in some known district, as a hamlet, town, or manor, (*Co. Litt.* 110, a.) and does not arise from the grant or agreement of the party—*Gateward's case* (8), whereas this right does, and though not a *profit à prendre*, nor properly an easement, but rather an excuse for a trespass, has its origin from a presumed mutual grant or covenant between the owners of each farm, that neither of them nor their

in their own land, and therefore every one doth put in their cattle to feed *promiscue* in the open field;” and he says that “the said common called shack, which in the beginning was but in the nature of a feeding because of vicinage for avoiding of suit, within some places of that country, is by custom altered into the nature of a common appendant or appurtenant, and in some places it retains its original nature.”

(6) 15 Law J. Rep. (n.s.) Q.B. 19.

(7) 4 Bing. N.C. 688; s. c. 7 Law J. Rep. (n.s.) C.P. 210.

(8) 6 Rep. 60.

(4) 4 Rep. 38.

(5) Common of shack exists in Norfolk, and is defined by Lord Coke (7 Rep. 6, a). “to be taken in arable land after harvest until the land be sown again, &c., and it began in ancient time in this manner: the fields of arable land in this country consist of the lands of many and divers several persons lying intermixed in many and several small parcels, so that it is not possible that any of them, without trespass to the others, can feed their cattle

tenants should sue the other, or his tenants, or distrain, or perhaps even drive their cattle away (see *Termes de la Ley*, *Common pur cause*), so long as the farms should respectively lie open to each other. It is releaseable like any other private right, and it ought, according to the rules of pleading, to be pleaded as a prescription. A prescriptive obligation on another, such as to repair fences, need not be pleaded in a *que estate*, because the party pleading does not know the title, and may therefore say that the tenants and occupiers from time whereof, &c. have been used to make and repair fences, but the real nature of the right in question is not a simple prescriptive obligation not to sue for trespass, or distrain cattle on his side, but a mutual obligation on both. The obligation of one owner is the consideration for that of another: per Holt, C.J., "it ought to be pleaded mutual"—*Bromfield v. Kerber* (9); and therefore we think that so general a mode of pleading as has been adopted in this case, which seems to have been taken in part from a plea of the obligation to repair fences, cannot be sustained. There ought, upon principle, to be a plea of prescription in a *que estate* when it is not a manorial custom; such a plea is given in *Rastell's Ent.* 625, b, though it is to be observed in that precedent the turning is alleged to be on the adjoining common, which is inconsistent with the notions of common *pur cause de vicinage* as generally received. The present replication appears to us to be defective in substance as a plea of prescription. It does not state that the farms have, respectively, time out of mind had common *pur cause de vicinage eo nomine*, or in any way shew the common to be annexed to the estate in the land which the plaintiff occupies. The statement in the subsequent part of the replication of the plaintiff's title to the land forms no part of the statement of right or *quasi* right, but only serves to bring the plaintiff's sheep within the right as before claimed; it only states, by way of shewing the common *pur cause*, &c., that the sheep have from time, &c. been used and accustomed to wander. This fact, indeed every part of the replication, may

be true, and yet Nant Heilyn and Tan-y-Graig may have been both the property of one owner in fee till the commencement of the suit. In pronouncing this decision, we are not called upon to say what allegation of common *pur cause de vicinage* would be sufficient in a declaration, or in any pleading in which the common was not claimed against the opposite party, but against some other by way of inducement, or in any case wherein the party pleading is a stranger to the right of common, or where his position is such that by the rules of pleading possession only (or in case of things incorporeal *quasi* possession) is sufficient to maintain his pleading; nor do we decide what is the proper form of claiming common *pur cause de vicinage*, in the more usual case in which it is claimed, as incident to an ordinary right of common on the land from which the cattle escaped. These cases are to be governed by the principles of law, and the authorities which are applicable to them. Our decision is confined to the case of a party who is shewn by the preceding part of the record to be a wrongdoer on the land of the opposing party, claiming by his replication the common *pur cause de vicinage* as annexed or incident to his own land, in derogation of the general exclusive right of his opponent to his land. In such a case, the general principles of law require that the claim should be shewn to arise by grant or prescription; and we think the replication in the present case defective in substance for not shewing the one or the other. On the argument the case of *Smith v. Baynard*, which was cited from 3 *Keb.* 388, was pressed on the Court as one in which a plea to the like effect as this replication had been held good on demurrer. The report referred to is so confused (even after correcting some obvious mistakes of the plaintiff and the defendant for each other), that it is scarcely possible to conjecture from it what was the matter in question, or to draw from it any inference, except that the pleadings and argument are erroneously and imperfectly stated. There is a notice of the case in a later stage in the same book, p. 417 (not referred to in the argument), which is much clearer, and which reports that case as one in which the plaintiff in his replication replied to a justi-

fication for damage feasant, that his cattle escaped from a close in which he had common *pur cause de vicinage* into the defendant's close, in default of repair by the defendant, who was bound by prescription to repair, to which the defendant demurred, and the plaintiff had judgment. This is sufficiently simple and intelligible, but as it seems unlikely that in this state of the record the confusion in the report (p. 388) should have arisen, or some of the questions obscurely intimated there have been raised, we caused the record, which is still extant in the Queen's Bench, to be examined. It is of Hil. term, 25 & 26 Car. 2. 112. By this record it appears that it was an action of replevin, for taking the plaintiff's cattle in Cross Park. The defendant, in his avowry, said that Cross Park contains one acre, and that he is seised in fee and took the cattle damage feasant. The plaintiff pleaded in bar that he is owner, and seised of twenty acres, called Vicarage Common, contiguous to a parcel of land called Tregowe Common, not separated by any fence, &c. from Vicarage Common, and that from time whereof, &c. the aforesaid cattle were accustomed to feed in the twenty acres, and stray into Tregowe Common and to inter-common, on account of vicinage, and that Tregowe Common was contiguous to a close of John Paul, called Havas and Creig, and that J. Paul and the tenants of that close, and from time whereof, &c., were accustomed to repair the fences between that close and Tregowe Common, and that Havas and Creig lies contiguous to a close of the defendants, called Croft, and that the defendants and tenants of Croft, and J. Paul, and the aforesaid tenants and occupiers of Havas and Creig were used and ought to repair the hedges and ditches between Havas and Creig and Croft, and that Croft lies contiguous to Cross Park, in which, &c., then in the occupation of the defendant; and the plaintiff further said that he, being seised of Vicarage Common, and the defendant of Cross Park, he put his cattle into the twenty acres to feed there, and because the hedges of the defendant, between the two closes, were broken in default of the defendant, that the plaintiff having placed his cattle to feed there they strayed into Tregowe Common, and from thence into

Havas and Creig, and thence into Croft, and thence to Cross Park, into which they entered in default of the defendant, and the cattle were in the said close in which, &c. feeding at the said time when, &c. until the defendant took them, &c. The defendant demurred to this plea in bar, stating, as special causes, that by the law of the land cattle of any one person cannot obtain any right of inter-commoning *in alieno solo* by usage or *per aliquam longi temporis prescriptionem*; and for that it is not shewn by that plea that the cattle entered by defect of fences. The defendant joined in demurrer. No judgment is entered on the roll, but supposing the judgment to have been for the plaintiff, as reported in 3 *Keb.* 417, it by no means supports the replication in the present case. The plea in bar, in *Smith v. Baynard*, does not claim a right of common *pur cause de vicinage* in the defendant's land, but amounts only to a plea of defect of fences, the averments preceding the statement of escape through defect of fences into the defendant's land, having no other purpose than to shew that the plaintiff's cattle were lawfully on the land adjoining the defendant's, and then that the alleged trespass arose from a default of the defendant's, without any default of the plaintiff. See *Fitz. Nat. Br.* 128, C, a, where it is said that if A. be bound to repair against B, and B. against C, and beasts escape out of the land of C. into the land of B, and thence into the land of A, A. shall not have trespass against C. The allegation in the plea in bar, in *Smith v. Baynard*, of common *pur cause de vicinage* in Tregowe Common, not charging the defendant's land, but being introduced only for the purpose above mentioned, was properly considered as sufficient on the same principle that possession of a close without shewing title would, in a like case, have been. It appears, therefore, that the case of *Smith v. Baynard* does not support the replication in the present case. For the reasons before given, we think that the replication is insufficient, and that the judgment must be affirmed.

*Judgment affirmed.*

1847.  
Nov. 9. } CONNOP AND ANOTHER, execu-  
1848. } tors of DAVEY, deceased, v.  
Feb. 26. } LEVY.

*Pleading—Circuity of Action—Contract of Indemnity—Executors—Continuance of Contract of Testator—Fraud.*

*A declaration in assumpsit contained a set of counts for work done, and money paid by, and on an account stated with D, alleging promises made to D, and a similar set of counts by and with the plaintiffs as executors of D, laying the promises to the plaintiffs as such executors. The second plea stated that D, being the projector of a railway company, agreed, in consideration of defendant consenting to act as a member of the provisional committee, to indemnify him from any professional or other charges on account of the said railway; that the defendant accordingly consented to become and became a member of the provisional committee; that the said work and labour, monies, and accounts in the declaration were respectively done, paid, and stated by D. and by the plaintiffs, as his executors, in and about the surveying the line of the said railway, and after the said agreement to indemnify; that defendant became liable to the said professional and other charges, and made the promises, in the declaration mentioned, only in his character of member of the provisional committee; that after the accruing of the causes of action the railway was abandoned, and the said work done and money paid became wholly useless and of no value to the defendant; and that any money paid by or damage recovered from the defendant, in respect of the said work or payments, will be wholly lost to the defendant, and that the defendant will be thereby damaged, contrary to the said agreement. Last plea, that the said D. in his lifetime caused and procured the defendant to enter into the promises in the declaration by fraud and covin. On special demurrer, —Held, that the first plea was a good bar to avoid circuity of action.*

*Held, also, that the last plea was well pleaded to the whole declaration, as the defendant had a right to treat the work done and money paid by, and account stated with the plaintiffs, as being done, paid and stated*

*in continuance and in respect of the previous contract with D; and that fraud used in procuring that contract extended to the implied promise arising from the plaintiffs' performance of it.*

**Assumpsit.** The declaration stated that the defendant was indebted to J. M. Davey, deceased, in 2,000*l.* for work and labour by him done; and in 2,000*l.* for money paid by the said J. M. D.; and in 2,000*l.* for money found to be due from the defendant to the said J. M. D., on an account stated between them; alleging a promise to pay the said monies to J. M. D. There were then similar counts for work and labour of the plaintiffs as executors of the said J. M. D. for the defendant, at his request, and for divers journeys and attendances by the plaintiffs as such executors as aforesaid, then made and undertaken in and about the doing of the said work and labour for the defendant, at his like request; and for money by the plaintiffs as such executors as aforesaid paid for the use of the defendant; and for money found to be due from the defendant to the plaintiffs as such executors as aforesaid, on divers accounts then stated between the defendant and the plaintiffs as such executors as aforesaid; alleging a promise to pay the last-mentioned monies to the plaintiffs as such executors as aforesaid.

Second plea to the whole declaration, that before the making of the said promises in the declaration mentioned, and in the lifetime of the said J. M. D., to wit, on &c., the said J. M. D. projected a certain undertaking, to wit, an undertaking for the formation of a railway, then proposed to be called the "Herne Bay, Canterbury and Dover Railway, and that the said J. M. D. being then desirous of forming a company for the purpose of carrying into effect the said undertaking, and in order to induce the defendant to become a member of the provisional committee of the said projected undertaking and company, did then promise and agree to and with the defendant, that in consideration that he, the defendant, would consent to act as one of the provisional committee of the said Herne Bay, Canterbury and Dover Railway, and such other branches as might be determined on, he, the said J. M. D., would indemnify and



save harmless the defendant from any professional or other charges on account of the said railway; that the defendant, relying upon the said promise of indemnity, thereupon did consent to act as one of the said provisional committee, and then became one of the said provisional committee accordingly; that the said work and labour so alleged to have been done, and the materials for the same provided by the said J. M. D., in the lifetime of the said J. M. D., for the defendant, at his request, and the said journeys and attendances so made by the said J. M. D. and his assistants, and the money so paid by the said J. M. D. for the defendant, at his request, were respectively done, provided, made and paid by the said J. M. D. in his lifetime, in and about the surveying of the line of the said Railway, and that the account in the said declaration alleged to have been stated between the said J. M. D. and the defendant, was stated of and concerning monies alleged to be due and owing to the said J. M. D., in respect of the said work, labour, journeys and attendances so made and done as aforesaid by the said J. M. D. and his assistants, and of and concerning the said monies so paid as aforesaid by the said J. M. D., in and about the surveying of the line of the said Railway as aforesaid. That the said work and labour and materials so alleged to have been done and provided by the plaintiffs as executors of the said J. M. D., since the decease of the said J. M. D., for the defendant, at his request, and the journeys and attendances so made, and the monies so alleged to have been paid by the plaintiffs as such executors for the defendant, at his request, were respectively done, made and paid by the plaintiffs as such executors, in and about the surveying of the line of the said railway, and that the account so alleged to have been stated between the plaintiffs as executors as aforesaid and the defendant, was stated of and concerning the said work and labour, materials, journeys and attendances so done and made as aforesaid, by the plaintiffs as executors as aforesaid, and of and concerning the said money so paid as aforesaid by the plaintiffs as executors as aforesaid, in and about the surveying of the line of the said railway. That the said work and labour was so done, and the said materials so provided, and

the said journeys and attendances were so made and given, and the said money was so paid, and the said accounts were so stated as aforesaid, by the said J. M. D., in his lifetime, and by the plaintiffs as his executors since his decease respectively, after the making the said promise of indemnity so given by the said J. M. D. to the defendant as aforesaid, to wit, on &c., and on divers days and times between that day and the commencement of this suit; and that the defendant became liable to the said professional charges in respect to the surveying of the said line of railway, and to the said other charges on account of the said railway, and made the said promises in the declaration mentioned only in his character of member of the provisional committee of the said Railway Company, and not otherwise. That after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on &c., the said undertaking for the formation of the said railway was wholly abandoned, and the said work and labour, journeys and attendances which had been so made and done as aforesaid by the said J. M. D. in his lifetime, and the plaintiffs as his executors since his decease, and the said payment of money so made as aforesaid by the said J. M. D. in his lifetime, and by the plaintiffs as his executors since his decease, in and about the surveying of the said line of railway, then became and was wholly useless and of no value to the defendant; and that any sums of money which may be paid by, or any damages which may be recovered from the defendant, in respect of the said work and labour, journeys and attendances in the declaration mentioned, so made and done as aforesaid, or in respect of the other payments in the declaration mentioned so made as aforesaid, will be wholly lost to the defendant, and the defendant will be damnified to that extent, contrary to the true intent and meaning of the said agreement and promise of the said J. M. D. to indemnify and save harmless the defendant. Verification.

Last plea, that the said J. M. D. deceased in his lifetime caused and procured the defendant to enter into the said promises in the declaration mentioned, by means of the fraud, covin, and fraudulent misrepresenta-

tion of the said J. M. D. and others in collusion with him. Verification.

Demurrer to the second plea, on the ground that if it discloses a defence at all it amounts to the general issue; that if it confesses any cause of action it does not avoid it; that it is pleaded to the whole declaration, whereas at most it could only apply to those counts which allege a cause of action accruing to the deceased, and that it is double and multifarious.

Demurrer to the last plea, on the ground that it professes to be pleaded to the whole declaration, whereas it is only an answer to a part, and that, as compared with the declaration, it is repugnant and absurd on the face of it.

Joinders in demurrer.

*Crowder*, in support of the demurrers (Nov. 9).—The second plea sets up a cross demand, which would only enable the defendant to bring an action against the plaintiffs as executors of Davey, in the event of his being sued for these charges. The indemnity given is against individual loss only, and *non constat* that any has accrued, as although the scheme has been abandoned there may have been deposits enough paid to meet these charges. *Morley v. Inglis* (1) shews, that a plea setting up such an agreement by the testator is no answer to the action. The executors would only be liable on the agreement to indemnify if they had assets, and therefore it is not certain that there would be any circuity of action.

[*COLERIDGE, J.*—Does the doctrine of circuity of action depend upon the second action being productive? You admit such a cross action would lie.]

No doubt it would be no answer that the second action would be unproductive, on the ground of insolvency, or the like: but here the plaintiffs would only be liable to an action as executors in the event of their having assets.

[*WIGHTMAN, J.*—Is not this work done under a contract with the defendant, that in consideration of his allowing his name to be used he should not be liable to be sued?]

If so, the plea amounts to the general issue. But this plea is wrongly pleaded to the whole declaration, for a debt due from

the testator cannot be set off against an account stated with the plaintiffs as executors—*Scholefield v. Corbett* (2).

Then the last plea is bad, as it is pleaded to the counts for work done, &c. by the executors, as well as to the counts alleging the promise to the testator.

[*ERLE, J.*—If the work done by the executors was in continuance of the work done by the testator, and under the same contract, and the fraud was committed in the beginning of the contract, it will extend to the subsequent performance by the executors.]

Possibly such a defence might be pleaded, but it is not that which is here set up; besides, it would be repugnant to the declaration, which does not allege a contract entered into by the testator and continued by the executors.

*Peacock, contra.*—The second plea shews that the promise made in fact by the defendant was made in his character of provisional committee-man, and under circumstances which disentitle the plaintiff to sue upon it; therefore it confesses a cause of action which it avoids, and does not amount to the general issue.

[*WIGHTMAN, J.*—The undertaking is only to save harmless the defendant. Suppose that deposits enough were received to enable the defendant to pay.]

That might be replied: but it cannot be the case, as it is alleged in the plea, and admitted by the demurrer, that whatever the defendant is called on to pay will be wholly lost to him. The law as to circuity of action is collected in the notes to *Turner v. Davies* (3); and *Carr v. Stephens* (4) is a strong case to shew how the Courts incline against circuity of action. *Morley v. Inglis*, cited for the plaintiff, is distinguishable, as there the guarantee was given for a third person, and the damages being unliquidated the debt could not be set off. In *Scholefield v. Corbett* also the money was received after the testator's death to the use of the executors, and therefore a debt from the testator could not be set off against it. The plaintiffs, as executors of Davey, cannot be in a better situation than Davey himself would have been, and he could not have sued the

(2) 6 Nev. & Man. 527.

(3) 2 Wms. Saund. 150.

(4) 9 B. & C. 758; s.c. 7 Law J. Rep. K.B. 336.

(1) 4 Bing. N.C. 58; s.c. 7 Law J. Rep. (N.S.) C.P. 11.

defendant; therefore this plea is as good an answer as it would have been to an action by Davey.

As to the last plea being pleaded to the whole declaration, if the promise to the executors was implied from their continuance of the contract entered into with the testator, and that was founded in fraud, it cannot be sued upon by the executors, as it could not have been sued upon by the testator if completed in his lifetime; this plea does (at least on general demurrer) shew that the promises were made with the plaintiffs in furtherance of a contract entered into with their testator. Either the declaration must be taken to be pointed to work, &c. done by the plaintiffs in furtherance of their testator's contract, in which event the plea is clearly good, or the contract entered into with the plaintiffs as executors is unconnected with that made with their testator, in which case the plea would be bad, but the declaration would also be a misjoinder.

*Crowder*, in reply.—The cases cited as to circuity of action were cross demands between the same parties; the fact of the statute of set-off giving express power to executors to set off debts due to their testator, shews that otherwise they would not have been within its provisions. That is a strong argument against there being any circuity of action here.

[*COLERIDGE, J.*—This is not a case where the cross actions might both go on at the same time: the right of action against the plaintiffs would not arise until the first action against the defendant was ended.]

Yes; and as this is a contract of indemnity the defendant cannot sue the plaintiff until he has himself been sued and has suffered loss; in any other view the plea amounts to the general issue. As to the last plea, it ought to be an answer *in omnibus*; it is not enough that there may possibly be cases in which it would be an answer.

[*ERLE, J.*—I can find no cases where it would be an answer, except that put by Mr. Peacock, of money had and received, or of work done in continuance of a prior contract.]

The account stated with the executors may be in respect of money lent or goods sold by them.

[*LORD DENMAN, C.J.*—The defendant

undertakes to prove an account stated in respect of a contract entered into with the testator.]

[*ERLE, J.*—This plea is a good answer to the count for work and labour, and money paid by the executors, and you have no point stated that it is not confined to that count.]

The objection is, that the plea is too general.

*Cur. adv. vult.*

The judgment of the Court (5) was now (Feb. 26) delivered by—

*COLERIDGE, J.*—The first set of counts of the declaration was for work done and money paid by, and on an account stated with the testator Davey. The second set was for the same by and with the plaintiffs as executors of Davey. The first of the pleas alleged that Davey being the projector of a company for a railway agreed, in consideration of defendant consenting to act on the provisional committee, to indemnify him from any professional or other charges on account of the said railway; that defendant did consent so to act; that the works, monies, and accounts in the declaration mentioned were respectively done, paid, and stated by Davey, and by the plaintiffs as his executors in and about the surveying of the line of the said railway, and after the said agreement to indemnify; that defendant became liable to the said professional charges in respect of surveying the said railway, and the other charges on account of the said railway, and made the promises only in his character of member of the provisional committee, and not otherwise; that the project was abandoned, and the said work and money became useless and of no value; that any sums recovered on account of the said work and monies paid will be lost to the defendant, and the defendant will be damnified to that extent contrary to the promise of Davey to indemnify. This plea shews that the causes of action were professional and other charges on account of the railway comprised within the testator's agreement to indemnify, and that the defendant could recover from Davey, or his representatives, as much as the plaintiffs can recover from the defendant in respect of these causes

(5) Lord Denman, C.J., Coleridge, J., Wightman, J., and Erle, J.

of action. The plea therefore is a bar to avoid circuity of action—*Turner v. Davies*, where the cases of pleas held good as being in avoidance of circuity of action are collected.

The second of the pleas alleged that the testator caused the defendant to enter into the promises by fraud; and in support of the demurrer to this plea it was contended, that it could not apply to the promises in the second set of counts, which were made after the death of the testator. The defendant answered, that if he became indebted to the plaintiffs as executors for work done as executors after the death, and money paid as executors after the death, it was in the manner to be gathered from the first of the pleas, namely, that a contract was made with the testator for surveying the line, and that the plaintiffs as executors after the death, in performance of that contract, did the work and paid the monies mentioned in the second set of counts, and that the account was stated with the plaintiffs in respect thereof; that the counts are applicable to this cause of action, and the defendant has a right so to apply them; and that if the testator by fraud procured the original contract, his fraud procured the implied promise arising from performance of the work, and payment of the money by the executors under the contract. Upon this view, we are of opinion that the defendant's answer is well founded, and therefore our judgment is for the defendant.

*Judgment for the defendant.*

1848. }  
Nov. 12; } LEWIS v. HARRIS.  
Feb. 26. }

*Pleading—Insolvent—Order for Protection and Distribution—5 & 6 Vict. c. 116.*

*To an action on a bill of exchange the defendant pleaded that he, not being a trader, &c., at the time of the passing of the 5 & 6 Vict. c. 116, duly presented his petition for protection to the Court of Bankruptcy in London, which had annexed to it a full schedule of debts containing all matters mentioned in the statute; and that the said petition was filed, &c., and that a final order for protection and distribution was made by the commissioner for protecting the person of the defendant from all process, and for the vesting*

*his estate in T. M. A, one of the official assignees of the said Court of Bankruptcy, and that the debts in the declaration mentioned accrued before the filing of the said petition, and that the order was still in force, &c. :—Held, that the plea was good, both in form and substance, as shewing the effect of a final order under the 10th section of the above statute, though it did not shew the appointment of a creditors' assignee.*

Assumpsit by the drawer against the acceptor of a bill of exchange.

Plea—That after the making of the said promises and accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, to wit, on the 16th day of June, A.D. 1843, the defendant not being a trader within the meaning of the statutes in force relating to bankrupts, at the time of the making and passing of the act of parliament hereinafter mentioned, and having resided twelve months in London, under and by virtue of, and according to the directions and provisions of, a certain statute made and passed in the sixth year of the reign of our Lady the now Queen, intituled, "An Act for the Relief of Insolvent Debtors," (5 & 6 Vict. c. 116,) duly presented his petition for protection from process to the Court of Bankruptcy in London, which said petition during all the time herein in that behalf mentioned had annexed to it a full and true schedule of the defendant's debts; and the same schedule and petition then were pursuant to and then duly contained all the matters in that behalf mentioned in the said statute, according to the form and effect thereof, and the same petition, bearing date, to wit, on the 16th day of June 1843, was forthwith afterwards, to wit, on the day and year last aforesaid, duly and according to the form and effect of the said statute filed of record in the said Court of Bankruptcy; and that such proceedings were thereupon had in the same court, upon the said petition of the defendant, pursuant to the said statute and, in all respects conformably thereto; that afterwards, and before the commencement of the suit, to wit, on the 28th day of August, A.D. 1843, according to the form of the said statute, and pursuant thereto, a final order for protection and distribution was made by a commissioner

duly authorized in that behalf; that is to say, such final order as aforesaid was then made by R. G. C. F. Esq., one of the commissioners of the said county, duly authorized in that behalf, for the protection of the person of the defendant from all process, and for the vesting of the estate and effects of the defendant in T. M. A., one of the official assignees of the said court of bankruptcy; that the several debts in the declaration mentioned arose before the said date of the said filing of the said petition; and that the said order and discharge still remain in full force, and in all respects valid in law. Verification.

Demurrer, assigning for causes that it is alleged in the plea that a final order for protection and distribution was made by a certain commissioner of bankrupts therein mentioned, whereas no power or authority was given to such commissioner by the statute, in the said plea mentioned, to make any order whatever for distribution, as in the said plea mentioned, but merely an order for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who might attend before the commissioner on a certain day, and for carrying into effect such proposal as the petitioner should have set forth in his petition; and also that the final order in the said plea mentioned is not such an order as the commissioner in the said plea named was authorized by law to make; and also that it is not stated in and by the said plea, that the petition therein mentioned was referred by the Court of Bankruptcy to R. G. C. F. Esq., therein named, &c.

Joinder in demurrer.

The plaintiff's points were, that the plea, as a plea of protection, under the statute 5 & 6 Vict. c. 116, is bad. First, because it merely negatives the defendant being a trader at the time of the passing of that statute, instead of negating his being so at the time of his presenting his petition for protection; secondly, because the order, which is therein alleged to have been made, is not such as is warranted by the statute; thirdly, that it is not a general plea, in the form given by the 10th section of 5 & 6 Vict. c. 116, and, as a special plea, it is bad for

not stating that the defendant gave the necessary notices, or that the necessary proceedings were had to warrant the making of the final order; fourthly, that, a general plea being given, the defendant cannot plead specially.

This case was argued in Michaelmas term (Nov. 12,) by—

*Archbold*, in support of the demurrer.—The plea is ill, as it does not pursue the general form given by the statute; and being special it does not state the particulars required by the statute—*Sheen v. Garrett* (1), *Leaf v. Robson* (2).

[*COLERIDGE, J.*—What does it omit?]

It does not omit, but adds matter which shews that the proceedings are void on the face of them. The order, as set out in the plea, is for vesting the bankrupt's estate in the official assignee only, whereas the 4th section of the 5 & 6 Vict. c. 116. requires also a creditors' assignee. This objection was taken by Maule, J., in *Nicholls v. Payne* (3).

[*ERLE, J.*—The Court do not appear to have given any judgment in that case, as the defendant's counsel elected to amend.]

[*WIGHTMAN, J.*—Would the order as set out here support an issue taken on the making of the order in pursuance of the statute?]

Clearly not: it is necessary that an order for distribution, in pursuance of this statute, should vest the insolvent's estate in two assignees. The plea is also ill for not shewing that the defendant was not a trader in 1842; and if so, it should be shewn that he did not owe more than 300*l*.

[*COLERIDGE, J.*—The plea states that the defendant was not a trader within the statutes in force concerning bankrupts.]

The plea is also bad, if the alleged date of presenting the petition is to be taken to be the real date; as the statute 7 & 8 Vict. c. 96, which amends the 5 & 6 Vict. c. 116, gets rid of the plea altogether—*Toomer v. Gingell* (4).

[*COLERIDGE, J.*—But you might raise that question by replying specially that the

(1) 6 Bing. 686; a. c. 8 Law J. Rep. C.P. 270.

(2) 13 Mee. & Wels. 651; a. c. 14 Law J. Rep. (n.s.) Exch. 129.

(3) 8 Scott, N.R. 732; a. c. 15 Law J. Rep. (n.s.) C.P. 23.

(4) 15 Law J. Rep. (n.s.) C.P. 255.

petition was subsequent to the passing of the 7 & 8 Vict. c. 96.]

*Cowling*, contra.—It is a sufficient answer to say that the plea is good under the 10th section of the 5 & 6 Vict. c. 116, which provides, "that if any action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order, signed by the commissioner, shall be sufficient evidence." This act is not wholly repealed by the 7 & 8 Vict. c. 96, which must, at all events, be taken to extend only to cases subsequent to the 9th of August 1844. The petition in this case was filed in 1843, and the order was made under the 5 & 6 Vict. c. 116: and it is stated in the plea that the order is still in force. The 5 & 6 Vict. c. 116. empowers the commissioner to give protection to the person of the petitioner from all process. The subsequent act only protects in reference to debts mentioned in the schedule. Then as to the form of the plea. The 6 Geo. 4. c. 16, by section 126, gives a precise form of plea; but the 10th section of the 5 & 6 Vict. c. 116. gives no form. The plea should shew that the petition was after the debt accrued, and that brings it within the operation of the section. It need not be stated that the petition was duly presented. In *Cook v. Henson* (5) it was held sufficient to plead that a petition was duly presented and a final order for protection and distribution was made: in that case *Leaf v. Robson* was cited; and Tindal, C.J. observed, that "if the decision of the commissioner as to the motion authorizing the making of a final order is not to be controverted, there can be no reason for requiring the plea to set out all the facts necessary to give him jurisdiction." In *Leaf v. Robson* it was not alleged that the petition was *duly* presented, or that the order was final, or that it was for protection and distribution. In *Nicholls v. Payne* it was not stated that the final order was for distribution. It is no objection that it is not stated that

(5) 1 Com. B. 908; s. c. 14 Law J. Rep. (N.S.) C.P. 295.

there was a creditors' assignee; the Court will not assume that the creditors attended, and if they did not attend a creditors' assignee would not be appointed.

[WIGHTMAN, J.—But is not the order *prima facie* bad for not shewing either that the estate was vested in the creditors' assignee, or some reason why such assignee was not appointed?]

In *Gillon v. Deare* (6) the plea did not state that the order was for protection and distribution. If the argument on the other side is tenable, the plea would have been bad in that case, on the very ground that there was no creditors' assignee shewn.

[COLERIDGE, J.—The point was not made in that case.]

[WIGHTMAN, J.—In that case, too, the plea gave the reason for the omission. Would the order support the plea as it is set out?]

Yes. If the order is not correct in form the creditors may, under the 12th section, apply to have it rescinded. The order, in fact, is duly made, and is in the usual form.

[WIGHTMAN, J.—Your difficulty is that you do state particular circumstances. It may be that you state too much.]

All the averments are under a *videlicet*.

*Archbold*, in reply.

*Cur. adv. vult.*

The judgment of the Court was now (Feb. 26,) delivered by—

COLERIDGE, J.—In this case the plea contains all that is required to make it valid under the 5 & 6 Vict. c. 116. s. 10. (see *Cook v. Henson*), and also an allegation describing the final order to be for vesting the effects in the official assignee. The plaintiff contended that the plea must be taken to describe the form and effect of the final order mentioned therein; and as, by section 4. of the above-named statute, the effects are to be vested in an official assignee and an assignee to be chosen by the creditors, a final order, as stated in the plea, would be void both in form and effect (see *Nicholls v. Payne*); but it appears to us that the plea is valid. The description of the final order does not purport to set out the form; and although we have

(6) 2 Com. B. 308; s. c. 15 Law J. Rep. (N.S.) C.P. 25.

no judicial knowledge of any forms settled under the regulations authorized by section 13. of the statute, still it is obvious that a final order may be silent as to the vesting of the effects, and may leave that consequence to follow by force of the statute, and that, therefore, the plea may only describe the effect of the final order. Then, with respect to the effect, the 7 & 8 Vict. c. 96. s. 10, enacting that the official assignee shall have all rights alone until a creditors' assignee is chosen, shews that a final order may have the effect stated in this plea; and as in many cases of insolvency no creditors' assignee is ever chosen, perhaps the majority of final orders operate in the way here pleaded. These objections fail, and it is, therefore, not necessary to resort to the further answer, that as the plea is complete and valid, if the objectionable part is struck out, that part may be treated as surplusage, which does not vitiate.

*Judgment for the defendant.*

1848. }  
Jan. 20; } LILLEY v. ELWIN.  
Feb. 26. }

*Master and Servant—General Hiring—Discharge under 4 Geo. 4. c. 34.—Notice—Pleading—Indebitatus Counts—Rescinding Contract—Payment pro rata.*

*The plaintiff declared on a contract by the defendant to employ the plaintiff in his service until the service should be determined by due and reasonable notice, and alleged as a breach, that the defendant wrongfully dismissed him without notice; with a count for work and labour. The defendant pleaded to the special count, that the plaintiff misconducted himself by refusing to work, and that the defendant discharged him; and he also pleaded to that count, that the defendant, in consequence of the plaintiff's misconduct in absenting himself, summoned him before a magistrate under the statute 4 Geo. 4. c. 34; and that the magistrate discharged him. The proof was, that the plaintiff was hired generally as an agricultural labourer, and left work before eight o'clock on a particular day because beer was not supplied, and that he was on the following day taken before a magistrate, who ordered his dis-*

*charge from service:—Held, that the hiring being general, the defendant was entitled to a verdict on the first count on the ground of variance.*

*Held, secondly, that the defendant was entitled to a verdict on both the special pleas, though the jury did not find that the plaintiff wrongfully absented himself; and lastly, that, the facts stated in those pleas being proved, the plaintiff was not entitled to recover on the count for work and labour.*

**Assumpsit.** The declaration stated, that in consideration that the plaintiff, on &c., at the request, &c. would enter into the defendant's employ and service, to wit, in the capacity of a servant in husbandry, and serve him in that capacity for a certain time then understood and agreed between them, to wit, from the day and year aforesaid, to wit, until the said service should be determined, to wit, by due and reasonable notice in that behalf on either side, at and for certain reasonable hire and wages, to wit, &c., the defendant undertook and promised the plaintiff to retain and employ the plaintiff in the capacity aforesaid, upon the terms aforesaid, and pay, &c., and continue him in such service until it should be determined by due and reasonable notice. Averment, that although the plaintiff, to wit, on &c., did enter into the employ of the defendant, &c., and hath always from the commencement thereof been ready and willing to remain and continue in the said service, &c., and during all the time aforesaid tendered and offered himself to the defendant in such service, yet the defendant did not nor would continue the plaintiff in his said service, but on the contrary, on &c., refused to continue the plaintiff in his service, and wrongfully discharged the plaintiff without any previous notice, *per quod* the plaintiff lost wages, to wit, 20*l.*, which he might have earned in the defendant's service, and has been deprived of divers other great gains and profits, &c.

There were also counts for work and labour, and on an account stated.

**Pleas**—First, non assumpsit; second, to the first count, that the defendant did not refuse to continue the plaintiff in his service, nor did the defendant discharge the plaintiff therefrom *modo et formâ*. Third plea, to the first count, that before the discharge of the

plaintiff, as in the first count mentioned, to wit, &c., the plaintiff, as such servant, &c., was requested and commanded by the defendant to mow and reap the corn then standing in a certain field of the defendant, and to continue so mowing and reaping the said field until the hour of eight o'clock in the evening of the said day, the same being the usual period for continuing to mow corn at the said time, and to set and place the corn so mown in shocks on the following morning, and then it became and was the duty of the said plaintiff so to do, of which the said plaintiff then had notice; but although the plaintiff, at the command of the defendant, then commenced mowing and reaping the said corn, and continued so reaping and mowing the same for a portion of the said day, to wit, till the hour of four in the afternoon, and although the said plaintiff might and could have continued mowing and reaping the corn in the said field, yet the said plaintiff neglected and refused to continue mowing and reaping the said corn until the hour of eight o'clock in the evening, and when a small quantity only of the said corn was reaped, and while a large portion, to wit, one-half of the corn in the field, was still standing unmown, and whilst a long time, to wit, four hours of the said day remained unelapsed, and before the said hour of eight o'clock, the plaintiff refused to continue mowing, &c., and wrongfully and in breach of his said duty and of the said command of the said defendant, then quitted and absented himself from his said work, and left the corn so then standing in the said field, and then refused to return to his said work of mowing and reaping the said corn, wherefore the defendant did discharge the plaintiff from his said service, as he lawfully might for the cause aforesaid. Verification. Fourth plea, to the first count, that whilst the plaintiff was in the said service of the defendant, and before, &c., he, the plaintiff, was a person so hired and employed as such servant in husbandry, and the plaintiff, so being such servant of the defendant, did before his discharge, to wit, &c., unlawfully quit his work before the same was completed, contrary to his duty as such servant in husbandry, and in breach of his said contract, wherefore the defendant afterwards, to wit, &c., made his complaint on oath before John Sladden, Esq., one of

Her Majesty's Justices, &c., and the said plaintiff then being brought before the said John Sladden, and having admitted the truth of the complaint, and that he, the plaintiff, was guilty of the same, he, the said John Sladden, did then and there adjudge, order and direct that the plaintiff was guilty thereof, and that he should be forthwith discharged from the said service and employment of the defendant, whereupon the defendant did discharge the plaintiff from his said service. Verification. Fifth plea, as to so much of the second count as respects the sum of 2*l.* 5*s.*, that after the accruing of the causes of action, he, the said defendant, paid to the plaintiff, who then accepted and received, the said sum of 2*l.* 5*s.* in full satisfaction, &c.

Replication to the third and fourth pleas *de injuriâ*, and *nolle prosequi* as to the 2*l.* 5*s.*

At the trial, before Lord Denman, C.J., at the Spring Assizes for Kent, 1847, it appeared that the plaintiff was an agricultural labourer, and was hired by the defendant at Michaelmas 1845, as a waggoner. No precise amount of wages was agreed on, but it was proved that 10*l.* 10*s.* a year was a reasonable sum for wages for that class of servants to which the plaintiff belonged. On the Thursday before the 4th of August 1846, the plaintiff was sent with other labourers to a field of the defendant's to mow wheat. For some days they continued to work at the mowing (according to what appeared to be the usual course) until half-past six in the evening; at which time they had an allowance of strong beer, and then they desisted from mowing and proceeded to put the wheat into shocks, which operation they continued till eight o'clock, when they finally left off work in the harvest field, and the plaintiff then proceeded to look after the horses. On the 4th of August the plaintiff and the other labourers were at three or four o'clock told by the bailiff, that they were not to shock the wheat till the next morning. They continued to work till half-past six as usual, when they sent for their beer, and they were told that they would have no more till the corn was carried. They then left work in the harvest field, instead of continuing to mow till eight. The defendant said nothing that evening, though he was present when the labourers were at



supper at eight o'clock, but on the following morning he told them he had no work for them, and on that day they were all taken before a magistrate, and charged with absentiug themselves from work contrary to the provisions of 4 Geo. 4. c. 34. They admitted that they were guilty of leaving off work at half-past six the previous evening, and the magistrate ordered them to be discharged from their employ and to forfeit their wages. His Lordship directed the jury, that the absentiug of the plaintiff from work was a refusal to continue working; but it was for them to say under the third plea whether the defendant had a right to discharge the plaintiff on this ground, and also whether the refusal of the beer was a good ground for the plaintiff absentiug himself; and that the same question was raised on the fourth plea, which alleged an unlawful leaving of the defendant's service by the plaintiff. His Lordship reserved leave to the plaintiff to move to enter a nonsuit. The jury found for the plaintiff, damages 8*l.* 5*s.* 6*d.*

In Hilary term—

*Shee, Serj.* obtained a rule *nisi* for a nonsuit, or for leave to enter a verdict on the third and fourth pleas, or for a new trial. He cited *Turner v. Mason* (1).

*Montagu Chambers and Lush* shewed cause (Jan. 20.)—First, there is no ground for a nonsuit, as the contract was proved. The hiring was general according to the evidence, though that might be in point of law a hiring for a year—*Fawcett v. Cash* (2); and it is averred in the declaration that the plaintiff was entitled to reasonable notice, which was a question for the jury as well as what was reasonable notice—*Williams v. Byrn* (3). Besides, the plaintiff is clearly entitled to a verdict on the count for work and labour. Secondly, as to entering a verdict for the defendant, the substance of the third plea is, that the plaintiff was commanded to do a certain act. But even if it be taken that he was lawfully commanded, still it appears that the plaintiff was hired as a waggoner; was he bound to mow or reap

at all? At all events, was he bound to continue reaping till the time specified? No wilful disobedience is alleged, and therefore this case is distinguishable from *Callo v. Brouncker* (4) and *Turner v. Mason*. The fourth plea is founded on the statutes 5 Eliz. c. 4. and 4 Geo. 4. c. 34. s. 3; and as the whole plea is put in issue by the replication *de injuriâ*, it should have been shewn that an offence was committed. The statute 4 Geo. 4. c. 34. s. 3. provides, that if any servant in husbandry (amongst others) having entered into service with any person shall absent himself from his service before the term of his contract, a Justice of the Peace upon complaint, &c. may punish the offender by abating the whole or any part of his wages, or discharge such servant from the service, but the magistrate cannot both stop a servant's wages and discharge him; and the jury must be taken to have found that the plaintiff did not unlawfully absent himself. It is evident that in this case the magistrate acted as a peacemaker, and at most only decided that it was better that the servant should be discharged, leaving the question of wages open.

[COLERIDGE, J.—Was not this decision a judicial determination of the contract?]

If that were so, still this action is not brought for wages accruing after the time of the discharge. Besides, the plea must state all the facts necessary to bring the case within the jurisdiction of the magistrate; if that jurisdiction is not shewn, the adjudication does not prove the plea, and if the adjudication is bad the plea is bad. It may also be contended, that the statute 4 Geo. 4. c. 34. does not make the "leaving work" such a misconduct as to give the magistrate jurisdiction, it only mentions "absentiug from service." The averment that the plaintiff unlawfully left work might be satisfied by proof that the plaintiff left work for five minutes only—*In re Turner* (5).

[COLERIDGE, J.—That would be a question for the magistrate if he had jurisdiction.]

If the magistrate had not jurisdiction, it is clear that there was no such wilful disobedience as to entitle the defendant to discharge the plaintiff. It was not proved that the 10*l.* 10*s.* was fixed as the amount of wages payable at the end of the year,

(4) 4 Car. & Pay. 518.

(5) 15 Law J. Rep. (N.S.) M.C. 140.

(1) 14 Mee. & Wels. 112; s. c. 14 Law J. Rep. (N.S.) Exch. 311.

(2) 5 B. & Ad. 904; s. c. 3 Law J. Rep. (N.S.) K.B. 113.

(3) 7 Ad. & El. 177; s. c. 6 Law J. Rep. (N.S.) K.B. 239.

but it was given by the jury as the usual rate of wages.

*Shee, Serj. and Ogle*, in support of the rule.—First, the defendant is entitled to a nonsuit. If there was an express hiring for a year, notice is out of the question. It cannot be that a yearly contract of hiring in the case of agricultural servants can be determined by notice, which might be given just before harvest time. The month's notice or month's warning in the case of domestic servants is matter of custom. If so, the plaintiff cannot fall back on the count for work and labour—*Cutter v. Powell* (6).

[*COLERIDGE, J.*—It would appear that the conduct of the plaintiff was submitted to the magistrate, who has annexed a specific penalty, leaving the question of wages still open.]

[*PATTESON, J.*—It is contended, on the other side, that the magistrate could not both discharge the servant and also deprive him of his right to wages. Something is said incidentally on this point in *Lancaster v. Greaves* (7).]

If the magistrate does not imprison the servant, he may abate the whole of the wages due; but if he discharges the servant, the common law itself will deprive him of the wages. *Spain v. Arnott* (8) is in point. Then, the third plea is said to involve a mixed question of law and of fact, which ought to have been left to the jury, and might have been found in the same way as it has been decided; but it is submitted that it is solely a question of law. The plaintiff insisted on a customary allowance of beer, but no custom was proved; and then the only point was, whether this was a lawful order, disobedience of which justified dismissal. It is conceded on the other side that wilful disobedience is sufficient to justify the dismissal—*Turner v. Mason*. As to the fourth plea, it is said that this plea being under the statute is not supported by the adjudication.

[*WIGHTMAN, J.*—There is no question as to the validity of the adjudication, but only whether the plea was proved.]

The adjudication proves the latter part of the fourth plea, and the evidence which

proves the third plea proves the remainder of the fourth. The fact of a charge being made is all that is necessary to give the magistrate jurisdiction to discharge the servant; and there is no necessity that the facts stated in the complaint should be alleged or proved.

*Cur. adv. vult.*

The judgment of the Court was now (Feb. 26) delivered by—

*COLERIDGE, J.*—The plaintiff in the first count declared on a special contract of hiring, determinable on reasonable notice, and alleged a breach in discharging him without such notice. The proof was a general hiring as an agricultural labourer, a waggoner. That is in law a hiring for a year, and not determinable at any time on reasonable notice. This is a fatal variance, and the defendant is entitled to a verdict on the plea of non assumpsit so far as regards the first count. There was also a traverse of the discharge, on which the plaintiff is entitled to retain the verdict. But there were two special pleas to this count: one (the third plea) stating a discharge by the defendant for disobedience of orders, in not working during harvest till eight o'clock at night; the other (the fourth plea) stating that the plaintiff quitted his work, and a discharge by the magistrates under 4 Geo. 4. c. 34. s. 3. There was also a count for work and labour, to which the only plea was non assumpsit, on which the plaintiff had a verdict. The plaintiff had a verdict on the special pleas, but leave was given to enter a verdict for the defendant on them. It is necessary to consider those pleas and the evidence with regard to them, not only on account of costs, but because the facts proved essentially affect the plaintiff's right to retain his verdict on the *indebitatus* count. The hiring was for 10*l.* 10*s.* for the year; no part of the wages being due till the end of the year. The discharge was at the end of ten months. If the plaintiff had been guilty of disobedience of orders and of unlawfully absenting himself from his work, so as to justify that discharge, (assuming the defendant could have discharged the plaintiff,) then, no wages being due, the plaintiff was entitled to nothing, and the *indebitatus* count cannot be sustained.

(6) 2 Smith's Leading Cases, 1.

(7) 9 B. & C. 628; s. c. 7 Law J. Rep. M.C. 116.

(8) 2 Stark. N.P.C. 256.

If, on the other hand, the discharge was not justifiable, then the plaintiff was at liberty to treat that discharge as a rescinding of the contract by the defendant, and to adopt that rescinding and sue for wages *pro ratâ* up to the time of the unjustifiable discharge, and so to retain his verdict on the *indebitatus* count. We do not think it necessary to go through the authorities which establish this view of the law ; they will be found collected in Mr. Smith's *Leading Cases*, vol. 2, p. 1, in the notes to the case of *Cutter v. Powell*.

The discharge in this case was not directly by the master (the defendant), but by a magistrate, under the statute 4 Geo. 4, on the complaint of the master. But we are of opinion that it is sufficiently the act of the defendant to entitle him to a verdict on the third plea, supposing the alleged misconduct of the plaintiff to be established, and also to entitle him to a verdict on the plea of non assumpsit to the *indebitatus* count, on the like supposition, because, in that case, he never was indebted to the plaintiff at all. It was contended, that the only material part of the fourth plea is the discharge by the magistrate, and that the alleged misconduct stated in the plea by way of inducement was not put in issue by the replication, for that the magistrate may have discharged the plaintiff on other grounds, as by way of settling the dispute in an equitable way, and so leaving the question of right to wages *pro ratâ* untouched. But on reference to the statute, it will be found that the magistrate has no jurisdiction to discharge unless it shall appear to him that the servant "shall not have fulfilled such contract, or hath been guilty of any such misconduct or misdemeanour as aforesaid." So that the question on the two special pleas, and also on the plea of non assumpsit to the *indebitatus* count, ultimately depends on the facts, whether they do, or do not, establish such misconduct of the plaintiff as justified his being discharged.

The plaintiff was engaged as a waggoner, but during the harvest worked in the field generally ; and we think it must be taken as part of the contract that he should so do. The practice was during harvest to work till eight o'clock in the evening. The plaintiff refused to work till that hour, not as

being an unreasonable hour, or as not being within the terms of his contract, but because strong beer of good quality was not allowed to him, according to a custom which he alleged to exist, the beer supplied being, as he contended, very bad small beer, not so good as water. This supposed custom the plaintiff wholly failed to establish by evidence, and his desertion of his work was left without justification. The defendant, therefore, had a right to discharge him, and must be taken to have exercised that right by ordering him not to return, taking him before a magistrate, and acquiescing in the magistrate's order of discharge.

The jury, indeed, negatived the wrongful absence of the plaintiff from his work ; but their opinion on that point cannot do away the effect of these facts, which are stated in the plea and were clearly proved. It follows that the plaintiff cannot recover for the time of his actual service on the *indebitatus* count, as he was bound to give a whole year's service before claiming any wages, and broke his contract by leaving that service before the year's end.

*Rule absolute to enter a verdict for the defendant on all the issues except the second.*

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1847. } THE QUEEN v. THE MAYOR OF  
Dec. 3. } DOVER.

*Mandamus, Return to—Particularity.*

*A writ of mandamus, in setting forth the title and qualification of L. to have his name inserted in the burgess roll, alleged, inter alia, in the terms of the statute 5 & 6 Will. 4. c. 76. s. 9, that he had paid all such rates (including therein all borough rates directed to be paid under the provisions of that act,) as had become payable by him. The return traversed this allegation in its terms:—Held, on demurrer, that the return was good.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 75.]

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1847. }  
Dec. 29. } NEWTON v. BANKS.

*Error—Costs—Court of Requests—Suggestion.*

*By a court of requests act it was provided that a plaintiff suing in any of the courts at Westminster, for a cause of action recoverable in the court of requests, should not be entitled to any costs if he succeeded:—Held, an error brought on a judgment in the Court of Queen's Bench for debt and costs, the fact of the defendant being resident within the jurisdiction of, and liable to be sued in the court of requests being assigned as error, and the plea being in nullo est erratum, that the judgment, so far as regarded the costs, was erroneous.*

*Error coram nobis.* The error assigned was, that the record and proceedings were erroneous in this, that judgment had been entered for debt and costs, whereas the plaintiff in error (the defendant below), at the time when the action was brought, resided within the jurisdiction of the court of requests for the western division of the hundred of Brixton, and was liable to be sued in that court. Joinder in error.

*Newton*, the plaintiff in error, in person.—The Court of Requests for the western division of the hundred of Brixton is established by stat. 46 Geo. 3. c. lxxxviii., and by the 14th section of that act a plaintiff suing in any of the courts at Westminster for a debt recoverable in the above court of requests, shall not by reason of a verdict for him be entitled to any costs whatsoever. The judgment as to costs is therefore erroneous, and will be reversed on error—*Todd v. Todd* (1), *Baddley v. Oliver* (2), where the Court interfered after execution; and *Cassidy v. Stewart* (3) is an authority that the Court will only look to the time at which the proceedings are commenced.

[PATTESON, J.—My only difficulty is the assigning as a fact something which affects the judgment alone.]

[COLERIDGE, J.—If you had entered a

suggestion to deprive the plaintiff of costs, and judgment had been given for costs in spite of the suggestion, you then might have raised the question on the record.]

Such a suggestion can, after verdict, only be entered by leave of the Court, and a Judge on circuit has no power to grant leave—*Baddley v. Oliver*. To make the judgment for costs erroneous, it is enough that the privilege of the plaintiff in error existed at the time of the commencement of the suit—*Hamley v. Hutton* (4). This is similar to the case of an infant; and in the case of a member of parliament the privilege may have accrued pending the proceedings.

*Hoggins*, contra.—The assignment is, that the record and proceedings are erroneous, because the defendant resided within the jurisdiction of the court of requests; but how does that fact appear on the record at all? A new fact cannot be assigned for error; and the only question appearing on the record is, whether there is a cause of action on the record.

[COLERIDGE, J.—The answer you give might be given in every case in which infancy is assigned as error.]

But it is assigned in respect of some matter appearing on the record.

[PATTESON, J.—There are many cases in which error may be assigned, in respect of something not appearing on the record. For example, in the case of outlawry, it is assigned as a fact, that the party was beyond seas. The statute, here, makes no particular provision for depriving the plaintiff of costs.]

[COLERIDGE, J.—If there is anything in your objection, it might be made the ground of setting aside the writ of error.]

[WIGHTMAN, J.—There is also this further difficulty: you might have traversed the fact of the defendant residing within the particular district, but you have joined in error. In the common case of a writ of error to reverse an outlawry, if the defendant in error chooses to say, *in nullo est erratum*, he confesses the facts. Those facts being before the Court, the question is, whether the judgment for costs is right or wrong.]

The defendant cannot do that by writ of error which he ought to have done by suggestion.

(4) 5 Dowl. P.C. 332.

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(1) 1 Bl. N.S. 639.

(4) 1 Cr. & M. 219; a. c. 2 Law J. Rep. (N.S.) Exch. 76.

(3) 3 Man. & Gr. 575; a. c. 10 Law J. Rep. (N.S.) C.P. 57.

[WIGHTMAN, J.—I do not think that you can get over the cases of infancy or outlawry, or the case of a married woman. As far as the judgment is concerned, that is a matter connected with the record. The defendant in error has joined issue, saying *in nullo est erratum*. There is error on the record, although it is shewn to be there by new matter.]

*Per Curiam—*

*Judgment reversed, as to the costs.*

1848. }  
Jan. 21; } PYE v. MUMFORD.  
Feb. 26. }

*Pleading—2 & 3 Will. 4. c. 71. ss. 5, 7.*  
*—Prescription—Life Estate.*

*Where a defendant pleads an enjoyment of an easement as of right for thirty years, under 2 & 3 Will. 4. c. 71. and the plaintiff relies on the existence of a life estate, or any of the other portions of time which, by section 7, are to be excluded from the computation of the thirty years, not being inconsistent with the actual fact of enjoyment, he is bound, under the 5th section of the above statute, to plead such life estate, &c. specially.*

Trespass for breaking and entering a close of the plaintiff, called Lavenham Hill Green, and laying large quantities of dung, soil, and rubbish upon it, &c.

Fifth plea,—that the defendant, long before and at the said time when, &c. was and still is seised in his demesne as of fee of and in a certain farm and divers, to wit, 500 acres of land, contiguous and near to the said close in which, &c., and that the defendant and those whose estate he has, for thirty years next before the commencement of the suit have continually had and enjoyed as of right and without interruption, and have been used and accustomed to have and enjoy as of right and without interruption, and the defendant still of right ought to have for himself and themselves, his and their tenants and farmers, occupiers of the said farm and lands, with the appurtenances, for the necessary and efficient cultivation and manuring the same, as to the said messuages, &c. belonging and appertaining, the right and privilege in every

year, and at all times of the year, of entering into and upon the said close in which, &c. to cart and carry all the muck, dung, &c. made, arising, and accruing in and upon the said messuages, &c. into and upon some certain small and reasonable portion of the said close in which, &c., to wit, &c. necessary and fit for the purpose of intermixing thereon such muck, dung, &c. and of making manure thereof, and of continuing such muck, dung, &c. thereon until the same was mixed and rolled together and formed into manure, and had become in a fit and proper state to be carried, and of carrying the same from and off the said close in which, &c. to be put, placed, and spread upon and over the said farm, &c. of the defendant. The plea then justified the alleged trespasses in exercise of this right. Verification.

The replication to this plea traversed in its terms the right alleged in the plea; and issue was joined thereon.

The cause was tried, at the Spring Assizes for Suffolk, 1847, when the plaintiff had a verdict on all the issues, with nominal damages, leave being reserved to the defendant to move to enter a verdict on the last issue. It appeared on the evidence that the plaintiff was lord of the manor of Lavenham, in Suffolk, and that the close in question was part of the waste of the manor, adjoining a farm of the defendant. The defendant proved the enjoyment, as alleged in the plea, for the space of thirty years next before the commencement of the action. But it appeared that by a settlement of the 19th of February 1813, the manor was limited to Emily Pye for life, with remainder to James Pye for life, with remainders over. In 1839 Emily Pye died, leaving James Pye surviving, who died on the 25th of February 1845. The period of enjoyment proved included the period between 1813 and 1845; but if this interval was excluded, the period proved did not amount to thirty years. The plaintiff contended that on the last issue he was entitled to rely on the duration of the life estates as defeating the right claimed. The defendant objected that such life estates ought to have been specially replied.

A rule *nisi*, to enter the verdict for the defendant on the last issue, having been obtained,—

*Byles, Serj.* and *O'Malley* shewed cause (Jan. 21).—This case depends on the proper construction to be given to 2 & 3 Will. 4. c. 71. The defendant relies on section 5, the plaintiff on section 7. of that act. By the 7th section it is expressly provided, that the time during which any person otherwise capable of resisting any claim, shall be tenant for life, is to be excluded in computing the prescribed periods; but it is said that section 5. requires such an answer to be specially pleaded, and the words of that clause relied on are "if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter *hereinbefore* mentioned, or on any cause or matter of fact, or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." Now the excepted periods mentioned in section 7. cannot be said to be *hereinbefore* mentioned without doing violence to the language of the act.

[LORD DENMAN, C.J.—Has the parliamentary roll been examined, to see if this word is correct?]

It has not: but assuming it to be so, the effect of giving the construction contended for by the defendant will be that a life estate is not excluded in computing the thirty years, contrary to the express proviso of section 7. The words of section 5. may receive a reasonable construction. Suppose before more than thirty years ago there had been a licence, that would not be inconsistent with the simple fact of enjoyment, and must be pleaded—*Tickle v. Brown* (1), *Beasley v. Clarke* (2); so an interruption within section 4. must be replied—*Clayton v. Corby* (3), which is quite consistent with the present argument of the plaintiff; for it only decides that the thirty years to give a right may be made up partly of the time previous to, and partly of the time since, the existence of a life estate. No

doubt the Court there threw out some expressions which will be relied on as an authority that the life estate must be specially replied, but these *dicta* are merely extra-judicial.

[LORD DENMAN, C.J.—How is a defendant who has a mere easement to know what the course of the plaintiff's title has been, so as to be able to meet it by evidence?]

[WIGHTMAN, J.—What state of things applies to the words "incapacity or disability"? Need idiotcy be replied?]

No; for it is not "*hereinbefore* mentioned."

[COLERIDGE, J.—Those words may be confined to "other matter": it would not be necessary to use words of reference with respect to matters specifically mentioned in the same section.]

Such a replication as is contended for by the defendant would not be good, as it would not confess such an enjoyment for thirty years as is alleged in the plea, *i. e.* thirty years irrespective of any life estate, and the defendant by his rejoinder would depart from his plea.

[WIGHTMAN, J.—The plaintiff would admit an enjoyment, in fact, for thirty years, but reply that there was a life estate in existence during part of those thirty years: then the defendant by his rejoinder alleges thirty years' enjoyment, such as will support the right alleged in his plea. Until replication, the plea may mean either thirty years absolutely, or thirty years exclusive of the life estate, and the replication fixes which of these meanings is to be adopted. There would be no departure.]

*Onley v. Gardiner* (4) is decisive to shew that the years during which the life estate subsisted are to be considered as struck out in reckoning the thirty years next before the commencement of the suit.

[PATTERSON, J.—According to your argument, a replication such as suggested would have been bad as amounting to an argumentative denial that the user was of right. It does not appear that this point was taken in *Wright v. Williams* (5).]

There is no more necessity for a special

(1) 4 Ad. & El. 369; s. c. 5 Law J. Rep. (N.S.) K.B. 119.

(2) 2 Bing. N.C. 705; s. c. 5 Law J. Rep. (N.S.) C.P. 281.

(3) 2 Q.B. Rep. 813; s. c. 11 Law J. Rep. (N.S.) Q.B. 239.

(4) 4 Mee. & Wels. 496; s. c. 8 Law J. Rep. (N.S.) Exch. 102.

(5) 1 Ibid. 77; s. c. 5 Law J. Rep. (N.S.) Exch. 107.

replication in cases within the 7th section than in cases under the 4th section. It would not be necessary to reply specially that the lands were in possession of a tenant during any part of the time — *Kinloch v. Neville* (6), *Bright v. Walker* (7).

[WIGHTMAN, J.—In what cases do you say that a special replication is necessary?]

In the case of a special agreement or interruption. Several instances are given in *Tickle v. Brown*.

*Biggs Andrews and Worlledge*, in support of the rule.—The argument for the defendant must go to the extent of shewing that it is impossible to reply a life estate, idiocy, coverture, or any other matter which would defeat the right claimed under the statute, and yet the words of the statute distinctly require it. The thirty years in the plea may mean either the thirty years immediately before the commencement of the suit, or if there is a life estate it may mean thirty years exclusive of the life estate. The 7th section provides, that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, &c., or tenant for life, shall be excluded in the computation of the periods hereinbefore mentioned. But such a tenancy for life is an incapacity within the meaning of the 5th section; and, at all events, it is a matter of fact not inconsistent with the simple fact of enjoyment. The defendant cannot know of the existence of the life estate, and only relies on the actual fact of enjoyment.

[WIGHTMAN, J.—Your argument would equally apply to a lease for years. Suppose a party pleads twenty years' enjoyment as of right, and the evidence is that for fifteen years the land was in lease, and the landlord knew nothing of the enjoyment, or had directed the tenant to prevent the user: it may be important to consider this, as it was held, in *Tickle v. Brown*, to be only necessary to reply specially matters covering the whole time of enjoyment.]

The act of parliament no doubt says, in one section, that the time during which a party otherwise capable of resisting a

claim shall be tenant for life, &c. is to be excluded from the computation of the period; but in the other section, it says, that the facts shall be pleaded. The clauses must be read together. The word "hereinbefore" must be read "herein"—*Bengough v. Edridge* (8). The whole point was, in fact, involved in *Clayton v. Corby*. The thirty years may mean either of two periods. In *Wright v. Williams* the plea was held bad on a different ground, and the replication was also held bad.

[PATTESON, J.—The decision in *Clayton v. Corby* may, at all events, amount to this, that *prima facie* the words "thirty years" must be taken in their plain and ordinary meaning. If the plaintiff has the option of treating them in their ordinary sense, or as thirty years, exclusive of the time mentioned in the act, he may traverse: but you contend he cannot do that.]

If he could, every sort of evidence would be given at the trial, for which the opposite party were unprepared.

[WIGHTMAN, J.—A replication such as you suggest should, as it seems to me, go on to say that there was no thirty years' enjoyment exclusive of the tenancy for life, by special traverse or otherwise, so as to exclude any thirty years—unexceptionable years. According to your argument, the particular thirty years is immaterial. I put that to shew that it may come to a traverse after all.]

The consent given in *Tickle v. Brown* was equally within the terms of the act.

[WIGHTMAN, J.—A licence is not only not inconsistent with the simple fact of enjoyment, but accounts for it.]

[PATTESON, J.—The question comes to this, whether the life estate is an answer to the plea, or is only an element in the computation of time necessary for the proof of the plea.]

But if under the 7th section it is set up at all, the 5th section renders it necessary that it should be replied specially. *Prima facie*, the plea must be taken to mean thirty years immediately before the action. If a life estate were replied, the rejoinder would either traverse the life estate or shew another thirty years, and the question would be raised by the surrejoinder. Here one

(8) 1 Sim. 173, 263, 267; s. c. 5 Law J. Rep. Chanc. 113.

(6) 6 Mees. & Wels. 795; a. c. 10 Law J. Rep. (n.s.) Exch. 248.

(7) 1 Cr. M. & R. 211; s. c. 3 Law J. Rep. (n.s.) Exch. 250.

party relies on one section of an act, and the other on another section: the party who relies on the subsequent section must plead it. It is clear that the 7th section virtually says, that under certain circumstances "thirty years" shall have a different meaning from their ordinary meaning. It would be necessary to reply specially a tenancy for years—*Thibault v. Gibson* (9).

*Cur. adv. vult.*

The judgment of the Court was now (Feb. 26) delivered by—

COLERIDGE, J.—This was an action of trespass *quare clausum fregit*. The defendant pleaded the enjoyment of a right on the land for thirty years, under the 1st section of 2 & 3 Will. 4. c. 71. The plaintiff, by his replication, traversed the enjoyment. On the trial the defendant proved the enjoyment for thirty years next before the action; in answer to which the plaintiff proved that during part of those thirty years the land had been held by a tenant for life. The question in the cause is, whether the plaintiff was at liberty to do so, or whether he ought to have replied that fact specially. By section 7. it is plain that the time during which the tenancy for life subsisted is to be left out in computing the thirty years; and the defendant, if the point be properly raised by the pleadings, must shew an enjoyment for thirty years exclusive of that time, either subsequent to that time, or partly prior and partly subsequent. This was established in *Clayton v. Corby*. Whether the point was properly raised depends on the 5th section, which enacts—[His Lordship read the section].—Now, the tenancy for life is clearly a matter of fact, not inconsistent with the simple fact of enjoyment; and, therefore, if it be an answer to the defendant's plea, it is plain that, by the express words of the 5th section, it ought to be replied, and cannot be received in evidence on the traverse taken. Whether it be an answer to the plea depends upon the sense in which that plea is to be read; if the plea asserts thirty years' enjoyment computed, as the 7th section directs, that is, exclusive of tenancies for life, &c., then the statement of a tenancy for life would obvi-

ously be no answer to the plea, for the plea has already excluded the time of such tenancy. The plaintiff, in such case, could not rely on the tenancy for life, and therefore need not and could not reply it. If, on the other hand, the plea is to be read as *prima facie* asserting an enjoyment for the actual thirty years next before the action, counted in the ordinary manner, then the tenancy for life during a part of that time would be *prima facie* an answer to the plea, and would be relied on by the plaintiff, and ought to be replied. The defendant would then be driven to rejoin, either denying the tenancy for life, or in some form asserting an enjoyment for thirty years, exclusive of the time of that tenancy. It is said that such a rejoinder as last mentioned would be a departure from the plea, because to make it consistent with the plea, the sense first supposed must be given to the plea, and then the replication would be unnecessary, whereas the sense secondly supposed is the only one which calls for a replication. The Court, in *Clayton v. Corby*, said, that "The thirty years, alleged in the plea, will be the thirty years actually or constructively next before the commencement of the suit, according as the plaintiff shapes his replication." We think this the true construction of the plea. The defendant cannot be supposed to know the plaintiff's title, or to be cognizant of any tenancy for life; he may well intend to set up thirty years' enjoyment actually next before the action, but when he is informed by the plaintiff's replication that a tenancy for life existed, he may well prepare to establish an enjoyment for thirty years constructively. The words of the plea are large enough for either case, and the second sense put on them by the rejoinder is in the nature of a new assignment. It is true that a new assignment proceeds on the supposition that the other party has mistaken the meaning of the previous pleading, and doubtless any new assignment which enlarges and goes beyond the previous pleading of the same party is bad. The rejoinder, therefore, in such a case as the present cannot be taken as being strictly a new assignment: it would be a departure, and contrary to the rules of pleading. But it would be necessary, and therefore good by force of the statute, if we are right in saying that the statute requires

(9) 12 Mea. & Wels. 18; s. c. 13 Law J. Rep. (N.S.) Exch. 2.



that a tenancy for life should be specially replied. No other view of the pleadings would put the parties on equal terms, nor meet the plain intention of the legislature, collected from the words of the 5th and 7th sections of the act. Some argument was raised in respect of the word "hereinbefore" used in the 5th section; but it is not necessary to consider this, for that word is not applicable to the subsequent words, "matter of fact not inconsistent with the simple fact of enjoyment," on which our judgment turns. We are, therefore, of opinion that the evidence was improperly received, and that the rule ought to be absolute to enter a verdict for the defendant on the fifth plea; but, under the circumstances, we think that the plaintiff ought to be at liberty to amend on payment of costs, and a new trial granted.

*Rule absolute accordingly.*

1848. }  
Jan. 30. } JACKSON v. COLLINS.

*Bill of Exchange—Notice of Dishonour—Admission of Liability.*

*A. drew a bill for 10l. on B, who owed him 20l. The bill was payable on Saturday, the 10th of August. On the following Wednesday A. was told by the bankers of C, the holder, that they understood that he, A, had received the money to take up the bill. He said he should keep the money, as B. still owed him 10l., and that he wished the bankers would sue B. on the bill:—Held, evidence to go to the jury that A. had received due notice of dishonour.*

Assumpsit by the indorsee against the drawer of a bill of exchange for 10l., drawn on and accepted by one Hackwood.

Plea (amongst others), that the defendant had no notice of the dishonour of the bill.

It appeared at the trial, before Erle, J., at the Sittings in London, after Michaelmas term, that the bill was drawn by the defendant on one Hackwood, who owed him 20l. The plaintiff discounted the bill. The bill became due on Sunday, the 11th of August. The bill was not paid on the Saturday, by reason (as was alleged) that the acceptor thought that it was not

payable till the Monday. Hackwood, the acceptor, afterwards sent the defendant 10l. to take up the bill; and it was proved by the clerk of the plaintiff's bankers, that the defendant called at the bank on Wednesday, the 13th, when the clerk told him that they had received advice that he (the defendant) had received the money from Hackwood to take up the bill. The defendant said that Hackwood still owed him 10l., and that he should therefore keep the 10l. he had received, and leave the plaintiff to sue Hackwood on the bill.

The learned Judge thought that there was no evidence of notice of dishonour of the bill, and directed a nonsuit, with leave to the plaintiff to move to enter a verdict for 10l. and interest.

In this term—

Crowder obtained a rule nisi accordingly. —He cited *Wilkins v. Jadis* (1), *Campbell v. Webster* (2), *Curlewis v. Corfield* (3), *Brownell v. Bonney* (4).

*Humfrey and Corrie* shewed cause.—The drawer made no admission of liability on the bill so as to bring the case within those cited in moving for the rule. The defendant is silent on the subject of notice or liability.

[COLERIDGE, J.—We can hardly help seeing that in the conversation on Wednesday he assumes his liability, and has recourse to a shift.]

But notice on Wednesday would be too late. It is quite consistent with all that took place that no notice was in fact given; and it is not to be presumed, against all the probabilities of the case, both that notice was given, and given in the proper time, and by the proper party—*Tindal v. Brown* (5), *Chapman v. Keane* (6), *Roberts v. Bradshaw* (7). In *Tindal v. Brown*, Ashurst, J. observed, that "notice means something more than knowledge, because it is competent to the holder to give credit to the maker."

(1) 1 Moo. & Rob. 41.

(2) 2 Com. B. 258; s. c. 15 Law J. Rep. (N.S.) C.P. 4.

(3) 1 Q.B. Rep. 814.

(4) *Ibid.* 39; s. c. 10 Law J. Rep. (N.S.) Q.B. 71.

(5) 1 Term Rep. 167.

(6) 3 Ad. & El. 193; s. c. 4 Law J. Rep. (N.S.) K.B. 185.

(7) 1 Stark. N.P.C. 28.

*Crowder*, contra, was not called upon.

LORD DENMAN, C. J.—In some cases great strictness has been required in proof of notice of dishonour; but there are cases in which the rule has been relaxed, and I think there is good sense in holding that, under certain circumstances, the rule should be relaxed. No doubt the notice should be given in proper time; but here the acceptor, who ought to have provided for the bill, sends the money to the drawer after the time when the bill was payable. The drawer admits that he had received the money, and merely says he means to keep it. The question is, whether there was evidence for the jury. I think the rule must be made absolute.

PATTESON, J.—We must take it on these pleadings that the bill was duly presented, and therefore that it was presented on Saturday. There may, no doubt, have been some misapprehension on this point; but however that may be, it is clear, from the evidence of the banker's clerk, that the defendant, the drawer, had the money sent him on Monday. The clerk, in fact, tells the defendant that he, the clerk, has received a letter informing him that he, the defendant, had on Monday received the money to take up the bill. The defendant does not deny this; on the contrary, he says it is true, but that he wants to keep the money in payment of a further debt owing him by the acceptor. It comes to this, that after the bill was due, and after it was dishonoured, the defendant gets a notice on the Monday from the acceptor. If so, and as we are not inquiring whether there was an admission of the defendant's liability, but of the fact of notice, I think that that was evidence amply sufficient to go to the jury.

COLERIDGE, J.—The only question is, whether the defendant received notice of dishonour in due time. I think that a distinct admission of his liability, after the bill was due, will be sufficient to go to the jury as evidence that he had received notice. On Wednesday the drawer is told by the clerk that the clerk has heard that he has received money to take up the bill. Now, he had either received the money or he had not. If he had, then surely he must be taken to have received notice. If not, then there is the evidence that he did not stand

upon his non-liability; but he says he means to keep the money, which is the answer of a man who meant to admit his liability.

WIGHTMAN, J. concurred.

*Rule absolute.*

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1847.	{	DOE d. BIDDULPH AND OTHERS v. POOLE.
May 3.		
1848.		
Feb. 26.		

*Lease—Tenant for Life—Power of Leasing—Operation of invalid Lease as a surrender of existing Lease.*

*B, tenant for life, with a power of leasing, made in April 1788 a lease to A. for ninety-nine years, determinable on three lives, of a portion of premises already demised to A. by two several leases of 1760 and 1784. The lease of April 1788 purported to be granted "for and in consideration of the surrendering up to B." of the leases of 1760 and 1784; "and in order to effectuate an agreement entered into between A. and one C. for the sale to C. of the residue of the premises, which residue the lease recited was intended to be demised by B. to C., by indenture of lease bearing even date therewith." The lease to A. of April 1788, was not a good execution of the power. The lease of 1784 was a good execution of the power. The lease of 1760 had determined. The residue of the premises, mentioned in the lease to A. of April 1788, was demised to C, by indenture of that date, by a valid subsisting lease:—Held, that the acceptance by A. of the lease of April 1788 did not, as to the premises thereby demised to A, operate as an absolute surrender in law of the lease of 1784, and that, on ejectment being brought by the remainder-man after the death of the tenant for life, the lease of 1784 must be considered as a subsisting lease.*

Ejectment to recover the possession of certain messuages, &c., situate in the parish of Stogursey, in the county of Somerset, being the premises expressed to be demised in the indenture of lease marked A, herein-after mentioned. The declaration contained demises from the said Robert Biddulph, Lawrence Walker, Joseph Steward, and William Cookesly Thompson, dated the 10th

of April 1845, and from the said Alexander W. Grant, dated the 26th of May 1845.

The defendant entered into the usual consent rule to defend as landlady.

By Judge's order of the 4th of November 1846, the facts were stated for the opinion of the Court in the following

#### CASE.

The Right Hon. Charles Earl of Egremont, before and at the date of his will, bearing date the 31st of July 1761, and from thence to the time of his death, was seised in his demesne as of fee of the premises mentioned in the declaration, and being so seised, by his will, bearing date as aforesaid, and duly executed and attested as by law is required, gave and devised all his manors, messuages, lands, advowsons, rents, and hereditaments (including the premises sought to be recovered in this ejectment), in the several counties of Somerset, Dorset, and Cornwall, with their respective rights, members, and appurtenances, part of the estate of his father Sir William Wyndham, Bart., deceased, unto his eldest son George Lord Cockermouth and his assigns for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to testator's second son, Percy Charles Wyndham and his assigns for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to the testator's third son Charles William Wyndham and his assigns for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to the fourth, fifth, and all and every other the son and sons of the said testator's body lawfully begotten or to be begotten, whether born in his lifetime or after his decease, severally, successively, and in remainder one after another, as they should be in priority of birth, and of the respective heirs male of the body of such son and sons lawfully issuing.

The said will contained the following power:—"And I do hereby further will and declare that it shall and may be lawful to and for the several and respective persons to whom any estate for life is hereinbefore devised, when and as they shall be in the actual possession of the said manors, messuages, lands, tenements, hereditaments, and premises hereinbefore devised to them

respectively for their said respective lives as aforesaid, or any part thereof, by virtue of the limitations hereinbefore contained, by indenture or indentures, under their respective hands and seals, to demise, lease, and grant all or any of the said manors, &c., parts and shares of manors, &c., hereinbefore mentioned to be hereby devised or limited to any person or persons for any term or number of years not exceeding twenty-one years, to take effect in possession and not in reversion, or by way of future interest, so as in every such lease or demise there be reserved to continue payable, half-yearly or oftener, during the term thereby to be granted, and to be incident and go along with the reversion or remainder of the same premises expectant thereon, the best and most improved yearly rent that can, at the time of making such lease, reasonably be got for the same, without taking for the making of such lease any fine, premium, or foregift; and also to demise and lease, grant in possession or reversion for one life, or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the said premises usually so leased, so that all the leases to be made by virtue hereof, which shall be in force at the same time, shall be determinable on the dropping of one life, or the dropping of two or three lives at the most, so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained or more, and so that in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained, and so as no clause or clauses be contained in any of the said leases, giving power to any lessee to commit waste, or exempting him from punishment for committing the same, and so as the respective lessees do execute counterparts of all such leases."

The said Charles Earl of Egremont died on the 21st day of August 1763, without

having revoked or altered his said will, leaving four sons born in lawful wedlock, namely, George O'Brien, his eldest son, in the said will called George Lord Cockermouth, who succeeded his father as Earl of Egremont, the said Percy Charles Wyndham, his second son, and the said Charles William Wyndham, his third son, and William Frederick Wyndham, his fourth son, who was born on the 6th of April 1763.

The said Charles William Wyndham, his third son, died on the 7th day of July 1828, without ever having had any issue. The said Percy Charles Wyndham, the second son, died on the 5th day of August 1833, without ever having had any issue. The said William Frederick Wyndham, the fourth son, died on the 18th day of February 1828, leaving George Wyndham, afterwards Earl of Egremont, his eldest son and heir-at-law, him surviving. The said George O'Brien Earl of Egremont, died on the 11th day of November 1837, without ever having had any issue.

Upon the death of the said testator, the said George O'Brien Earl of Egremont entered into the possession and receipt of the rents of the said manors, lands, &c., so devised as aforesaid, as tenant for life under the said will. In the year 1837, the said George O'Brien Earl of Egremont and the said George Wyndham, afterwards Earl of Egremont, barred the estate tail of the said George Wyndham in the said manors, lands, &c., devised by the said Charles Earl of Egremont, and the inheritance in fee of the same manors, lands, &c. was thereupon settled upon and became vested in the said George Wyndham, subject to the estate for life of the said George O'Brien Earl of Egremont. The said George Wyndham, who became Earl of Egremont, died on the 2nd day of April 1845, having first made his will, duly executed for passing real estates whereby he devised to the said Robert Biddulph, Lawrence Walker, Joseph Stroad, and William Cookaley Thompson, the inheritance of the said manors, lands, &c., devised by the said will of the said Charles Earl of Egremont, and such devises upon his death became seised thereof. The said George O'Brien Earl of Egremont, whilst such tenant for life, made and executed an indenture of lease to one Abraham Symons, bearing date the 29th day of April

1788, being the lease in question in this cause. A copy of this lease was annexed to the case. A counterpart thereof was duly executed by the lessee. It is admitted between the parties for the purposes of this case, that the above-mentioned lease of the 29th day of April 1788, was not a due execution of the leasing power contained in the will of Charles Earl of Egremont.

Copies of two leases respectively in 1760 and 1784, mentioned in the above lease of the 29th day of April 1788, were annexed to the case. It is admitted for the purposes of this case, that the said lease of 1784 was a due execution of the said leasing power, and that one of the *cestui que vies* mentioned therein is alive.

The lease of 1760 has determined.

The said lease of 1788 demised part only of the lands and premises contained in and demised by the said prior leases, of 1760 and 1784, as will be seen by reference to the leases. The residue of the lands and premises contained in such prior leases were demised by the said George O'Brien Earl of Egremont to John Ackland, Esq., by a lease bearing date the same 29th day of April 1788, which lease was afterwards surrendered to the said George O'Brien Earl of Egremont, and a new lease granted of the premises therein contained to the said John Ackland, by a lease bearing date the 29th of April 1794, and which last lease is still a subsisting lease.

By the lease of the 29th of April 1788, which was between George O'Brien Earl of Egremont, of the one part, and Abraham Symons, of the parish of Stoke Curry, in the county of Somerset, yeoman, of the other part, it was witnessed, that for and in consideration of the surrendering and yielding up into the hands of the said Earl, at or before the sealing and delivery of these presents, two certain indentures of lease, the one bearing date the 1st of January 1760, and purporting to be a demise and grant from Charles late Earl of Egremont, deceased, to Bartholomew Symons, since deceased, and Abraham Symons (and which now is vested in the said Abraham Symons) for ninety-nine years, and now determinable on the death of Joseph Dowdon, of the hereditaments and premises hereinafter mentioned to be hereby demised, with other

lands and premises now parted and disencumbered therefrom, and demised by indenture of lease, bearing even date herewith by the said Earl (party hereto) to John Ackland, of Fairfield, int he said county of Somerset, Esq., for the term of ninety-nine years, determinable on three lives; and the other bearing date the 23rd of March 1784, and purporting to be a demise and grant of the whole of the same premises from the said Earl (party hereto) to the said Abraham Symons, for ninety-nine years, determinable on the deaths of Betty Symons and Sarah Symons, his daughters, and to commence and take effect immediately on the death of the said Joseph Dowdon, and also in consideration of the sum of 5s., and in consideration of the covenants, and in order to effectuate the agreement entered into between the said Abraham Symons and John Ackland, with respect to that part of the premises sold off as aforesaid, and which is intended to be demised by an indenture of lease, bearing even date herewith by the said Earl (party hereto) to the said John Ackland, for the term of ninety-nine years, determinable as therein mentioned, he, the said Earl, demised, &c. to Abraham Symons, all that messuage, &c., *habendum* to the said Abraham Symons, his executors, administrators, and assigns from henceforth, for, by, during, and unto the full end and term of ninety-nine years from thence next ensuing and fully to be complete and ended, if Joseph Dowdon, son of John Dowdon, of &c., aforesaid, aged &c., Betty Symons, aged &c., and Sarah Symons, aged &c., and daughter of the said Abraham Symons, or any or either of them, should so long happen to live, *reddendum* certain quit rents and heriots.

The lease of the 1st of January 1760 was a devise from Charles Earl of Egremont to Bartholomew Symons and Abraham Symons; *habendum* at the expiration or other sooner determination of a certain term of ninety-nine years, granted of all and singular the said premises, by indenture of lease, bearing date the 13th of December 1723, by Sir William Wyndham, bart., since deceased, to Roger Dowdon, for ninety-nine years.

The lease of the 25th of March 1784 was as before recited.

The plaintiff's points were:—That the

term created by the lease of 1784 was well surrendered in the year 1788, as to the whole of the premises comprised in such lease; and it being admitted that the lease of 1788 is invalid, that there is, consequently, no valid subsisting lease of the premises sought to be recovered in this action.

The defendant's points were:—That the lease of 1784, as it regards the lands and premises sought to be recovered in this ejectment, was at the date of the demise in the declaration a valid subsisting lease, and that the acceptance of the lease of 1788, being an invalid lease, did not operate as a surrender in law of the said lease of 1784, as it regards the said lands and premises.

This case was argued (May 3, 1847,) by—

*Crowder*, for the lessors of the plaintiff.—Though a lease which is wholly void and conveys nothing may not amount to a surrender, yet this lease, which is only voidable, amounted to a surrender by operation of law, whatever the intention of the parties may have been—*Com. Dig.* tit. 'Surrender,' and *Shep. Touch.* p. 300. In *Roe v. the Archbishop of York* (1) the lease was considered void, and the judgment proceeded on that assumption, though in point of law the lease might have been good during the life of the archbishop. It is true that in *Doe d. Lord Egremont v. Forwood* (2), in which it was held that the first lease was to be considered as surrendered under circumstances similar to the present, the second lease had the words "which is hereby surrendered accordingly," which are not to be found in the present case; but the question is, what is the legal operation of taking the second lease? The express stipulation in *Doe d. Lord Egremont v. Forwood* was that which the law would have implied, or it would amount to nothing. In *Lyon v. Reed* (3), where the case of *Roe v. the Archbishop of York* was not referred to, it was held that the acceptance of a new lease was a surrender in law of the old one. It is to be observed that the lessor in the lease of 1788

(1) 6 East, 86.

(2) 3 Q.B. Rep. 627; a.c. 11 Law J. Rep. (N.S.) Q.B. 321.

(3) 13 Mee. & Wels. 285; a.c. 13 Law J. Rep. (N.S.) Exch. 377.

makes no reference to the power, and the lease cannot be said to pass nothing; and if any interest passed it would not be a lease by estoppel—*Bac. Abr. tit. 'Leases,' 'Estoppel,'* (O), *Co. Litt. 47, b.* The cases of *Devson v. Stanley* (4), and *Wilson v. Sewell* (5), were decided on that ground.

[PATTERSON, J.—Suppose the former lease had expired before the present lease had been granted, could it be contended that it passed nothing at all?]

It gave an interest for the life of the grantor, and that is a sufficient consideration for the surrender, though it may be void as against a remainder-man. This question was much considered in *Doe d. the Bishop of Rochester v. Bridges* (6); but in that case there was a clear act of surrender. The circumstance of hardship cannot alter the rule of law; and the question is, was anything taken under the second lease? It may be said that a portion only was surrendered, and that now is demised to Ackland.

[PATTERSON, J.—The taking of a part would not amount to a surrender of the whole—2 *Roll. Abr.* 498, and *Thursby v. Plant* (7); but the new lease shews the intention of all parties to demise a portion at all events to some one else—*Hamerton v. Stead* (8).]

*Kinglake, Serj.*, for the defendant.—The lease of 1788 is wholly invalid, as not being a due execution of the power. The surrender by operation of law can only be that of which the grantor grants a valid lease, viz., of the portion demised to Ackland, if that be by a valid lease. The Statute of Frauds will not be satisfied by a mere recital of some arrangement made between the parties; and by the common law, "If lessee for years accepts a new lease by indenture of part of the same lands, this is a surrender for that part only, and not for the whole"—*Bac. Abr. tit. 'Leases and Terms for Years,'* letter S, p. 882, and *Fish v. Camplin* (9) there cited; the reason being "that there is no inconsistency between the two

leases for any more than for that part only which is so doubly leased." Here, though there has been a demise of part to Ackland, and a surrender of that, yet as to the part retained by the lessee, he has not got what he bargained for.

[COLERIDGE, J.—Would there not be the same inconsistency if the lessee only took under the new lease, during the life of the lessor?]

The mere granting a lease to a third party does not operate as a surrender, unless it is granted with the full assent of the lessee—*Thomas v. Cook* (10), *Doe d. Lord Egremont v. Forwood*. It is contended that the lease must operate in one way, though it purports to operate in another; and that because there is a grant of a part there is by law a surrender of the whole; but the same argument was relied on unsuccessfully in *Roe v. the Archbishop of York*.

[ERLE, J.—Suppose the lease professed to have been made "under any power which I have;" and it turned out not to have been a due execution of any power which the lessor had, and was therefore invalid, would that be a good surrender of the whole?]

Clearly not. The case of *Roe v. the Archbishop of York* is a distinct authority to the contrary. The parties to the second lease might take something less than they had before; but such lease will not operate as a surrender, contrary to the express intention of the parties who contracted with reference to another object.

*Crowder*, in reply.—If *Roe v. the Archbishop of York* had decided the question, the argument in *Doe d. Lord Egremont v. Forwood* would have been unnecessary. Did anything pass by the lease of 1788, or not? If it did, the surrender is valid. There is nothing to shew that the lessor had any intention to execute the power. Symons held the property under the lease of 1788 from that time to the present. He did not hold under the lease of 1784, as Ackland had part of the premises demised by that lease. The lease of 1788 was only voidable. *Thomas v. Cook* does not apply. Besides, the authority of that case is shaken by *Lyon v. Reed*.

*Cur. adv. vult.*

(4) 4 Burr. 2210.

(5) *Ibid.* 1980.

(6) 1 B. & Ad. 847; s. c. 9 Law J. Rep. K.B. 112.

(7) 1 Wms. Saund. 236, a.

(8) 3 B. & C. 478; s. c. 3 Law J. Rep. K.B. 33.

(9) 2 Roll. Abr. 498.

(10) 2 B. & Ald. 119.

The judgment of the Court was now (Feb. 26, 1848) delivered by—

COLERIDGE, J.—In this case it appeared that before 1788 the premises in question, with a parcel mentioned below, were held under two leases for ninety-nine years, determinable at the end of three lives; and that in 1788 the lessee had sold that parcel to one Ackland, and wished to surrender it to the reversioner, so that he might lease it to Ackland, which lease was to be made at the same time as the lease in question; it further appeared that by lease of 1788, stated by way of recital to be made in consideration of the lessee's surrendering the two former leases, and in order to effectuate his agreement with Ackland, the lessor demised the premises in question to the lessee for ninety-nine years, determinable on the same three lives, and with an apportionment of the rents and heriots, the parcel being severed. This lease, being granted by tenant for life, with power to lease, and not being a due execution of the power, was void after his death against the remainder-man, who brought ejectment; and as the former leases are not otherwise determined, he has contended that the acceptance of the lease of 1788 was a surrender in law of the former leases then subsisting.

It was not disputed that the acceptance of a valid lease is a surrender in law of a former lease inconsistent therewith, and that the acceptance of a void lease is not, and that the acceptance of a lease made voidable upon condition, may also be a surrender in law, if rendered void according to the contract. But the question has been, whether acceptance of a lease which is voidable, and afterwards made void, contrary to the intention of the parties thereto, and which does not pass an interest according to the contract, is still an absolute surrender in law, provided it has operated to pass any part of the term contracted for, as during the life of a lessor tenant for life, which is the present case; and we are of opinion that this question must be answered in the negative.

The doctrine of surrender implied by law was introduced for the purpose of giving effect to the intention of the parties. The surrender is presumed for the purpose of making a grant operative, which

otherwise would be without effect—*Thompson v. Trafford* (11). The surrender is in consideration of the grant; and if the grant fails contrary to the intention of the parties, it seems unreasonable that an absolute surrender should be presumed to have been intended. The facts of the present case are remarkable to negative an intention to surrender, unless the new grant should be valid. The object of the parties was to sell a parcel to Ackland, and to apportion the rent on the residue; and if the lessee had assented to a demise of the parcel by the lessor to Ackland, and he had accepted it, that would have been a surrender in law of the parcel by such lessee—*Walker v. Richardson* (12), and see *Doe d. Huddleston v. Johnston* (13). Also a surrender of parcel is no surrender of the residue—2 *Roll. Abr.* 497, 'Sur.' M, pl. 1; and an apportionment could be made without a surrender. The lease, therefore, of 1788 was unnecessary. It did not substantially alter the lessee's interest in the premises, and was intended to confirm his interest under the subsisting leases. Now it is not possible to conceive a more perverted application of the doctrine of giving effect to the intention of the parties, than to hold that an instrument intended solely to confirm leases should be effective solely to destroy them. It has been objected that the surrender must have been absolute, if the second lease has been valid for any time, because the valid leases for the same term cannot co-exist; but the objection does not arise, if the surrender of the first lease be held to be conditional; and this, we think, is the true construction.

That an express surrender may be on condition, either precedent or subsequent, is clear upon the authorities, as if it be with reservation of rent, and conditioned to be void if the rent be not paid—*Shep. Touch.* p. 307. "A condition annexed to a surrender may reave the particular estate, because the surrender is conditional"—*Co. Litt.* 218. b. This being so, as to express surrenders, we can discover no reason why an implied surrender may not also be taken to be conditional to be void on a given event. As the surrender is by implication only, it

(11) Poph. 9.

(12) 2 Mee. & Wels. 882; s. c. 6 Law J. Rep. (N.S.) Exch. 229.

(13) M'Clel. & Y. 144.

is equally open to imply a conditional or an absolute surrender; and where the implication of a conditional surrender prevents injustice and gives effect to the real intention of the parties, the true spirit of the law requires that implication to be made, and forbids an implication leading to the contrary consequences.

The implication of a condition that the surrender should be void in case the new grant should fail, appears to us to be free from objection. Indeed, where the terms of a lease import an express surrender solely in consideration of the new grant, we think that a construction that such surrender was conditional would be warranted, and would give effect to the intention of the parties. This construction would not interfere with the mutual estoppel from a deed between lessor and lessee; the doctrine would not apply till the new term had been defeated by title paramount, and all estoppel was removed.

The same results to the parties would follow if the new lease when made void was held to be void as a surrender *ab initio* on account of legal fraud upon the surrenderor, the lessor being taken to have asserted that he had power to make the lease, and induced the surrender upon the faith of that assertion. This was one ground of decision in *Davison v. Stanley*; but a construction that a surrender in law is conditional appears to us the preferable opinion. The presumption in favour of this view from its justice is confirmed by decided cases. In *Davison v. Stanley* the new lease was valid during the life of the lessor, who was tenant for life of the reversion; and it was held that the new lease was not a surrender in law of a former lease, because it did not pass an interest according to the contract. This important decision, which is in point for the present defendant, is supported as well on the ground that the implied surrender was conditioned to be void, if the new lease should not continue according to the intention of the parties thereto, as on the ground of fraud. In *Wilson v. Sewell* the present question was discussed without being decided, as the new lease was valid; but the Court declares that "if a surrender is intended for a particular purpose, and that purpose, the only motive of it, fails, the surrender ought to fail too." Where a dean

and chapter made a valid lease before the 13th Eliz., and granted a new lease after that statute, which was void thereby, and the question was, whether the acceptance of the second lease was a surrender in law of the former lease, it was held, not. And this opinion was independent of the question, whether the second lease was valid during the time of the dean who granted it or not, the Judges saying that they do not give an opinion on that point—*Lloyd v. Gregory* (14). Now, as the second lease was valid during the time of the dean who granted it (15), though afterwards void, this case is also in point for the defendant.

Where tenant in fee leased to A. for forty-one years, and afterwards to B. for ninety-nine years, and afterwards to A. by deed for forty-one years, it was held, that the acceptance of the second lease for forty-one years by A, was not a surrender in law of the first lease for forty-one years, because, if it was, the lease for ninety-nine years would make the second lease inoperative—*Watt v. Maydewell* (16). In 1 *Saund.* 236, note c, by Serjeant Williams, it is said, if the new lease be not a good one, if it does not pass an interest according to the contract and intention of the parties, the acceptance of it is no implied surrender of the former lease, and the above cases are cited.

In *Roe v. the Archbishop of York*, the approval of the general reasoning in *Wilson v. Sewell* and *Davison v. Stanley*, and also the recognition of the principle, that the intention should govern according to the authorities cited in pp. 104, 105, are in support of our opinion. The judgment itself is wholly beside the present question, because it passed for the defendant on the point that the second lease was void *ab initio*, and it thus became unnecessary to adjudicate on the precise view now relied on by us, which was there presented to the Court by Holroyd and Gibbs, as a second ground of defence, with much clearness. The authorities relied on in that and other cases, to prove a surrender to be absolute in case an interest, however small, has passed, are reduced in importance on close consideration.

There are numerous dicta by learned

(14) Sir W. Jones, 405.

(15) Co. Litt. 45, a.

(16) Hutton, 104.



Judges and in text writers, but, with the exception of *Whitley v. Gough* (17), there does not appear to be any decision on the point; and even in that case the facts are so scantily reported as to leave it uncertain whether the point arose at all. There husband leased for ninety years by deed, and assigned the reversion, so as to vest it in himself and wife, and afterwards leased for eighteen years by parol, and died, and his widow sued the lessee in trespass; and it was held that the acceptance of the second lease was a surrender in law of the first, though by parol, and for a shorter term. If the action was brought before the expiration of the eighteen years, this case would be in point for the present plaintiff; but it is consistent with the statement of facts and of the points decided, that the action may have been after the eighteen years, and after the lessee had had the term he contracted for, and it would then be irrelevant. The *Digests*, into which this case has been adopted, throw no light on this question of fact. In *Fulmerston v. Steward* (18), the second lease of sixty years was made void as to all beyond twenty-one years, by the retrospective effect of 30 Hen. 8. c. 13, and still it was held to be a surrender in law of a former lease for sixty years. But both leases were, when made, valid; and there is no analogy between the avoidance of a valid lease without breach of contract by a retrospective statute, and the avoidance of a voidable lease contrary to the contract, from the failure of the title of the lessor. In *Mel-lows v. May* (19) there was a lease to baron and feme for lives, and afterwards baron and feme and son accepted another lease for lives, and it is said that the second lease was void *ab initio*, i. e. being to commence at *dies datus*, i. e. *in futuro*, and still was valid as a surrender of the first lease. But this report is of no weight, both from the unsoundness of the position itself, that a void lease involves a surrender—see *Roe v. the Archbishop of York*,—and also because in the report of the same case in *Moor*, 636, the second lease is stated to have been held valid, in which case, of course, it involved a surrender in law. *Fludd v. Gregory*, 2 Roll. Abr. 495, 'Sur.' F, pl. 7, is the

case reported by Sir W. Jones, as *Lloyd v. Gregory*; and the report of that Judge, as before mentioned, does not bear out the statement in *Rolle*, that a voidable lease, if made void, is a surrender. In *Shep. Touch.* p. 301, it is said, "That the acceptance of a second lease is a surrender, though it be avoidable, as if it be upon condition, which happens, or if it be made by tenant in tail, or the like." In the first case, the lease avoidable, according to the contract of the lessee, would be a surrender; but in the second case, if it was made void, contrary to the contract, it would raise the present question; and *Sheppard* cites for that position only *Whitley v. Gough*. In *Willis v. Whitewood* (20), the question was, whether lease by tenant in fee of socage lands was surrendered in law by accepting a new lease from the guardian in socage, and two Justices against one held, that the first lease was determined, though not surrendered; but enough particulars are not reported to decide whether the lessee knew what the interest of the guardian was, and had that which he contracted for. In *Lane's case* (21), *Ives's case* (22), and *Thompson v. Trafford*, the second estate was valid, and so the question was not raised. In *Cary* (23), the abstract of an application to Chancery for a specific performance of an agreement for the first lease, is too short to ascertain its application to the present question. These are the earlier cases, which have been heretofore referred to in support of the point now relied on for the plaintiff. In *Doe d. the Bishop of Rochester v. Bridges*, there was an express surrender by separate deed at a different time, and the lessee is stated to have had that which he contracted for. In *Doe d. Lord Egremont v. Forwood* there was also an express surrender in the lease in consideration of its grant. These cases, therefore, might be distinguished from the present, on the ground that the new leases were founded on express and not implied surrender. But the general reasoning, above mentioned, would lead to a different decision of the latter case. The nature of the transaction, and the intention of the parties is really the same, whether those expressions

(17) *Dyer*, 140, (b).(18) *Plow.* 106.(19) As reported in *Cro. Eliz.* 874.

(20) 1 Leon. 302.

(21) 2 Rep. 17.

(22) 5 *Ibid.* 11, a.

(23) 21. Anon.

of surrender are added in the lease or not; and the principle of Lord Mansfield's judgment extends equally to surrenders so expressed, and to surrenders implied by law, and accordingly this case has been reconsidered in the present term—*Doe d. Lord Egremont v. Courtney* (24). The hardship resulting from a strict application of what was supposed to be the rule, led us to doubt the correctness of that supposition, and to review the authorities cited for it; and our inquiry has led us to the conclusion, that the position which would produce such a result is not supported by law. The case for the lessors of the plaintiff consequently fails, and our judgment is for the defendant.

*Judgment for the defendant.*

1846. }  
April 19. } *DOE d. GEORGE EARL OF EGRE-*  
1848. } *MONT AND ALEXANDER WIL-*  
Feb. 26. } *LIAM GRANT v. COURTNEY.*

*Lease—Tenant for Life—Power of Leasing—Void Lease—Surrender.*

In 1755, a tenant for life, under a power of leasing demised lands to the defendant for ninety-nine years, determinable on lives. In 1812, the tenant for life under the same power granted a further lease in reversion of the same lands to the defendant for ninety-nine years on additional lives. The lease purported to be made "in consideration of the surrendering up into the hands of the lessor by the lessee" of the lease of 1755, "which surrender is hereby made and accepted accordingly." The lease of 1812 was not a valid execution of the power:—Held, that as it did not pass an interest according to the contract, it did not operate as a surrender of the lease of 1755, and one of the lives named in that lease being still in esse, ejectment would not lie.

Ejectment for lands in Devonshire, the day of the demise being the 20th of October 1844.

At the trial, before Coleridge, J., at the Spring Assizes for Devon, 1845, the lessor of the plaintiff rested his title on the same pedigree as in the preceding case. It also

appeared that on the 29th of September 1755, Charles Earl of Egremont demised to Richard Courtney the premises which were the subject of this action, *habendum* to the said Richard Courtney, his executors, administrators and assigns, from and immediately after the expiration or other sooner determination of a certain term of ninety-nine years, or some such term of years now determinable on the death of Sarah Peppin, for and during the further term of ninety-nine years, if the said Richard Courtney, aged about twenty-eight years, and Betty, the daughter of Thomas Hill, of Rackenford, in the county of Devon, aged six years, or either of them, should so long happen to live.

By indenture of the 11th of July 1785, Percy Charles Wyndham (the third tenant for life under the limitations of the will set out in the preceding case), in consideration of the fine of 90*l.* and the reservations and covenants, &c., demised the premises to Richard Courtney from and immediately after the expiration or other sooner determination of the term granted by the lease of the 29th of September 1755, for the term of ninety-nine years from the date, if Richard Courtney, son of Richard Courtney the younger, and grandson of Richard Courtney party hereto, should so long happen to live.

By indenture of the 25th of March 1812, between Percy Charles Wyndham, the lessor, of the one part, and Richard Courtney the younger, the lessee, of the other part, it was witnessed, that in consideration of the surrendering up into the hands of the said lessor, by the said lessee, at or before the delivery thereof, of a certain lease of the 29th of September 1755, granted of the premises hereby demised for the term of ninety-nine years now determinable on the death of Betty Hill, daughter of Thomas Hill, *which surrender is hereby made and accepted accordingly*, and also in consideration of 240*l.*, &c. the lessor demised to the said Richard Courtney the same premises, *habendum*, from the expiration or other sooner determination of the term of ninety-nine years granted by the lease of the 11th of July 1785 for ninety-nine years, if Bartholomew Courtney aged two years, and Hannah Courtney aged one year (children of the said lessee), or either of them, should so long live.

It also appeared that the estate of the

(24) See the following case.

present plaintiff, as tenant for life, vested in him in possession in November 1837, (Percy Charles Wyndham, the grantor of the lease of 1812, having died in August 1833). The steward of the lessor of the plaintiff had received the rents of this property from the defendant in 1838, 1839, and 1840. And that, on the 27th of September 1843, a notice, dated the 25th of September, was given on behalf of the solicitors of the lessor of the plaintiff to the defendant, "to quit and deliver up on the 25th day of March next the peaceable and quiet possession of all messuages, tenements, &c., situate &c., which you now hold of the said Earl of Egremont, provided that your tenancy commenced at Lady-day, or otherwise that you quit and deliver up peaceable and quiet possession of the said premises at the end of the year of your tenancy which shall expire next after the end of one half year from the time of your being served with this notice." This notice was accompanied by a letter intimating that an investigation was proceeding, with respect to the validity of the leases for lives held under Lord Egremont; and in the event of his lordship being advised that the lease under which the defendant held was bad, an ejectment would be brought; but if it was considered good, the notice would be withdrawn. For the defendant, it was contended that if the lease of 1812 was a void lease under the power, it would not operate as a surrender of the lease of 1755; and that as Betty Hill was not proved to be dead, that lease was still subsisting—*Doe v. Forwood* (1). Secondly, that the notice to quit was insufficient to support the demise laid in the declaration, and was not a positive notice by reason of the accompanying letter. The learned Judge directed a verdict for the lessors of the plaintiff, with liberty to the defendant to move to enter a nonsuit on the objections raised at the trial.

*Kinglake, Serj.*, in Easter term, 1845, obtained a rule nisi, accordingly; and in Easter term 1846 (April 19),

*Crowder and Montague Smith* shewed cause.

*Kinglake, Serj.* and *Merivale* were heard in support of the rule.—The arguments and

authorities are fully stated in the judgment of the Court, which was now (February 26, 1848,) delivered by—

*COLERIDGE, J.*—This case was tried, before me, at the Devon assizes; and it being admitted that the lease under which the defendant had supposed himself to be in possession could not be sustained with reference to the power under which alone it could have been valid, a verdict passed for the lessor of the plaintiff. But two points were made at the trial and on motion before us for a nonsuit, which are now to be considered.

There were the counterparts of three leases produced, of the respective dates of 1755, 1785, and 1812; and the plaintiff's case was, that the two latter were invalid, which was admitted, and that the last was granted in consideration of a surrender of the first, and operated as a surrender of it. This was necessary to his case, as one of the lives on which the lease of 1755 was granted was still in being, and that lease still in force, unless so surrendered. But the defendant contended, that the surrender having been made only in consideration of the grant of a new valid lease, did not take effect, because the new lease was invalid.

Secondly, assuming that this point should be decided against him, he contended that he had become tenant from year to year, and that his tenancy had not been determined by any good notice to quit. Upon the first point, the counsel for the plaintiff contended that it had been already decided in their favour by this Court in *Doe v. Forwood*. It is remarkable that in the judgment in that case not a word is said upon this point, and what is reported to have dropped from the Judges in the course of the argument, seems against the plaintiff; but as the judgment could not have passed for him unless the Court had thought there had been a good surrender of the valid lease, it must be taken that they did so hold under the circumstances of that case. There the former lease was particularly described in the invalid one, which was said to be granted for the consideration of the surrender of such former one, (adding—"which is hereby surrendered accordingly,") and of the sum of 157*l.* 10*s.* paid by the

(1) 3 Q.B. Rep. 627; s. c. 11 Law J. Rep. (N.S.) Q.B. 321.

lessee to the lessor. This surrender was relied on by the counsel in that case as being an express surrender, and taking it out of the principle of decision in *Roe v. the Archbishop of York* (2), and bringing it within that of *Farmer v. Rogers* (3). That case, however, turned on no distinction between an express and an implied surrender; but on whether the note in writing there relied on was a sufficient surrender to satisfy the Statute of Frauds. Nor is there any thing in the judgment in *Doe d. the Bishop of Rochester v. Bridges* (4) (a case also referred to) which points to the importance of the distinction. There the surrender of the valid lease was by a deed-poll executed a few days before the invalid lease; and the consideration of such surrender was not stated to be the granting of the new lease, and what is of more importance, the new lease, as the judgment remarks, was "in terms precisely conformable to the intent mentioned in the deed of surrender. The surrender obtained exactly the lease for which he bargained, and therefore it cannot be said that the new lease is a fraud or deception upon him; and if the surrender be deemed conditional," (*i. e.* on the granting of a new lease, as stipulated for) "the condition has been complied with." It was said, on behalf of the defendant in the present case, that the surrender in *Doe v. Forwood* was taken to be express, and that in the present case it was only implied; that in that case it was found that, on the execution of the second, the first was, in fact, delivered up to the lessor, but that in the present case no such delivery up was proved. These differences in fact were relied on to distinguish the two cases; but we think that they are not made out satisfactorily. In *Doe v. Forwood* the ground for calling the surrender express was the introduction of the words "which is hereby surrendered accordingly," whereas in the present case the words were "which surrender is hereby made," or equivalent words. On the words "hereby surrendered accordingly" in *Doe v. Forwood*, Patteeson, J. is reported to have said "that is on the supposition of the new lease being granted," referring to the consideration immediately

before expressed. As to the delivery up of the old lease, the fact was not shewn either way on the trial of the present case, nor was any point made of it on either side. But this fact can only be evidence of intention, which was not needed in this case: it will not be in itself a surrender. In *Roe v. the Archbishop of York*, the fact existed, together with cancellation, and yet the surrender was not held complete.

But then it was said that the whole doctrine, which vacated the surrender of a prior lease whether express or implied, where the consideration was the grant of a new lease, applied only to the case where such new lease was void, and not where it was merely voidable; that here the second lease was not void; that it bound the grantor, and might have been confirmed by each succeeding tenant for life to its expiring by efflux of time. We have had occasion to consider this doctrine in another of these cases (5), and to examine the decisions at some length; we will not, therefore, now repeat that examination, contenting ourselves with saying that the principle to be found laid down by Lord Mansfield in *Wilson v. Sewell* (6) and *Davison v. Stanley* (7) seems to us the true one: that where the new lease does not pass an interest according to the contract, the acceptance of it will not operate a surrender of the former lease; that in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and that in case of an express surrender, so expressed as to shew the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate all the intention of the parties, would make that surrender also conditioned to be void in case the grant should be made void; see *Doe d. Biddulph v. Poole* (8). Tried by this principle we are, on consideration, satisfied that the lease of 1755 was not surrendered, and was a good answer to the action. Our decision upon

(2) 6 East, 86.

(3) 2 Wils. 26.

(4) 1 B. & Ad. 847; s. c. 9 Law J. Rep. K.B. 113.

(5) *Doe d. Biddulph v. Poole*, ante, p. 143.

(6) 4 Burr. 1980.

(7) Ibid. 2213.

(8) Ante, p. 143.

this point makes it unnecessary to consider the validity of the notice to quit; and the rule for entering a nonsuit will be absolute.

*Rule absolute.*

1847.	}	DOE d. THE EARL OF EGREMONT v. WILLIAMS AND ANOTHER.
Jan. 12.		
1848.		
Feb. 26.		

*Power, Execution of—Lease—Usual and Reasonable Covenants—Premises usually leased.*

*Under a power to make leases for years, determinable on lives, of premises usually so leased, reserving the usual rents and heriots, and so as there should be contained usual and reasonable covenants, a lease was granted, in 1831, of a tenement, called C, "together with so much of the water from the shuts in D.'s ground as R. M. has been accustomed to have, and at the same time for the purpose of working a mill, and also the use of the water descending from the head weir, reserving to the occupiers of the meadows watered by the said course running from the head weir through Little Moor Meadow, and thence by a trough into T. Meadow, the right to enter and cleanse the said watercourse, and to take the water for watering the meadows, having the right thereto as heretofore accustomed." This lease contained a covenant to do suit and service at the courts of the manor of W, but no covenant to pay fines, &c.*

*In what was taken as the pattern lease, executed in 1749, there was a demise of C, with all waters, watercourses, &c., excepting to the lessor a watercourse flowing from the head weir, through Little Moor Meadow, and from thence by a trough into another meadow, for watering the same and other lands of the lessor; and there was a covenant to pay fines, &c., as well as to do suit and service.*

*It appeared that from a date prior to 1749, there had been no courts baron or customary courts held for the manor, and no evidence was given of the existence of any freehold or copyhold tenants:—Held, that the covenant to pay fines, &c. was not a*

*usual or reasonable covenant, the omission of which avoided the lease.*

*Held, also, that the lease of 1831 did not demise more than had been formerly leased, the effect of the pattern lease being to pass the channel of the watercourse, reserving only the water itself.*

*Held, also, that it was properly left to the jury to say what quantity of water R. M. was accustomed to have to turn the mill, in order to see whether it was in excess of what was formerly granted.*

*Ejectment for lands in Somersetshire.*

The cause was tried, before Platt, B., at the Summer Assizes, 1845, for the county of Somerset, when it appeared that the action was brought to recover possession of premises, parcel of the manor of Williton Regis, leased in 1831 to the defendants, by George O'Brien Earl of Egremont, under a power reserved by the will of Charles Earl of Egremont in 1761, to the person in possession, "to demise, lease, and grant, in possession or reversion, for one life, or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the said premises usually so leased, so that all the leases to be made by virtue hereof, which shall be in force at the same time, shall be determinable on the dropping of one life or the dropping of two or three lives at the most, and so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained or more, and so that in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained usual and reasonable covenants, and a condition of re-entry for non-payment of rent," &c.

A lease for ninety-nine years, determinable on two lives, of the premises in question, made by Charles Egremont, then Sir Charles Wyndham, dated the 22nd of April 1749, and which was taken as the pattern lease, contained the following description:—"All that messuage, &c., called Cutwell, &c., together with all houses, outhouses, edifices, buildings, ways, passages, waters, watercourses, &c., to the said messuages, &c. belonging and appertaining, &c., excepting

out of the present demise and grant, unto the said Sir C. Wyndham, his heirs and assigns, a watercourse, flowing or descending from a head weir, formerly erected on the croft parcel of the premises in and through a meadow, parcel of the said demised premises, called Little Moor Mead, and from thence conveyed by a trough into a meadow, formerly in possession of B. W. &c., for watering and improving the same and other lands of the said Sir C. Wyndham." The rent reserved was 1*l.* 4*s.* and the best beast, or 3*l.* 6*s.* 8*d.* as a heriot. In the lease was contained a covenant by the lessee to "do suit and service unto all and every the court and courts of the said Sir C. Wyndham, his heirs and assigns, to be holden and kept for or within the manor of Williton Regis aforesaid, in such manner as other the tenants of the same manor in respect of their several estates are used and accustomed to do, and also to pay all fines, amerciaments, penalties, and sums of money, which shall be then set, laid, or imposed upon or against the said lessee for or by reason of any neglect, offence, or just cause."

The lease to the defendants, which was granted on the 24th of December 1831, by George O'Brien Earl of Egremont, and was for ninety-nine years determinable on three lives therein named, demised a tenement, called Raglands, and the tenement called Cutwell, "together with so much of the water from the shuts in Dawes's ground as the late Mr. Richard Morle has been accustomed to have; and at the same time for the purpose of working the said leather mill; and also the use of the water descending from the head weir, formerly erected on the croft parcel of the said tenement, called Cutwell, except and reserving to the occupiers of the meadows watered by the said course running from the head weir aforesaid, through the Little Moor Meadow, parcel of the said tenement called Cutwell, and thence by an aqueduct or trough into Townsend Meadow, now in the occupation of &c., the right to enter and cleanse the said watercourse, and to take the water for watering the meadows, having the right thereto as heretofore accustomed." This lease reserved a rent of 1*l.* 6*s.*, and also heriots for Ragland, 2*l.*, and for Cutwell the best beast; and contained a covenant by the defendants, to "perform suit and

service at all the courts to be held by the said lessor, his heirs and assigns, in and for the manor of Williton Regis."

It appeared by the evidence that, in 1817, a leather mill was erected, and when it was at work the water, which ought to have been conveyed from the head weir through Little Moor Meadow, was diverted into the mill leet, and thence into the natural stream, thereby depriving Little Moor Meadow and the meadows beyond of irrigation. It further appeared, that anciently the water ran through the shuts in Dawes's ground towards Cutwell for three days only during the week, but that after the mill was built Morle used to take half of the water during the three days, and that the shuts were altered to meet this state of things. With regard to the covenant to pay fines, no evidence was given to shew that any courts baron or customary courts had been held for the manor of Williton Regis since 1739, and it appeared that there had been no freehold or copyhold tenants of the manor within the time of living memory.

The objections by the lessor of the plaintiff to the lease of 1831 were (amongst others), that the ancient and accustomed rents and heriots are not reserved by it; that it does not contain the usual and reasonable covenant to pay fines and amerciaments imposed at the court of the manor, and that the lease includes premises not usually so leased, viz. the water from the shuts in Dawes's ground, and the use of the water descending from the head weir erected on the croft.

The learned Judge left only this one question to the jury—whether the lease of 1831 assumed to grant more than was enjoyed by former tenants of the same premises, viz. Cutwell. The counsel for the plaintiff contended that this was a question of law, and ought not to be left to the jury. The jury found that more was not granted than had been before enjoyed, and the verdict was entered generally for the defendants, leave being reserved to move to enter a verdict for the plaintiff on the objections raised at the trial.

A rule nisi to enter a verdict or for a new trial having been accordingly obtained, cause was shewn (Jan. 12, 1847) by—

*Cockburn, Butt, and Kinglake, Serj.*—First, as to the demises of both Cutwell and

Raglands at one rent, *Doe d. the Earl of Shrewsbury v. Wilson* (1) decides that such a lease is good—*Doe d. Earl of Egremont v. Stephens* (2), in which this very point is decided. [This was admitted on the other side.] Secondly, the omission of a covenant to pay fines and amerciaments is immaterial, as no courts have been held since the lease of 1749; and all the freehold tenements in the manor having long been extinguished, there can be no manor court—*Baldwin v. Tudge* (3), *Chetwode v. Crew* (4), *Com. Dig. tit. 'Copyhold,'* (R), 1, 2, *Glover v. Lane* (5), *Bradshaw v. Lawson* (6). Besides which, a covenant is mere surplusage, as it is incident to the jurisdiction of the lord of the manor. The covenants should be both usual and reasonable. Thirdly, as to the water, which is said not to be usually leased, the exception in the pattern lease is not inserted, but the present lease is, in substance, the same. The reservation in the pattern lease is to the lessor for the improvement of the meadows, whereas in the present lease it is to the occupiers of the meadows for the same purpose. The intention in both leases was not to create a new right in the lessor or the occupiers, but simply to recognize a pre-existing right. The mill mentioned in the lease of 1831 having been built by Lord Egremont in 1817, the lessee might have used the water in any way not inconsistent with the right of others—*Mason v. Hill* (7). The new lease, in fact, instead of excepting all the water, only excepts a certain portion; but it, by exception, gives the occupiers of the lands above the right as theretofore accustomed. No new right is therefore created. The right to the water would not be affected by unity of possession—*Sury v. Pigot* (8). It is also said, that the exception in the lease of 1831 is bad, as not being to the lessor, his heirs and assigns; but no form of words is necessary. This indeed is not the creation of a right,

but only the declaration of the existence of the former one.

*Crowder, M. Smith, and Phinn*, in support of the rule.—It is admitted that the first point is decided by *Doe d. Lord Egremont v. Stephens*. Secondly, as to the usual covenants, a covenant to do suit at the courts and to pay fines is a reasonable covenant, and is found in the pattern lease.

[WIGHTMAN, J.—A covenant which the lessee has no means of performing cannot be said to be a reasonable covenant.]

The same may be said of the covenant to do service at the mill, which may be pulled down. Thirdly, as to the watercourse, before the lease of 1831, the land was demised to Morle, with liberty to make the cut or leet, and to erect the mill; and the miller, accordingly, uses the water. It is a fallacy to suppose that by the lease he would acquire any right as against the lessor of the plaintiff; the right would expire with the life of the then tenant for life. The cut or leet enables the miller to carry off all the water; and the reversionary interest of the lessee is thereby injured. The exception in the lease of 1831 amounts to nothing. The occupiers cannot have the water as they are strangers to the grant; and the grantor cannot have that, by way of exception, which he has granted out already; the grant being construed most strongly against him.

[PATTERSON, J.—The original lease excepts so much of the water as was necessary for the purpose of watering; and the lease of 1831 gives so much water, provided the lessee does not interfere with the right of the people below.]

It may be difficult to put a construction on the exception as it stands. It ought to have been intelligible.

[COLERIDGE, J.—Is it not for you to shew that something is granted which is prejudicial to the reversioner?]

*Prima facie* something is granted which was not granted before. If the watercourse was demised, an additional rent should have been reserved. The pattern lease reserves to the tenant for life the right of dealing with the water as he pleased. The lease of 1831 is good as to the grant, but bad as to the exception.

[COLERIDGE, J.—It may amount to a limitation of the grant, i.e. a grant of the

(1) 5 B. & Ald. 363.

(2) 6 Q.B. Rep. 227; a.c. 13 Law J. Rep. (N.S.) Q.B. 350.

(3) 2 Wils. 20.

(4) Willes, 614.

(5) 3 Term Rep. 447.

(6) 4 Ibid. 443.

(7) 3 B. & Ad. 304; a.c. 1 Law J. Rep. (N.S.) K.B. 107.

(8) Poph. 166.

water provided the lessor did not interfere with the rights of the occupiers.]

*Cur. adv. vult.*

The judgment of the Court was now (Feb. 26, 1848) delivered by—

COLERIDGE, J.—This case was tried before my Brother Platt, when a verdict passed for the defendants, on a point submitted to the jury, with leave to enter it for the plaintiff if we should be of opinion that the question in the case was one of law, which ought to have been ruled in his favour. The case for the plaintiff rested on objections to the lease under which the defendants held, as not supported by the power under which it was made, and these objections were ultimately reduced to two, now to be considered. The first was stated thus:—In what was taken as the pattern lease, executed in 1749, was a covenant to do suit and service at the courts of the manor of Williton, on usual notice to be there sworn, and ordered by the steward, and to pay all fines and americiaments there lawfully imposed. In the lease in question was a covenant to do suit and service; but there was no express covenant to pay fines and americiaments for default of suit. The power required that in all leases granted under it there should be contained all usual and reasonable covenants. It was admitted that no courts baron or customary courts had been held within the manor from 1739, and it was admitted in the argument that there had been no freeholders or copyholders within the manor within the time of living memory, and there was no evidence to the contrary offered at the trial. It was, therefore, argued on the part of the defendant, that this being a lease for years the covenant was not properly a usual or reasonable covenant; that the court baron could not be now held, because there were no freeholders; nor could it be revived, because no freehold tenure of the manor could by law be created at this day; and by the same course of argument it was argued that no customary court could be held or revived for want of copyholders; and it was said, that although this covenant was found in the pattern lease of 1749, it was not conclusively to be taken to be a usual and reasonable covenant. We agree in these arguments, which in truth were not much disputed at the bar. But it was argued

that although the court baron and customary court were irrevocably gone, and so there were no courts, properly speaking, of the manor that were or could be held, yet there might be courts, such as the court leet, that in a popular way might be called manor courts, which in order to the identification of property as belonging to this reputed manor, it might be reasonable to bind the tenants occupying lands in it to attend, and that so considered the covenant would still be a reasonable one. But it would be unreasonable to give the words in the covenant a meaning other than they would naturally bear, in order to avoid the lease; and even if we gave the words the sense desired, and allowed the inference that a covenant to attend them might be reasonable for the purpose stated, it by no means follows that it would be unreasonable to omit that which alone is omitted, the covenant to pay fines and americiaments for default of suit. On the contrary, such a covenant might raise such questions as to the jurisdiction to impose the fine or americiaments, and to whom it was to be paid, that it might be considered very reasonable to omit it, leaving the lord to his remedy by action for the breach of the simple covenant to do the suit. On this ground, therefore, we see no reason to disturb the verdict. The second point, which was much more contested at the bar, was stated thus:—In the pattern lease, out of the general grant of water, watercourses, &c. was excepted a watercourse flowing by means of a head-weir out of a natural stream into an artificial channel made through the demised lands on a higher level, for the purpose of irrigating them and other lands of the lessor lower down the stream. In the interval between 1749 and the grant of the lease in question in 1831, one Morle, then tenant of the premises, had erected a mill and diverted water from this watercourse, and so diminished the water for irrigation of the lands just mentioned; the water he so abstracted being returned not to the artificial channel but to the natural stream, and so made unavailing for the purposes of those lands. In the lease of 1831, the grant to the lessee is only of so much of the water as Morle had been accustomed to have for the use of his mill, and there was no exception of the watercourse to the lessor, but only to the occupiers of the mea-



dows below a right to enter and cleanse the water-course, and take the water for the use of their meadows as heretofore accustomed; and this exception the counsel for the plaintiff urged, did not profess to include the watercourse, and was in itself merely void, so that the watercourse, which before was not demised, now passed to the lessee by the general words of the lease, and the remainder-men were also injured in respect of their lower lands, the abstraction of water by Morle being now made legal, if the lease in question was sustainable. This objection, therefore, is twofold: first, that more is now demised—the watercourse itself—than was granted by the pattern lease; secondly, the injurious consequence—the permanent diminution of water applicable to the irrigation of the lands below. As to the first, it appears to us the objection rests upon an assumption of fact as to the pattern lease which is not well founded. It is assumed that the artificial channel through which the water flowed from the head-weir did not pass by it, and was excepted out of the demise; but we collect the words of the exception in that lease to have been (following after a grant of all waters and watercourses belonging, &c.), “except a certain watercourse flowing through Little Moor Mead, thence into another mead (named) for watering it and other lands of Sir C. Wyndham.” Now, without saying that a watercourse may never mean the channel in which water flows, it certainly may mean the stream or flow of the water itself, and whether it means the one or the other in any instrument will very materially depend on the context; and in the case before us, it appears to us that that which flows through lands named for the purpose of watering them and other specified lands, must be taken to be the water itself, and not the channel through which it flows. If so, the channel itself would have passed by the pattern lease, subject only to the easement of the flow of water in it, which was substantially the thing excepted. And so the first part of this objection fails. It may be doubted whether, if this be removed, what remains is open for the plaintiff to insist upon with reference to the notice of objections; but if it be, it clearly raised not a point of law for the Judge, but a question of fact for the jury. It was necessary to ascer-

tain what quantity of water Morle had been accustomed to have to turn his mill, before it could be determined whether a grant of that quantity was in excess of what was granted by the former lease. The jury have in effect been directed to consider that question, and their finding is not questioned. We are, therefore, on the whole, of opinion that this rule should be discharged.

*Rule discharged.*

1847. }  
Nov. 25. } PLUMER v. BRISCOE.\*

*Sheriff—Replevin—Sufficiency of Sureties—Damages—Costs of Action against Sureties—Pleading.*

*A replevin bond which has been assigned by the sheriff, is admissible in an action against him for taking insufficient pledges, without proof of its execution, though there is an attesting witness.*

*The acts and declarations of the person who acted as replevin clerk are admissible against the sheriff, though there is no other evidence of his being such clerk than his acting as such on the occasion in question.*

*A writ of fi. fa., in an action on promises for the rent is also admissible against the sheriff, to shew that the proceedings taken against the plaintiff in replevin had proved fruitless.*

*The costs of an action against the sureties are recoverable as damages against the sheriff.*

*It is sufficient for the declaration to allege that the sureties were insufficient in fact, without noticing the tenant or shewing that the sheriff did not make due inquiry or even use reasonable caution.*

*Whether he used due caution is a question for the jury.*

Case against the sheriff of Sussex for taking insufficient pledges in a replevin suit of *Gladman v. Plumer* (1).

The declaration was in the usual form, alleging the distraining, by the plaintiff, on the goods of Gladman, and that the sheriff caused the goods to be replevied and delivered to Gladman, with the averment that at the then next county court of the said sheriff,

\* Decided in the previous term.

(1) See 15 Law J. Rep. (N.S.) Q.B. 79.

to wit, at the county court of the said sheriff, holden at, &c., the said Gladman did appear and levy his plaint, &c.; and that Gladman did not duly prosecute his suit, &c.; and that it was the duty of the sheriff, before making deliverance of the distress to Gladman, in pursuance of the statute, &c., to take from the said Gladman, &c., with two responsible persons as sureties, a bond, in double the value of the goods distrained, conditioned, &c.; yet the defendant, so being such sheriff as aforesaid, not regarding, &c., did not take from the said Gladman and two responsible persons as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously wholly omitted, &c., and on the contrary thereof he, the said defendant, wrongfully took in the name of the said defendant, as such sheriff as aforesaid, of the said Gladman and two other persons, to wit, &c., C. and D, a certain bond conditioned, &c., as a bond taken in pursuance of the said statute; nevertheless the plaintiff in fact saith, that the said C. and D. so taken as sureties, at the time of their becoming pledges and sureties in that behalf as aforesaid, were not good, able, sufficient, and responsible sureties, &c. but were, and each of them was, and ever since have been and still are wholly insufficient, &c., and that the goods and chattels had not been retained, or the arrears of rent paid, &c.

Plea (amongst others) denying the execution of the replevin bond; and traversing the allegation in the declaration, that the plaintiff in the replevin suit appeared and levied his plaint at the next county court, *modo et formâ*.

At the trial, before Coltman, J., at the Summer Assizes for Lewes, the plaintiff put in the replevin bond, to which there was an attesting witness, and which bond had been assigned to him by the sheriff. The attesting witness was not called, the plaintiff contending that proof of the assignment, as against the sheriff, dispensed with proof of the execution—*Barnes v. Lucas* (2); and the learned Judge admitted the replevin bond.

In the course of the cause a writ in an action on promises, in the suit *Gladman v. Plesner*, was put in, being in fact a judgment for the rent. This, it was con-

tended on behalf of the defendant, was not admissible, but was received by the learned Judge. The Judge also received evidence of the acts of Coppock, the replevin clerk, without any further evidence that he was such than that he acted in that character in these proceedings—*Jones v. Wood* (3), and *The King v. Jones* (4).

It further appeared that the plaint was not, in fact, levied at the next county court, but at the next but one. It was objected that there being a precise issue raised on this point, the declaration was not supported. The learned Judge held, that the averment was immaterial, and under his direction the jury returned a verdict for 24*l.* 5*s.* damages, which sum included the costs of an action against the sureties.

In the following Michaelmas term,—

*Bovill* moved for a new trial, on several grounds, and also in arrest of judgment.—First, the replevin bond was improperly admitted without due proof of its execution. *Barnes v. Lucas* is not consistent with the ruling of Tindal, C.J., at Nisi Prius, in *The Fishmongers' Company v. Robertson* (5); and though his ruling was not upheld by the Court of Common Pleas, the question is still pending on a bill of exceptions—*Slatterie v. Pooley* (6). Secondly, the writ of *fi. fa.* was improperly admitted. Thirdly, no foundation was laid for admitting in evidence the acts of Coppock, it not having been proved that he acted as replevin clerk on any other occasion. Fourthly, the plaintiff having taken upon himself to allege that the plaint was levied at the next county court, the Judge was wrong in directing the jury that the issue was immaterial. The condition of the bond is to prosecute the suit with effect and without delay; and at all events the jury should have been told that the plaint ought to be levied within a reasonable time.

[WIGHTMAN, J.—I do not see that it would be any objection if the plaint had not been levied for a year.]

[COLERIDGE, J.—The real question is, whether the sureties were at the time sufficient.]

(3) 3 Campb. 228.

(4) 2 Ibid. 131.

(5) 1 Com. B. 60.

(6) 6 Mee. & Wels. 664; s. c. 10 Law J. Rep. (N.S.) Exch. 8.

Fifthly, the costs of the action against the sureties should not have been included in the damages, without proof of previous notice to the sheriff that an action had been brought against the sureties—*Baker v. Garratt* (7). The sheriff might, upon notice, have paid the money. Sixthly, it was proved that the sheriff made all possible inquiry as to the sufficiency of the sureties, and did even more than has been held necessary. It was proved that inquiries were made of the bailiff and sheriff's officer, and the sheriff was not satisfied with the mere statement of the sureties themselves—*Jeffery v. Bastard* (8).

[WIGHTMAN, J.—All this was a question for the jury.]

Seventhly, the declaration is also bad in arrest of judgment. The action is founded on 11 Geo. 2. c. 19. s. 23, which enacts, that the sheriff shall take a bond from the plaintiff and two responsible persons as sureties. The declaration ought to negative the sufficiency of the plaintiff in the replevin suit as well as that of the sureties—*Hucker v. Gordon* (9). Also, the declaration merely alleges that the sureties were insufficient, and it is true that such is the common form. But surely it is not enough to allege their insufficiency in point of fact; in order to fix the sheriff with damages, it ought to be averred that he did not make due inquiry or take reasonable care—*Hindle v. Blades* (10).

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

LORD DENMAN, C.J.—This case was moved upon several grounds: one, that the verdict was against evidence; but upon consulting the learned Judge who tried the case, we do not find that he is dissatisfied with the verdict, and we see no reason to doubt the propriety of the verdict of the jury upon the evidence before them. The due care of the sheriff as to the responsibility of the bail, was entirely a question for the jury.

But it was said, that there was no

proper proof of the execution of the replevin bond, proof of the assignment by the sheriff being held sufficient evidence against him of the due execution of the bond. Upon this point, the case of *Scott v. Waithman* (11) is a decisive authority. The sheriff by taking and assigning the bond, admits its due execution and validity as a bond. The cases cited of *The Fishmongers' Company v. Robertson* and *Slatterie v. Pooley* turned upon very different points, and are clearly distinguishable.

Another objection was, that the declarations of the person who acted as the sheriff's replevin clerk were admitted. As these declarations related to a matter clearly within the scope of his duty as replevin clerk, and were made by him whilst acting as such in the very matter, we think they were properly admitted, and that the proof of his acting as replevin clerk was sufficient to shew *prima facie* that he was so.

It was also said, that a writ of *fi. fa.* was improperly received in evidence, because it was not in the replevin suit, but in an action on promises. As this was introduced merely to shew the fruitless proceedings that had been taken, we do not think that the admission of that document affords any ground for a new trial.

Another objection was, that the costs of the proceedings against the sureties could not be recovered against the sheriff, and *Baker v. Garratt* was cited; but that case only decided that damages beyond the penalty of the replevin bond could not be recovered in an action against the sheriff, which is not the case here; and, therefore, on that ground, the defendant is not entitled to a rule.

In arrest of judgment it was said, that the declaration only charged the not taking two sufficient sureties, without saying anything of the tenant, who might be sufficient. We think there is nothing in this objection. The distrainer has a right to have two sufficient sureties, and if he has not, is entitled to his action. One or two other objections were taken which were disposed of when the motion was made. There will, therefore, be no rule.

*Rule refused.*

(11) 3 Stark. N.P.C. 168.

(7) 3 Bing. 56; a.c. 3 Law J. Rep. C.P. 45.

(8) 4 Ad. & El. 823.

(9) 1 Cr. & M. 58; a.c. 2 Law J. Rep. (N.S.) Exch. 47.

(10) 5 Taunt. 225.

BAIL COURT. }  
 1848. } *In re FEARON v. NOWALL.*  
 Jan. 20, 31. }

*Prohibition—County Court—Jurisdiction—Landlord and Tenant—9 & 10 Vict. c. 95. s. 122.*

*Where a tenant, after notice to quit, refuses to deliver up possession of the premises occupied by him, and a plaint has been entered in, and a summons thereupon issued out of, the county court, under the 9 & 10 Vict. c. 95. s. 122, the fact of the tenant appearing to such summons, and shewing cause, is not sufficient to oust the county court of its jurisdiction to grant a warrant of possession; but it is for that Court to determine whether the cause shewn is sufficient or not.*

*So also the question, whether such tenancy has been "duly determined by a legal notice to quit," is one upon which the decision of the county court is conclusive upon the parties.*

This was a rule calling upon the Judge of the County Court of Surrey, and the plaintiff in the action of *Fearon v. Nowall* in that court, to shew cause why a writ of prohibition should not issue to prohibit that Court from carrying into execution the judgment recovered in that action.

From the affidavits it appeared that the plaintiff was the landlord, and the defendant the tenant of certain land, held from year to year, under an agreement, at a rent of 40*l*. The tenancy commenced on the 25th of March 1841, the agreement containing a provision that "the tenant should, on receiving a written notice to that effect, deliver up possession of the whole or such part of the said premises as might for the time being be required, within one calendar month next after such notice should have been delivered to him, and that upon every such delivery up of possession a proportionate deduction should be made of the rent thereby reserved, according to the quantity of ground so delivered up; and that in case any crop should be upon the ground delivered up pursuant to any such notice, a reasonable amount of compensation should be paid to the tenant." Several notices had been served from time to time upon the tenant, in obedience to which he had delivered up a considerable portion of the land,

but he had received no payment in respect of crops growing upon the land delivered up. At Michaelmas, 1846, a six months' notice to quit was served upon him, requiring him to give up possession of the residue of the land. At that time the claim of the tenant in respect of the growing crops amounted to 150*l*. On the 6th of June, possession not having been delivered up, a plaint was entered in the county court of Surrey, and a summons served upon the tenant, requiring him to shew cause why he should not deliver up possession of that residue to the plaintiff. On the 21st of July the defendant accordingly attended at the county court, and contended that the case was not within the jurisdiction of the court; but the Judge overruled the objection, heard the case, and gave judgment in favour of the plaintiff, directing that a warrant to recover such possession should issue on the 21st of December then next.

In the course of last Michaelmas term this rule was obtained upon two grounds: first, that on the appearance of the defendant at the county court to shew cause, the jurisdiction of that court to proceed further was taken away; secondly, that the notice to quit being insufficient to determine the tenancy, the Judge of the county court had no jurisdiction in the matter.

*Bovill* shewed cause (Jan. 29).—Neither ground of objection ought to prevail. The jurisdiction of the Judge of the county court, under the 122nd section of the 9 & 10 Vict. c. 95, is not taken away by the mere appearance of the defendant to the summons issued under that section. He must "shew cause to the contrary," that is to say, cause sufficient to satisfy the mind of the Judge; and a wrong decision of the Judge in this respect is no ground for a writ of prohibition. As to the second objection, that also was a matter for the Judge of the county court to adjudicate upon. It was for him to say whether the tenancy was duly determined or not. It is not open to the defendant to argue now that the notice to quit was insufficient under the terms of the agreement.

*Otter and Hugh Hill*, in support of the rule.—First, the defendant having appeared and shewn cause against the summons in the county court, the Judge had no longer jurisdiction to adjudicate in the matter. The statute of the 8 & 9 Vict. c. 95.

should be so construed as to make all the sections thereof consistent one with the other. If, under the 122nd section, the Judge of the county court is allowed to go into questions affecting the title of the parties, why does the 50th section enact that that court "shall not have cognizance of any action of ejectment"? The 122nd section of that statute is very similarly worded to the 1st section of the 1 & 2 Vict. c. 74, except that the words which occur there, requiring the tenant not only to appear and shew cause, but "to shew to the satisfaction of the Justices reasonable cause why possession should not be given up," are omitted from the 122nd section. This strengthens the argument on behalf of the defendant, and would go to shew that the legislature only intended the powers under that section to be exercised in cases either of vacant possession, or where the tenant makes no claim to the further possession of the premises. Secondly, it is submitted, that under the special provisions of this agreement it is clear that the tenancy was not determined by the notice given in this case. The only notice which could be effectual would be the one month's notice, accompanied by a payment or tender of a sum as compensation for the crops upon the land.

[ERLE, J.—Does not this fall within the principle of *The Queen v. Bolton* (1)?]

No; the fact that the tenancy had been determined by a legal notice to quit, is essential to give the Judge of the county court jurisdiction.

*Cur. adv. vult.*

ERLE, J. now (Jan. 31) delivered the following judgment.—In this case a rule for a prohibition to the county court of Surrey was moved for on two grounds: first, that the Judge had no jurisdiction to proceed, under 9 & 10 Vict. c. 95. s. 122, where the tenant appeared and shewed any cause against proceeding, whether good or bad. The words of the statute are, "if the tenant shall not appear and shew cause to the contrary;" and in my opinion those words require the tenant to shew such cause as constitutes in the opinion of the Judge a defence. The

construction contended for would render this part of the statute nugatory. The second ground was, that the notice to quit proved by the landlord did not determine the tenancy; that the Judge had no jurisdiction unless the tenancy was determined by a legal notice to quit; and that his mistaken decision upon a fact of jurisdiction was of no avail. It is unnecessary to say whether the Judge's decision on the fact was right, because it is clear that he had jurisdiction over the question of fact, and that it was his duty to commence the inquiry, and therefore his decision is now conclusive—*The Queen v. Bolton*.

*Rule discharged, with costs.*

[IN THE EXCHEQUER CHAMBER.]

1847. } CAMPBELL AND ANOTHER v.  
Dec. 3. } THE QUEEN.

*Criminal Law — Indictment — Error — Felony, whether Nomen Collectivum — Verdict — Uncertainty — Venire de Novo — Quarter Sessions.*

*The first count of an indictment, tried at the Quarter Sessions for the city of C, charged a stealing in the dwelling-house of D. above the value of 5l.; the second count charged a simple larceny of the monies of D. The jury process was to try "whether the prisoners are guilty of the felony aforesaid." The record stated that the jury found that the prisoners were "guilty of the felony aforesaid." The recorder adjudged the prisoners to be transported for ten years. On a writ of error to the Exchequer Chamber,—held, (affirming the judgment of the Queen's Bench) that the entry of the verdict and judgment was uncertain, the word "felony" in this venire meaning no more than one felony.*

*The King v. Powell, 2 B. & Ad. 75; s. c. 9 Law J. Rep. K.B. 71, is not overruled.*

*Held, also, (affirming the judgment of the Queen's Bench) that a venire de novo may be awarded in a criminal case where there has been a misawarding of the jury process. But*

*Quære—whether a venire de novo can issue in a case of felony on account of a defective verdict only.*

*Held, also, that a venire de novo may be*

(1) 1 Q.B. Rep. 66; s.c. 10 Law J. Rep. (N.S.) M.C. 49.

*awarded after judgment on an indictment for felony, and that it may issue to the Court of Quarter Sessions.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 89.]

1847. }  
Nov. 22. } STEVENS v. JEACOCKE AND  
1848. } OTHERS.  
Feb. 26. }

*Action on the Case; when maintainable—Statutable Right, Infringement of—Penalty—Fishery.*

*Where a statute confers a right and annexes certain penalties for its infringement, an action for damages will not lie against a party infringing the right by the party aggrieved.*

**Case.** The declaration stated that the plaintiff before, &c. and after the passing of the stat. 4 & 5 Vict. c. lvii. (1)

(1) The statute 4 & 5 Vict. c. lvii. which repealed the 16 Geo. 3. c. xxxvi., provides by section 2. that the six stems or stations for the taking fish within the Bay of St. Ives, respectively called and known by the names of the *Carrick Gladden*, the *Poll*, the *Ligh*, *Porthamaster*, *Peda-Oloer*, and *Carrick Leggoe* stems, shall be bounded as therein mentioned.

By sect. 5, in case any boat holding or assuming to hold any turn or stem on any of the said stems or stations, shall in pursuit of fish or otherwise row or pass into any other stem or station, except in the cases permitted, provided for by the act, the master seynner and bowman of such boat shall forfeit a sum not exceeding 10*l.* each.

By sect. 16, if any boat having a seyne net on board shall be put out to sea before the warp-rope of her seyne net shall be landed, the hewer of such boat shall forfeit 50*l.*, and if any fish shall be taken by such boat, all such fish shall be forfeited to the owner or owners of the boat then next in turn upon the stem or station, within the limits of which such offence is committed, leaving her warp-rope on board.

By sect. 17, if any boat holding the second or other following turn or stem upon any of the aforesaid six several stems or stations, shall be put out to sea before the boat entitled to any prior turn or stem upon such station shall have shot out her seyne, or having begun to shoot shall desist from shooting the same, the hewer of such boat shall forfeit any sum not exceeding 10*l.*

Sect. 18 imposes a penalty of 50*l.* on any boat which having desisted from shooting her seyne, should resume such shooting after another boat should have taken possession of the stem.

("to repeal the 16 Geo. 3. c. xxxvi. for encouraging the Pilchard Fishery carried on in the Bay of St. Ives, in the county of Cornwall, and to make other provisions in lieu thereof,") and after the 7th of July 1841, was the owner of the seyne boat *Alert*, and of a seyne net, tow-rope, and warp-rope belonging to the same, conformable to the provisions of the act, and employed the boat and net in the fishery carried on in the Bay of St. Ives under the provisions of the act, and before, &c. (the boat being duly registered under the act), the plaintiff was entitled to have and to hold stem and turn of fishing upon one of the six several stems or stations for taking fish within the said Bay of St. Ives; and that the boat was, &c., having on board five men and a net, proceeding to take its stem and turn of fishing under the provisions of the said act, and was rightfully entitled under the provisions, &c., to have and to enjoy the benefit and advantage of fishing within the limits of the said stem or station, and being so entitled did put off the said seyne boat to sea, within the limits of the said Poll stem, and was preparing and about to cast and throw the said seyne net of the plaintiff from and out of the said seyne boat of the plaintiff into the sea, within the limits of the said Poll stem, in order by and with such seyne net to take, surround, and catch divers large quantities of fish, to wit, &c., being fit for human food, and of great value, to wit, &c., then being in the sea, within the limits of the said Poll stem, and the plaintiff did, acting lawfully and rightfully, and in all things in conformity to the provisions of the said act, commence to take, surround, and capture the said fish so then being within the limits of the said Poll stem, and was then in the course of taking, surrounding, and capturing the said fish, and would then, but for the committing, &c., have taken and captured the said fish and reduced them into his lawful possession, as he was lawfully under and by virtue of the said act entitled to do: yet the defendants, well knowing, &c., but contriving, &c. to injure, &c., and to hinder and prevent the said plaintiff from making and completing the capture of the said fish, and to deprive him of the profit, &c., and just after the plaintiff was preparing to take, surround and capture the said fish as afore-

said, to wit, on &c., wrongfully and unlawfully and against the will of the plaintiff, disturbed and obstructed the plaintiff in the lawful and rightful exercise and enjoyment of the said benefit and advantage of fishing, to which he was then so entitled, and was so lawfully and rightfully exercising, &c., and did then unlawfully and wrongfully and against the will of the plaintiff cast and throw into the sea a certain seyne net, near to the said fish which the plaintiff was so preparing to surround and capture, and then wrongfully, &c. inclosed, surrounded and captured the said fish in and with the said seyne net, and thereby hindered and prevented the plaintiff from taking, surrounding, and capturing the said fish by and with the said seyne net of the plaintiff, whereby the plaintiff lost and was deprived of the said benefit and advantage of fishing to which he was so entitled, and was so in the lawful and rightful exercise and enjoyment of as aforesaid, and lost and was deprived of the said fish which he might and otherwise would have taken and captured as aforesaid, and of the sale thereof, and divers great gains and profits, to wit, &c., which he might and otherwise would have made from the lawful and rightful exercise of the said benefit of fishing, to the plaintiff's damage, &c.

Pleas—Not guilty; and other pleas traversing all the averments in the declaration; and also a plea setting up a right in the defendants to take their turn in the stem on the occasion in question. To this last plea the plaintiff replied *de injuriâ*.

At the trial of the cause, before Erle, J., at the Summer Assizes for Cornwall, 1846, a verdict was found for the plaintiff.

In the following Michaelmas term, a rule *nisi* was obtained for a new trial on various grounds, and also in arrest of judgment.

*Crowder, Butt, and Slade* shewed cause (Nov. 22).—The declaration shews the right of the plaintiff to catch the fish; and that he was interrupted when he was about to catch them, and had commenced catching them. There is therefore, *primâ facie*, a good cause of action. The defendants contend that the particular powers given by the statute for regulating the rights of the fishermen, and for enforcing penalties for the violation of those rights, deprive the plaintiff of his remedy at common law. To this it

may be answered, first, that the plaintiff had not given the requisite notices, forbidding the other boats to interfere, so as to bring himself within the protecting clauses of the act, which, being penal as against the defendants, should be construed strictly. Secondly, the plaintiff is not confined to the summary proceeding for penalties; but if his common law right has been interfered with, he may pursue his common law remedy. The penalties are merely cumulative. The penalty of 50*l.* would be quite inadequate, as he has lost, through the defendants' interruption, fish to the value of 600*l.* or 700*l.* There is, no doubt, a right created by the statute; the obvious meaning of which was to give the plaintiff the same interest in the fish as if he had a several fishery at the time he was fishing. It is true that if the *penalty* is sought to be recovered, the means provided by the act are to be pursued; but it is a fallacy to say, that because a right is created by act of parliament, an action on the case will not lie for an injury occasioned by the violation of it: besides, in point of fact, the right existed at common law, and the statute only provides for regulating the mode of its enjoyment.

*Cockburn and Montague Smith* were heard in support of the rule.

*Cur. adv. vult.*

The judgment of the Court was now (Feb. 26) delivered by—

LORD DENMAN, C.J.—This was an action for infringing a right derived to the plaintiff under the provisions of the 4 & 5 Vict. c. lvii. for the improvement of the pilchard fishery, within the Bay of St. Ives, Cornwall. The declaration shewed that the plaintiff having the statutable right, and accordingly holding his turn in the Poll stem in that bay, and being about to inclose fish in his seyne net there, was obstructed by the defendant's capture of them in another seyne net. After verdict for the plaintiff, upon the issues raised by the pleas, it has been moved, in arrest of judgment, that the declaration discloses no cause of action; and we are of opinion that this objection is well founded.

In an ordinary case of fishing at sea, we are not aware of any action by one fisherman against another for anticipating

him in a capture of fish which had not been appropriated, nor was any attempt made to maintain the case on that ground; but the case for the plaintiff was vested on the rights and duties created by the statute. The defendants answered that there was no general clause conferring the right and prohibiting infringement; but that specific infringements were prohibited, and for each case a specific penalty, with a specific mode of recovering it before magistrates, was provided. Thus the passing out of one stem into another, which comprises the act charged against the defendants, was so prohibited under a penalty, by section 5; and the infringing the turn by boats of the same stem was prohibited by sections 17. and 19; and by sections 41. and 48, mooring and hook-fishing by other boats, upon limited occasions, were prohibited under penalties; and by the 60th and following section, power to levy penalties and forfeitures by distress warrants, or imprisonment, was given to certain Justices. That therefore, if any infringement of a right was shewn, it was one in respect of which a specific remedy had been given; and that it was a rule of law that an action will not lie for the infringement of a right created by statute where another specific remedy for infringement is provided by the same statute.

It appears to us that the law is so, and that it governs the present case.

This general doctrine was adjudged in *Underhill v. Ellicombe* (2), where debt for composition-money for highway rates was held not to lie, inasmuch as the claim was given by statute; and the same statute which created it prescribed a particular remedy for its enforcement. In *Doe d. the Bishop of Rochester v. Bridges* (3), the Court say, "where a statute creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." Therefore the judgment will be arrested.

*Rule absolute to arrest the judgment.*

(2) 1 M. & Cl. & Y. 450.

(3) 1 B. & Ad. 859; a. c. 9 Law J. Rep. K.B. 113.

1847. }  
Nov. 10. } THE QUEEN v. PHILLIPS AND  
1848. } ANOTHER, JUSTICES, &c.  
Feb. 26. }

*Poor Law—Rateability—Scientific and Literary Society—Exemption under 6 & 7 Vict. c. 36.—Certificate, Effect of.*

*The stat. 6 & 7 Vict. c. 36. s. 1. exempts from rateability persons occupying buildings for the purposes of science, literature, or the fine arts exclusively: provided such society shall be supported wholly, or in part, by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, &c. between its members; and provided it shall obtain the certificate of the barrister appointed to certify the rules of friendly societies that it is entitled to the benefit of the act.*

*Section 5. provides, that in case such certificate is refused, the Quarter Sessions may order the rules of the society to be filed, which is to have the same effect as a certificate.*

*Section 6. gives an appeal to the Quarter Sessions against the certificate to any person assessed to the rate, who is to state the grounds of his appeal, and the Sessions may, if they think the certificate was granted contrary to the act, annul it, and their determination is to be conclusive and binding on all parties to all intents and purposes.*

*Held, that the certificate is not made conclusive proof of the other requisites of the statute having been complied with; but is merely one of the several conditions precedent, which must all concur to give a right of exemption.*

*The "Birmingham News Room" is a society by which the periodical publications and newspapers of the day are taken in and supplied for the perusal of subscribers. Share lists and advertisements of sales, &c. are laid on the table by subscribers and others for perusal. Any individual (not personally objectionable) is permitted to become a subscriber on complying with the rules of the society. The library contains several statistical and topographical works and directories for the use of commercial persons who are subscribers. The society is supported by the annual subscriptions of members. One of the rules provides for the receipt of fees for notices and advertisements put up in the news-room, and the keeper thereof is to account for*



*and dispose of the balance of such receipts as the committee may direct. No surplus of receipts nor expenditure had ever arisen. The building was erected from a fund subscribed in shares by the proprietors, who let the news-room and library to the news-room subscribers at an annual rent, in whom the possession of the news-room is vested:—Held, not to be a society instituted for the purposes of science or literature exclusively, nor one which might not by its laws make a dividend or gift among its members, and therefore not exempt from liability by 5 & 6 Vict. c. 36.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 83.]

BAIL COURT. }  
1848. } STINDT v. ROBERTS AND  
Jan. 19, 21. } ANOTHER.

*Evidence—New Trial—Ship and Shipping—Bill of Lading—Freight and Demurrage.*

*Where a document which is not legal evidence of the facts contained in it, consists of an enumeration of items otherwise legally proved, the reception of such document in evidence is no ground for a new trial.*

*The assignee of a bill of lading, who claims and receives goods under it, is liable to pay not only the freight of the goods, but also for demurrage, according to the terms of the bill of lading.*

**Assumpsit.** The declaration stated that before the making of the promise, &c. certain cattle bones had been shipped in good order, and well conditioned upon the ship of the plaintiff by certain persons trading at Bremen, under the style of Rosing & Co., to be delivered according to the terms of a certain bill of lading, signed by the plaintiff, that is to say, upon the terms following,—to be delivered in the like good order and well conditioned at the port of Hull, unto the order of the said Rosing & Co., or to their assigns, they paying freight for the said goods at the rate of 15s. 9d. per ton of 2,240lb., and gratuity 1l. 19s. 6d., with prime and average accustomed, the vessel to be discharged in four working days, or 2l. 10s. per day to be paid for laying days. That the vessel did proceed on her

voyage and arrive at Hull with the said cattle bones on board in the like good order and well conditioned as aforesaid, whereof Rosing & Co. and the defendants had notice. That after the signing of the said bill of lading as aforesaid, and before the detention thereafter mentioned, Rosing & Co. duly indorsed and signed the said bill of lading so made and assigned as aforesaid to the defendants, and the defendants then became and were indorsees of the said bill of lading and the assignees of the said cattle bones, and entitled to have and receive the same under and by virtue of the said bill of lading; and thereupon, afterwards, &c. in consideration of the premises, and that the plaintiff, at the request of the defendants, would deliver unto the defendants as such indorsees and assignees as aforesaid, and would suffer and permit them to take the said cattle bones according to the terms of, and agreeably to the said bill of lading, the defendants then promised the plaintiff to accept and take the said cattle bones on the terms and conditions contained in the said bill of lading in that behalf and agreeably thereto, and to discharge the said schooner or vessel in four working days, or pay to the plaintiff 2l. 10s. per day for laying days for the detention of the said vessel, beyond the four working days so allowed for the discharge thereof as in the said bill of lading mentioned. Averment, that the plaintiffs were ready and willing to deliver the said cattle bones to the order of Rosing & Co. or their assigns, pursuant to the bill of lading, and to the said defendants as assignees and indorsees as aforesaid from the time of making the said promise, and that the plaintiff did afterwards deliver, and the defendants receive the said cattle bones upon the terms contained in the said bill of lading. Breach, that the defendants did not discharge the vessel within the said four working days, but detained the vessel for three laying days over the said four working days.

**Pleas.**—First, *non assumpsit*; second, that the plaintiff was not ready and willing to deliver the cattle bones, *modo et forma*; third, that the defendant did not detain the vessel over the said four working days, *modo et forma*.

At the trial, which took place before the under-sheriff for Hull, on the 4th of August last, evidence was given on behalf of the

plaintiff of admissions made by each of the defendants that they were consignees of the cargo on board the plaintiff's vessel, and that the discharging of the cargo took place by their order and under their directions. It was also proved that the vessel was detained thereby for three laying days beyond the four working days. No evidence was given of any indorsement by Rosing & Co. to the defendants of the bill of lading; but the bill of lading which was in the possession of the plaintiff, and which was to the effect stated in the declaration, was, after notice to produce, put in as secondary evidence of the bill of lading in the possession of the defendants. It appeared also that a person whose duty it was to make out the account of the freight, did so on this occasion, and sent it to the defendants, who paid it,—striking out and refusing to pay, however, the item relative to the demurrage. This account was copied into what is called "The Manifest Book," and this book, although objected to, was admitted in evidence at the trial. The entry was in this form:—

Manifest of the cargo of the *Courier*, J. D. Stindt  
commander, from Bremen.

	£.	s.	d.
A quantity of cattle bones, from H. Roberts & Co., 98 tons 18 cwt. 2 qrs., 15s. 9d. per ton.....	77	18	1
Gratuity to Captain.....	1	19	6
	£79	17	7
Three days' demurrage .....	7	10	0
	£87	7	7

No notice to produce the account served upon the defendants had been given.

The under-sheriff left it to the jury to say whether the defendants had performed their contract, and whether the vessel had been improperly detained. The jury found a verdict for the plaintiff, damages 7*l.* 10*s.*

In the course of last Michaelmas term, a rule nisi was obtained, on behalf of the plaintiff, for a new trial; first, on the ground that the manifest book ought not to have been received in evidence; secondly, that there was no evidence of the promise stated in the declaration; and, in arrest of judgment, upon the ground that the consideration, as stated, was insufficient in law to support the promise alleged.

*Hugh Hill* now shewed cause.—Upon the first point, although the manifest book, being a copy of the account sent to the defendants, was not legal evidence, still, under the circumstances, its reception is no ground for a new trial. The amount of the freight and demurrage was abundantly proved *alunde*. Its having been received did not induce the jury to come to a different conclusion than they would have otherwise done—*Hughes v. Hughes* (1), *Alexander v. Barker* (2). Secondly, there was sufficient evidence of the promise alleged in the declaration to take the opinion of the jury upon it. The bill of lading was proved, and the defendants shewn to have received the goods as assignees thereof. They became therefore liable to fulfil all the conditions specified in the bill of lading; amongst other things to pay the demurrage—*Scaife v. Tobin* (3), *Williams v. Thomas* (4), *Harman v. Clarke* (5), *Harman v. Mant* (6), *Jesson v. Solly* (7), *Sanders v. Vanseller* (8). Thirdly, if the evidence was sufficient to satisfy the jury that the promise as alleged was made by the defendants, the consideration stated was in law sufficient to sustain it.

*Willes*, contra.—First, it is admitted by the other side, that the manifest book was not legal evidence. It is impossible now to say what effect its admission in evidence had upon the minds of the jury. It might have been a chief ingredient in inducing them to come to the conclusion they did. There ought, therefore, to be a new trial upon this ground—*De Rutten v. Farr* (9). Secondly, although in certain cases the assignee of a bill of lading is liable to the express terms contained in it, that is not, as a proposition of law, universally true. Where the assignee is the owner of the goods, the assignor of the bill of lading is his agent, and can there-

(1) 15 Mea. & Wels. 701.

(2) 2 Cr. & Jer. 133; s. c. 1 Law J. Rep. (n.s.) Exch. 40.

(3) 8 B. & Ad. 523; s. c. 1 Law J. Rep. (n.s.) Q.B. 133.

(4) 6 Esp. 18.

(5) 4 Campb. 169.

(6) Ibid. 461.

(7) 4 Taunt. 52.

(8) 4 Q.B. Rep. 260; s. c. 12 Law J. Rep. (n.s.) Exch. 497.

(9) 4 Ad. & El. 53; s. c. 5 Law J. Rep. (n.s.) K.B. 38.

fore bind him to the terms of the contract. But that was not the case here. All that was proved in this case was, that the defendants received the bill of lading, and took the goods in question. The only promise which can be implied in law from such a state of circumstances was to pay for the freight only, and not for the demurrage—*Amos v. Temperley* (10), *Williams v. Thomas*, *Sanders v. Vanzeller*. Thirdly, there is no sufficient consideration stated to support the promise as alleged. It would only support a promise to pay for the freight—*Roscorla v. Thomas* (11), *Jackson v. Cobbin* (12).

*Cur. adv. vult.*

ERLE, J. now (Jan. 21,) delivered the following judgment.—In this case, a rule for a new trial had been moved for, and it was objected, first, that the admission of the book of the plaintiff in evidence for himself, on the ground that it was a manifest and in the nature of a public document, was wrong. But although the book was not admissible to prove any fact, still I am of opinion, looking to the nature of the entry, that its reception is no ground for a new trial. It was a mere statement of the items of the plaintiff's claim—viz. that the freights for ninety-eight tons and a fraction at 15s. 9d. per ton amounted to 77l. 18s. 1d., and so forth. The facts on which those claims were rested were proved by legal evidence, and the book only added the results of multiplication and addition. A copy of the entry would have been analogous to the ordinary bill of particulars of a plaintiff's demand, which, after proof of the items, is often referred to by the jury for separate amounts and the sum total. It was also objected, that there was no evidence of the alleged promise to discharge the vessel in four days. But the claim of the cargo by the defendants as the assignees of the bill of lading, was evidence of an agreement to the terms therein mentioned, in consideration of which the master agreed to deliver the cargo.

The principle on which the consignee is

taken to contract for the freight and demurrage mentioned in the bill of lading, applies in respect of other stipulations therein mentioned, and the promise to pay demurrage in case of detention is in effect a promise to discharge within the limited time, or pay for the detention.

It was objected in arrest of judgment, that the consideration, although valid for a part of the promise, was invalid as to the part relating to discharging the vessel in four days. But no principle or authority was adduced to shew that a consideration valid according to the general definition, can be insufficient in law to support any promise which the contracting party may in fact choose to make thereon. The objection, therefore, appears to me to fail.

*Rule discharged.*

1847. }  
Jan. 23. } RYALLS v. THE QUEEN.  
1848. }  
Feb. 26. }

*Criminal Law—Indictment—Perjury—Jurisdiction—6 & 7 Vict. c. 73. s. 37.—Month—Materiality—Conclusion—Surplusage—“Misdemeanour” nomen collectivum.*

*An indictment for perjury contained four counts, stating that the defendant had retained U, an attorney, who had delivered his bill under 6 & 7 Vict. c. 73, and that after the expiration of one month from such delivery, U. had taken out a summons before a Judge to get the bill taxed; that the defendant, before shewing cause against the summons, made an affidavit denying that he had retained U, and perjury was assigned on this statement, the indictment alleging that “it became and was material in shewing cause against the summons to ascertain whether the defendant did retain U.” Each of the counts concluded, “and so the jurors, &c. did say that the said defendant, &c. did commit wilful perjury,” &c.*

*Held, that the word “month” was to be construed with reference to the 6 & 7 Vict. c. 73, and meant calendar month.*

*Held, also, that it was sufficiently shewn*

(10) 8 Mee. & Wels. 798; s. c. 11 Law J. Rep. (N.S.) Exch. 183.

(11) 3 Q.B. Rep. 234; s. c. 11 Law J. Rep. (N.S.) Q.B. 214.

(12) 8 Mee. & Wels. 790; s. c. 10 Law J. Rep. (N.S.) Exch. 389.

that the Judge had jurisdiction to issue a summons on the application of the attorney, without negating a prior application within the month by the party chargeable.

Held, also, that the fact of the retainer of U. by the defendant was a material ingredient in the inquiry.

Held, also, that the conclusion of the counts might be rejected as surplusage.

The record stated the venire to be to try whether the defendant was guilty of the perjury and misdemeanour aforesaid, and the

entry of the verdict that "he is guilty of the perjury and misdemeanour aforesaid, in manner and form," &c., and a general judgment of imprisonment was given "on the premises."

Held, that "misdemeanour" being nomen collectivum, the venire and verdict applied to all the counts, and that the judgment of imprisonment was divisible.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 92.]

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END OF HILARY TERM, 1848.

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# CASES ARGUED AND DETERMINED

IN THE

## Court of Queen's Bench.

EASTER TERM, 11 VICTORIÆ.

BAIL COURT. }  
1848. } *In re JONES v. JONES AND*  
April 29. } *ANOTHER.*

*Prohibition—County Court—Jurisdiction  
—Power of Judge to alter Verdict.*

*Where a cause in the county court is tried by a jury, the Judge has no power to alter their verdict.*

*A cause having been heard, an entry was made of judgment for the defendants. The defendants then left the court; and, subsequently, and as the defendants swore they believed, after the Court had broken up, the Judge rescinded his decision, and ordered a new trial, on which occasion he gave judgment for the plaintiff. The affidavits in answer did not shew affirmatively when the alteration had been made, but a copy of the entry in the register was produced, in which it was stated to have been at the same court:—Held, on application for a prohibition, that the Judge had exceeded his jurisdiction, and the rule for a prohibition was made absolute.*

This was a rule calling on the Judge of the county court of Merionethshire and the plaintiff in the suit, to shew cause why a writ of prohibition should not issue, directed to such Judge and his officers to prevent execution, or any other step being taken, or their giving validity to a judgment pronounced on the 13th of October last, under the following circumstances:—The plaintiff sued the defendants in the

county court, for the recovery of 16*l.*, principal and interest due on a promissory note, dated February 18, 1834. The plaint was returnable July 23, 1847. On that day the defendants required to be furnished with a copy of the note as better particulars. The learned Judge ordered the better particulars to be given, and adjourned the case to the 11th of August, on which day it stood over until the 12th. A plea of the Statute of Limitations was pleaded; but no notice had been given pursuant to the 19th rule of practice of the county court as framed by the Judges (1), nor had any leave been asked of the Judge under the latter part of that rule. On the 12th of August the case was adjourned until the 9th of September, being the next court day; and, as was sworn by the defendants, to enable the plaintiff to answer the plea of the Statute of Limitations. On the 9th of September, after hearing the parties, a verdict was given for the defendants, with costs to be divided; and an entry was accordingly made by the clerk in the paper book as follows:—"Statute of Limitations

(1) The 19th rule is "Where a defendant intends to rely on the special defence of infancy, coverture, the Statute of Limitations, &c., he shall give notice thereof in writing to the clerk of the court, five clear days before the day on which the summons is returnable. Provided always, that where such notice shall not have been given, the Judge in his discretion, and on such terms as he shall think fit, may adjourn the hearing of the cause, to enable the defendant to give such notice such number of days before the day to which the hearing, may be adjourned as the Judge may think proper."

—verdict for defendants—costs to be divided.” After the defendants and their attorney had left the court, the Judge rescinded the decision, and ordered the case to be adjourned to the next court. The entry, of which the defendants produced a verified copy, was “Same court—the above decision rescinded, and case adjourned to the next court.” The case came on again on the 13th of October, when the learned Judge gave judgment in favour of the plaintiff, with costs, on the ground that the plea of the Statute of Limitations had been improperly pleaded. Subsequently this rule was obtained, against which—

*F. Bailey* now shewed cause.—The Judge was correct in the course he pursued, as the rule of practice had not been complied with.

[COLERIDGE, J.—What do you say to his rescinding his judgment in the absence of the parties?]

It was merely an entry or note, and not a final judgment.

[COLERIDGE, J.—The entry is “Statute of Limitations—verdict for defendants—costs to be divided.” It was made by the clerk in the paper book; and the parties then go away. You cannot contend it was no judgment.]

Still though it was a judgment the learned Judge could alter it during the same court, as the superior Courts can alter their judgments during the same term, which is but one day in point of law—*Co. Litt.* 260, *a*. So also the Quarter Sessions are as one day. Here the entry, of which a verified copy is produced, is as follows:—“Same court.—The above decision rescinded, and case adjourned to the next court.” It was therefore altered at the same court. The Court will not interfere unless there has been a clear excess of jurisdiction. He referred also to *Keen v. the Queen* (2), and *The King v. Carlile* (3).

*Morgan Lloyd*, in support of the rule.

[COLERIDGE, J.—The only point is the want of jurisdiction.]

The judgment had been once pronounced, and the Judge was *functus officio*. It is expressly stated in the affidavit that the defendants had gone away from the court, and knew nothing of the alteration, and their attorney swears that he believes that

no revocation, alteration, or rescinding of such judgment took place at all upon that day. The affidavits on the other side do not negative this, but merely put forward a copy of the register book, the entry in which may have been made some days afterwards. Further, it does not appear whether this case was tried by a jury or not; and if it was a verdict by a jury, that cannot be altered after it is once recorded—*Co. Litt.* 227, *b*. If the Judge tried the cause alone then the rule would apply by analogy, for he is the jury as well as Judge. If this proceeding is to be allowed, the alteration may be made at any time. On the facts, it is clear that the Statute of Limitations was pleaded, with the full knowledge and assent of the plaintiff and the Judge.

COLERIDGE, J.—I am of opinion that this rule ought to be made absolute; not on the ground of an improper exercise of discretion by the Judge, because, however improper, I should not have the right to interfere, but on the ground that he has exceeded his jurisdiction unless it can be said that what took place previously on the 9th of September was altogether null and void. But this, however, is not so; for although the plea of the statute may not have been pleaded properly, yet it was, in fact, pleaded, and no objection was made to it. After the plea was put in time was applied for and given to the plaintiff to answer it, both on the 11th and 12th of August, and until the 9th of September, when judgment was given for the defendants. Whether or not it was heard by a jury does not distinctly appear; but if it was so heard, the Judge would certainly have no right to alter it at all. If it was heard by the Judge, still he had decided in favour of the defendants, and it is recorded in the book for that purpose, and the judgment was complete on that day. I do not mean to say but what a Judge may alter his judgment the same day and at the same court, but he can have no authority to do so in his own chambers after the court is over. The defendants, who had gone away as soon as they heard judgment pronounced in their favour, cannot, of course, speak to anything which transpires in their absence; but the clerk to the defendants' attorney does say that he believes, and the defendants also believe, that the judgment given for them, and recorded on the 9th of

(2) 16 Law J. Rep. (n.s.) M.C. 180.

(3) 2 B. & Ad. 973.

September, was not altered or rescinded at any time on that day, and that if it had ever been altered at all, it must have been after the Court had risen, and on a subsequent day. Surely this calls upon the other side to say whether or not, in fact, the judgment was so altered on the same day. They had notice of this statement in the affidavit produced on the part of the defendants, and might have produced an affidavit in contradiction had this not been so; but, instead of this, they merely give a verified copy of the entry of the judgment and its being rescinded on that day as entered in the book, which appears to be rather an evasion of the facts. I think, therefore, that there has been an excess of jurisdiction, and that the rule for a prohibition should be made absolute.

*Rule absolute.*

1848. }  
Jan. 31; } LEWIS v. HANCE.  
May 1. }

*Attorney, Privilege of—Costs—Suggestion on the Roll—County Court—Jurisdiction—9 & 10 Vict. c. 95. ss. 67. 129.*

*A creditor who sues in a superior court for a debt for which he might have sued in the county court cannot be considered as within the jurisdiction of the county court. And the words of sect. 67. of stat. 9 & 10 Vict. c. 95. being, that privilege shall not exempt "from the jurisdiction" of the county court, and not "from the provisions of the act,"—Held, that an attorney is not deprived of his privilege of suing in the superior court for a cause of action under 20l.\**

Assumpsit by the plaintiff, an attorney, as indorsee against the defendant as drawer of a bill of exchange under 20l. A verdict having been obtained by the plaintiff for a sum under 20l., a rule nisi was obtained to enter a suggestion on the record to deprive the plaintiff of costs, pursuant to the provision of the 8 & 9 Vict. c. 95. s. 129.

*Lush*, in Hilary term (Jan. 31), shewed cause.—To support the rule two things must be made out: first, that an attorney cannot sue in a superior court for a debt under 20l. without the penalty of losing his costs, which is equivalent to saying that his privilege as

an attorney is taken away by the statute 8 & 9 Vict. c. 95. s. 149. Secondly, that a bill of exchange for a sum not exceeding 20l., is a cause of action which cannot be sued for in one of the superior courts. Several sections of the statute will be relied on on the other side. The 67th section provides, that "no privilege, except in certain cases, (this not being one of them) shall be allowed any person to exempt him from the jurisdiction of any court holden under the act;" but it is difficult to see how this provision affects an attorney plaintiff. The old privilege was, of being sued in this court when defendant, and of suing by attachment of privilege when plaintiff; but the taking away his privilege cannot oblige him to sue in this court, for the county court cannot have jurisdiction until the party is sued. Sections 140. and 141. provide that the act shall not "affect the privilege" of the universities and the stannary courts, and coupled with the preceding clause would seem to allow of no other privilege whatever. But the above privilege is not to be taken away except by express words, and section 129. only shews the mode of obliging parties who are within the provisions of the act to adopt those provisions, but does not extend the provisions themselves. In *Board v. Parker* (1), the words of the act of parliament were stronger than in this case, and yet it was held that an attorney plaintiff was not deprived of his privilege of suing in his own court.

[*LORD DENMAN, C.J.*—You must contend that the general words do not apply to an attorney.]

The privilege of an attorney has its origin in the fact that he is supposed to be always present in the court—*Gerard's case* (2); and the same doctrine was adhered to since the Uniformity of Process Act, which though it takes away the writ of attachment of privilege, does not interfere with privilege itself—*Dyer v. Levy* (3).

*Creasy*, contra. — Formerly attorneys were supposed to be personally present in this court, and were therefore allowed their privilege—*Wiltshire v. Lloyd* (4). That is not the case now. In *Gardner v. Jessop* (5)

- (1) 7 East, 47.
- (2) 2 W. Black. 1128.
- (3) 4 Dowl. P.C. 630.
- (4) 1 Doug. 381.
- (5) 2 Wils. 42.

\* See *Jones v. Brown*, post, Exch. p. 163.

it was decided, on plea, that the privilege of an attorney did not extend to protect him from being sued in the county court of Middlesex; but *Dyer v. Levy*, *Wright v. Skinner* (6), and *Hussey v. Jordan*, cited in *Board v. Parker*, shew that his privilege as plaintiff was not taken away under the old acts. But though in former times an attorney was always supposed to be present in court during term—*Com. Dig.* tit. 'Attorney,' (B,) 3, and their number was limited by statute 33 Hen. 6. c. 7, viz. six for Norfolk, six for Suffolk, &c., the rules of the county court now suppose that attorneys are constantly present in them, though they are allowed only a limited scale of fees. The rule as to the construction of statutes in general is to adhere to the ordinary meaning of words; but if this is contrary to the obvious intention of the legislature, the Court will modify the language to avoid inconvenience—*Becke v. Smith* (7). If attorneys are allowed to sue in the superior courts, they will become the indorsees of bills of exchange of small amount, and harass the parties to them with excessive costs.

*Cur. ade. vult.*

The judgment of the Court was now (May 1) delivered by—

LORD DENMAN, C.J.—The question in this case is, whether an attorney plaintiff is within the provisions of the statute 9 & 10 Viet. c. 95, establishing county courts.

By section 58, jurisdiction is given in all personal actions where the debt or damage claimed is not more than 20*l.* By sect. 67, it is enacted that no privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any court holden under this act. The only exceptions are the universities and the court of the stannaries, by sections 140. and 141. By section 129, it is enacted, that if any action shall be commenced after the passing of this act, in any of her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified (the present action is not one of those specified), for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for a sum less than

20*l.*, if the said action is founded on contract, the said plaintiff shall have judgment to recover such sum only, and *no costs*.

The present action is on a bill of exchange, and the verdict under 20*l.*, and the motion is to deprive the plaintiff of costs under the 129th section.

It is clear that the Uniformity of Process Act, 2 Will. 4. c. 39, which takes away the process by attachment of privilege, has not altered the right of an attorney plaintiff, although he is obliged to sue by summons like any other plaintiff—*Dyer v. Levy*. It seems equally clear that the 129th section would not of itself deprive an attorney plaintiff of his privilege to sue in the superior courts without the risk of losing costs. The language of that section is not at all stronger than that of the 39 & 40 Geo. 8. c. civ. s. 12;—"If any action shall be commenced in any other court than the said court of requests, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of this act in the said court of requests, the plaintiff shall not by reason of a verdict for him have or be entitled to any costs whatever"—under which act it was held, in *Board v. Parker*, that the plaintiff, an attorney, did not lose his privilege, and was not bound to sue in the court of requests, at the peril of costs if he sued elsewhere. Nor are the words so strong as those in 10 Geo. 3. c. xxix. s. 3, on which *Dyer v. Levy* was determined; for there it is provided, that no action for any debt recoverable by the said act, shall be brought in any of his Majesty's courts at Westminster, and if it be judgment shall be given for the defendant. Yet an attorney plaintiff was held not to be within the act. So by 23 Geo. 2. c. 33. (the Middlesex County Court Act), section 19, it is enacted, that if any action shall be commenced in any of his Majesty's courts of record, and the defendant shall be liable to be summoned to the said county court, and the jury shall find damages for the plaintiff under 40*s.*, no costs shall be awarded to the plaintiff in such action, but the defendant shall be entitled to double costs of suit. Yet an attorney plaintiff was held not within the act—*Hussey v. Jordan*—25 Geo. 3, cited in the note to *Wiltshire v. Lloyd*. *Johnson v. Bray* (8) is to the same effect on a similar act; also *Willoughby v. Fenton*. In all

(6) 4 Dowl. P.C. 745; s. c. 5 Law J. Rep. (N.S.) Litch. 39.

(7) 2 Mee. & Wels. 195; s. c. 6 Law J. Rep. (N.S.) Exch. 54.

(8) 2 Brod. & Bing. 698.



these cases the debt was recoverable in the court created by the act, and the plaintiff might have sued there if he pleased, yet (by reason of his privilege as an attorney) he was held not bound to do so.

Unless we overrule all these cases, we cannot hold that the 129th section of the County Court Act *per se* subjects the plaintiff to loss of costs. But the 67th section was relied on, which undoubtedly takes away the privilege of an attorney when defendant, for it enacts, that no privilege shall be allowed to any person to *exempt him from the jurisdiction of the county court*. It is contended, that these words are large enough to embrace the obligation of a plaintiff to sue, as well as the liability of a defendant to be sued, in the county court. In the Middlesex County Court Act, 23 Geo. 2. c. 33, there is no such clause; therefore an attorney, whether plaintiff or defendant, has been held not to be within that act. In the other acts, on which the cases cited have turned, there is such a clause. In the 39 & 40 Geo. 3. c. civ. s. 10. it is enacted, that "no privilege shall be allowed to exempt any person from the jurisdiction of the said court of requests, on account of his being an attorney or solicitor; but that all attorneys and solicitors shall be subject to the several processes, orders, judgments, and executions in the same manner as any other persons." The Court, in *Board v. Parker*, held these words to be applicable only to defendants. The 67th section of the County Courts Act is in the same language as the early part of the 10th section of the 39 & 40 Geo. 3. c. civ; but the subsequent words about "processes," &c. are not inserted, and the Court, in *Board v. Parker*, commented on those latter words undoubtedly, though the decision does not appear to have turned upon them.

A debtor, when sued in the county court, is at once placed within its jurisdiction; and the abolition of any privilege, which would otherwise exempt him from it, is intelligible. But it is difficult to see how a creditor, who does not choose to sue in the county court, though he may do so, but who chooses to sue in a superior court, as he still may at the peril of costs, can be said to be within the jurisdiction of the county court. That court cannot in any way punish him or call him to account for not suing in it, or exercise any sort of jurisdiction over him, as to costs or otherwise, when he sues in

another court. He requires no privilege to exempt him from the jurisdiction of the county court, for he never was within it, and therefore the abolition of any privilege he may have cannot affect his position as regards the jurisdiction of the court. It is true that an unprivileged person suing in the superior courts, when he might have sued in the county court, is liable to forfeiture of costs; but that is by reason of the enactment in the 129th section, and in no way depends on the 67th section, which seems wholly inapplicable to a creditor not choosing to sue in the county court. If the words of the 67th section had been that "no privilege should be allowed to any person to exempt him from the *provisions of this act*," or any similar words, they would no doubt have embraced attorneys plaintiffs; but the words are, "from the jurisdiction" of the county court, that is, from being dealt with, from having power exercised over him by the county court. But it is plain that the county court cannot deal with, cannot exercise any power over, creditors privileged or unprivileged who refuse to sue in that court.

Neither of the sections, 67th or 129th, then *per se* affect an attorney plaintiff suing in a superior court. Can we then apply the 67th section to the 129th so as to see that, reading them together, the legislature clearly intended to take away the privilege of an attorney plaintiff, and subject him to the risk of costs, if he sue in a superior court, when he might have sued in the county court? We think that we cannot, and that however desirable it may be that attorneys should be subjected to that risk like other plaintiffs, the legislature has not so said even if it so intended.

*Rule discharged.*

BAIL COURT.

1848.

May 10.

*In re ZOHRAH v. SMITH.*

*Prohibition—County Court—Jurisdiction—Service of Summons.*

*The 11th rule of practice under the County Courts Act, 9 & 10 Vict. c. 95. requires that where the service of a summons has not been personal, it must be proved to the satisfaction of the Judge that the service of such summons came to the know-*

ledge of the defendant ten clear days before the return day of the summons:—  
*Held, on motion for a prohibition, that the sufficiency of the proof of service is entirely a question for the discretion of the Judge of the county court, and that a superior court will not interfere where he has exercised such discretion.*

Semble, per Coleridge, J., that the observance of such rule of practice is not a condition precedent to the jurisdiction of the county court in a case otherwise within its jurisdiction.

This was a rule calling upon the Judge of the county court for the Bloomsbury district, and the plaintiff in the above suit, to shew cause why a writ of prohibition should not issue to prohibit the said court from further proceeding in the suit, and from carrying into execution or giving effect to the judgment of the said court off the said plaintiff, and why the said court should not be prohibited from paying the sum of 24*l.* 5*s.* 8*d.*, paid into the said court under the said judgment, to any other person than the defendant.

It appeared that the plaintiff was sued out of the county court of Bloomsbury to recover 19*l.* 7*s.*, the value of certain fixtures, and was returnable on the 23rd of December. The summons was not served personally, but was left at the defendant's dwelling-house either on the 11th of December, as was sworn by the bailiff, or on the 14th of December, as was sworn by the servant and the daughter of the defendant. The defendant obtained an order for a *certiorari* on the 18th of December; but the *certiorari* was not issued, it being supposed that the order was sufficient to remove the cause. On the 23rd the cause came on, in the absence of the defendant, and judgment was given against him. On the 30th a *certiorari* was issued. On the 13th of January, after due notice to that effect, the defendant applied for a new trial on the ground that the summons was not personally served and did not come to his knowledge until the 14th of December, being less than ten days, the time required in such cases by the 11th rule of practice (1). On the 13th, the

application came on before the Judge of the county court, and facts were proved corroborating the statement of the defendant as to the time of service. It was stated in the affidavits upon which the rule was obtained, that on that occasion "the Judge, in deciding upon the said application, stated that he was of opinion that the said summons was served on Saturday the 11th of December, though it had not come to the knowledge of the said Aaron Smith until the Tuesday following, but as he, the said Judge, felt that the 11th rule was a very inconvenient one, very slight evidence satisfied him with regard to the service. That he, however, admitted that in this case he had no evidence whatever that the summons had come to the knowledge of the said Aaron Smith before the 14th of December; and that the said Judge went on to say, that he thought that the irregularity was one which the said Aaron Smith might waive; and that as he was of opinion that he, the said Aaron Smith, had, by the application to the Hon. Mr. Justice Erle for a *certiorari*, waived the irregularity, he should dismiss the application, with costs." The application was accordingly dismissed, with costs, and the present rule was obtained in Hilary term.

*Knowles and Hawkins* now shewed cause. —The clerk to the county court, in his affidavit, says, that the service was proved, as required, to the satisfaction of the Judge, and that is all that is necessary by the 11th rule of practice. There is no ground for a prohibition, as this is a point of practice only. This Court will never interfere in matters of practice in inferior courts—*Ex parte Smyth* (2). What is said as to the refusal of the application for a new trial only amounts to this, that the Judge, upon hearing the further evidence, had some doubt whether he had come to a correct conclusion upon the facts at the first hearing (3).

a summons to appear to a plaintiff shall not have been served personally, and the defendant shall not appear at the return day, it must be proved to the satisfaction of the Judge that the service of such summons has come to the knowledge of the defendant ten clear days before the said return day."

(2) 3 Ad. & El. 719.

(3) There were several other points discussed, but, as no decision was given upon them, the arguments are omitted.

(1) The 11th of the rules framed by the Judges is as follows:—"Provided that in all cases where

*Willes*, *contra*.—The Judge violated the general principle of law and justice in deciding against the defendant, without giving him the opportunity of making his defence as required by law. The 11th rule is not a matter of practice merely, for the defendant is not before the Court until the proper service or notice has been given. The terms of the rule are that "it must be proved" that the summons came to the knowledge of the defendant ten clear days before the return day. Here it is manifest the Judge thought proper to disregard the rule, because it was inconvenient in his opinion. The only evidence was, that the bailiff stated he had given the summons to the daughter, who told him that she would give it to the defendant. The Judge himself subsequently admitted that he was satisfied it did not come to the defendant's knowledge. The application for a *certiorari* could not be construed into a waiver, for it was resistance to the jurisdiction. There was no jurisdiction to try the cause, and it is peculiarly hard upon the defendant, as the plaintiff has before brought an action for the same cause in the Common Pleas, in which he was nonsuited.

COLERIDGE, J.—Several points have been made, upon which, if material to the decision of this case, I should have taken time to consider. But I think I can dispose of the case upon plain and intelligible grounds. A writ of prohibition never issues merely because a step taken in a court below may have been unwise or unjust, nor because we may think a decision unsatisfactory, but only because we find that the Court has exceeded, or is about to exceed, its jurisdiction. Now, in the present case the inferior court has acted upon two occasions, once on the 23rd of December, and again on the 14th of January; and on the first of those occasions, it is said that it acted without jurisdiction. Let me concede, for the sake of argument, that, on the first of those occasions, the due service of the summons was a condition precedent to the Court entering upon the case; and this is stating the case most strongly for the defendant. The rule directs, that in all cases where a summons to appear shall not have been served personally, and the defendant shall not appear on the return, it must be

proved to the satisfaction of the Judge that the service of such summons has come to the knowledge of the defendant ten clear days before the said return day. There is certainly no direct evidence of what the proof of service was before the Judge, upon the 23rd of December; but it is sworn in the terms of the rule that it was proved to the satisfaction of the Judge that the service did come to the defendant's knowledge within the requisite time. I am bound to take it that there was some evidence before him; and it was for him to decide upon its sufficiency, although I might not have been satisfied had I been in his situation. But when I argue, as though it were necessary to originate jurisdiction, that this proof should be given, I by no means wish it to be understood that such is my opinion, for I should say that it is entirely the other way; and that if the cause is within the jurisdiction of the court, that it is merely a rule to direct the Judge in the exercise of that jurisdiction. It may be compared to a notice of trial. If no notice of trial had been given in an action in one of the superior courts, it would certainly be a ground for a new trial; but such notice would not be necessary to give jurisdiction to try. So much, therefore, as to what took place on the 23rd of December. Then as to the proceedings on the 14th of January: the defendant was then before the Court, and what then took place is very strong against the argument for the plaintiff; for the Judge then said, "I am now satisfied that the summons was served on the 11th of December, but that it did not come to the knowledge of the defendant before the 14th;" and he might well say, on that occasion, and declare his opinion on the conflict of evidence, that if all those facts had been brought before him on the 23rd of December he should not have decided as he did. But this has nothing to do with his decision upon the 23rd of December, which is the occasion to which we must look. Upon this short point, I think the rule must be discharged.

*Rule discharged, without costs (4).*

(4) See *In re Robinson v. Lenaghan*, *post*, Excl. p. 174.

1848. } THE QUEEN v. THE TYTHING  
April 17. } OF EAST MARK.

*Highway—Dedication—User.*

*If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed whoever he may be; and it is not material to inquire who the precise owner was, or whether he intended to dedicate the road to the public.*

This was an indictment, for the non-repair of a public highway, alleging that the inhabitants of the tything had been immemorially accustomed to repair all roads within it.

*Plea—Not guilty, and issue thereon.*

At the trial, before Williams, J., at the Spring Assizes 1847, for Somersetshire, it appeared in evidence that fifty years ago a large moor in the manor of East Mark had been inclosed under a private act of the 34 Geo. 3. (1), which empowered the Com-

(1) Intituled 'An act for dividing, allotting, and inclosing certain moors, commons, or waste lands called Little Mark Moor and Summer Lease, and all the other open common or waste lands in the manor of East Mark, within the parish of Mark, in the county of Somerset.' The following clauses were those referred to in the argument:—

"That the commissioners may at any time or times, by notice in writing, to be affixed on the principal church door of the said parish, extinguish all or any part of the right of common in, over, and upon the lands to be inclosed, and that from thenceforth all such right of common shall cease and be for ever extinguished.

"That the commissioners shall, and are hereby authorized and required to set out, ascertain, order, and appoint both public and private roads, highways, &c., in, over, upon, and through, or by the sides of the lands and grounds hereby intended to be divided and allotted. \* \* \* And all such private ways, &c. shall be made, and from time to time be amended, cleansed, renewed, and kept in repair by such person or persons, and in such manner as the said commissioners shall award, order, and direct, and that it shall not be lawful for any person after such new roads or ways are set out, and the objections (if any) are heard and determined, to use any other road or way either public or private, in, over, upon, or through the said moors and lands, and that the grass and herbage growing and renewing, in and upon all and every the public and private roads and ways, so to be set out and ascertained as aforesaid, shall be and for ever remain to and for the use and benefit of such person or persons as the said commissioners shall by their award order and appoint, and all former roads and ways which shall not be continued, set out, and ascertained as aforesaid, shall be deemed part of the moors and lands to be divided and allotted pursuant to this act.

missioners to make allotments in respect of rights of common, and other rights of the freeholders and copyholders, and to make an allotment to the lord in respect of his interest in the soil of the inclosed lands,

"That after the commissioners shall have set out and allotted the several and respective parts and parcels of the said moors, commons, or waste lands, for the purposes aforesaid, they, the said commissioners, shall, and they are hereby authorized and required to set out, allot, inclose, and award, to and for M. H. B., as lord or owner of the soil of the said moors, commons, or waste lands, in respect of his right and interest in the said soil in the said moors, commons, or waste lands, such certain parts or parcels thereof as to the said commissioners shall seem meet, so that such parts or parcels so to be allotted and set out to the said lord of the said soil be not more than one-twentieth part of the remaining parts of the said moors, commons, or waste lands (quality, situation, and convenience considered).

"That the said commissioners shall have power and authority, and they are hereby authorized and required, in the next place to divide, set out, allot, inclose, and award, all the residue and remainder of the said moors, commons, or waste lands, unto, for and amongst every person or persons, proprietor or proprietors interested therein, in respect of their several and respective rights in, over, and upon the same. \* \* \* And that the several and respective allotments so to be assigned, set out and allotted unto and for the several persons who shall be entitled to the same by virtue of this act, shall be in full bar of, and compensation for, his, her, or their rights or interests in, over, and upon the said moors, commons, or waste lands, or any part thereof. And that immediately from and after the said commissioners shall have so set out and inclosed any part or parcel of the said moors, commons or waste lands to and for any person or persons by virtue of this act, all right of common in, over, and upon such part or parcel so inclosed as aforesaid, shall cease and be for ever extinguished.

"Provided, that nothing in this act shall prejudice, lessen, or defeat the right, title or interest of the said M. H. B. as lord of the said manor, or any future lord or lords of the said manor, in and to the seniorities, royalties, rights, and services belonging thereto; but the said M. H. B. and all future lords of the said manor, shall and may, from time to time and at all times for ever hereafter hold and enjoy all mines, minerals, goods, and chattels of felons and fugitives, felons of themselves, and persons put in exigent, deodands, waifs, estrays, forfeitures, and all other rights, royalties, jurisdictions, and pre-eminences whatsoever to the said manor appendant or appertaining (other than and except such for which compensation is directed to be made by this act) in as full, ample, and beneficial manner as he and they could or might have held and enjoyed the same in case this act had not been made.

"Saving always to the King's Most Excellent Majesty, his heirs and successors, and to all and every person and persons, bodies politic and corporate, his, her, or their heirs, successors, executors,

and also to set out public and private roads, &c. The road in question was originally set out by the Commissioners as a private way for the purpose of the occupiers of the inclosed lands, and they directed that the inhabitants of the tything should repair it. There was evidence of an user of this road by the public since the time when it was set out, and also some evidence of repairs being done under the direction of the Commissioners.

The counsel for the defendants contended, that there was no proof given of a dedication to the public, as there was no owner of the soil who could dedicate, (and *Barracough v. Johnson* (2) was referred to,) the right of the lord in the soil being extinguished by the allotment which had been made to him in lieu of it under the act; and that if the right to the soil was in the Crown dedication could not be presumed without evidence of consent. The learned Judge left it to the jury to say, whether the owner of the soil had consented to this road being used by the public in such a manner that they could presume a dedication; and referring to *Poole v. Huskinson* (3) he told them, that according to a dictum in that case, the ownership of the soil remained in the lord; but that, at all events, it must be in somebody; and he directed the jury to find whether the owner, *whoever he was*, had given his consent in a way sufficient to justify them in coming to the conclusion that such owner had dedicated the road to the public, and also, whether the user by the public was sufficient to shew an intention on the part of the owner, *whoever he might be*, to dedicate. The jury returned a verdict for the Crown, and leave was reserved to the defendants to move to enter a verdict. A rule *nisi* was obtained accordingly, or for a new trial on the ground

and administrators, (other than and except the several persons to whom any allotment or allotments shall be made, and whose rights are hereby intended to be barred and extinguished), all such estates, rights, title, interest, claim, and demand which they, any or every of them, had and enjoyed of, in, to, or out of the said moors, commons, or waste lands so intended to be divided and inclosed or exchanged as aforesaid at the time of passing this act or could or might have held and enjoyed in case the same had not been made."

(2) 8 Ad. & El. 99; s. c. 7 Law J. Rep. (n.s.) K.B. 172.

(3) 11 Mee. & Wels. 827.

that the learned Judge misdirected the jury in telling them that the soil remained in the lord of the manor, and that he ought to have stated that there was a difference in the amount of evidence requisite to prove dedication against the Crown and against a private owner; and *Barracough v. Johnson* and *The King v. Edmonton* (4) were cited.

*Kinglake, Serj. and Fitzherbert* now shewed cause.—*Poole v. Huskinson* is a direct authority in favour of the learned Judge's ruling. The section of the Inclosure Act extinguishing the lord's right of soil is not general, as contended on the other side, but only applies to such part of the waste land as is allotted to others. The lord's right to the soil of the roads set out still remains untouched: this is evident from other clauses of the act, and particularly from that which saves all the lord's rights. Strong words are required to divest an estate which has once vested—*Doe d. the Governors of Bristol Hospital v. Norton* (5).

[PATTESON, J.—If the argument of the defendants is correct, it must apply equally to all inclosure acts; and if the soil is not given expressly to the lord of the manor, it will vest in all cases in the Crown.]

That would be a very unreasonable construction of those acts. Then the Judge properly left the question open, that a dedication might be inferred, *whoever was the owner*; and no difference could occur in this respect whether that owner was the lord or the Crown. There is no ground for saying that the Judge expressed any opinion that the right of the lord to the soil still remained.

*Cockburn* and *Barstow*, in support of the rule.—The learned Judge referred to *Poole v. Huskinson*, and reserved leave to the defendants to move to enter a verdict on the point as to the lord's right of soil being preserved. No doubt he afterwards left it to the jury to say if there had been an intention to dedicate by the owner, *whoever he might be*, but the jury were previously told that the lord's right was not taken away. That, it is submitted, is a misdirection. The act clearly means to give the lord an allotment in respect of his rights over all the moor, including his right of soil in the roads set

(4) 1 Moo. & Rob. 24.

(5) 11 Mee. & Wels. 913; s. c. 12 Law J. Rep. (n.s.) Exch. 418.

out; and, therefore, according to *The King v. Edmonton*, the property in the soil would be in nobody. If so, there could be no person capable of dedicating, and no *animus dedicandi*, which is essential. *Poole v. Huskinson* is distinguishable, for there it did not appear that the lord's right in all the soil was extinguished; and therefore the dictum of Parke, B. may be supported.

[PATTERSON, J.—There is a clause here, directing the commissioners, in the first instance, to set out roads, and then to allot to the lord, in respect of his right of soil, not more than one-twentieth of the remaining part of the moor; that seems to exclude the roads. In respect of what then is that allotment to be?]

In respect of his right of soil over all the moor: the words "remaining part" measure the quantity to be given, not the rights to be extinguished.

LORD DENMAN, C.J.—The law, as lately laid down, has led the Courts into unimportant inquiries as to there being an intention to dedicate a road to the public. It seems to me, that if the jury find that there has been a long user as a public road, I am not at liberty to inquire into the question whether there was such an intention or not. Then it is said that a case of dedication will not be the same against the Crown and against a private person. But the Crown can undoubtedly dedicate, and the question whether there was a dedication was put to the jury. If persons have found a road used as public, and have built a town by it, are we to enter into the question of whether it was intended to dedicate the road or not? On the contrary, I think that the mere fact of enjoyment of a public road, for a great length of time, ought to be perfectly conclusive of such an intention, and it is immaterial in whom the soil was vested as owner. The learned Judge seems to have stopped short of any inquiry into the precise ownership; and, in my opinion, left the question quite correctly to the jury.

PATTERSON, J.—I think my Brother Williams's direction was quite right. He stopped short of saying in whom the ownership of the soil was, and left it to the jury to say whether there had been a dedication, whoever was the owner. If there had been a lease for ninety-nine years, it might be

there was no dedication without the consent of the owner of the freehold, because there was no person who could lawfully dedicate; but here there was no necessity for evidence of any intention or consent. There was no misdirection, for the Judge did not lay it down broadly that the lord of the manor was owner of the soil; if he had done so, the question as to whether that was really so or not might have been raised.

WIGHTMAN, J.—I am of the same opinion. The direction of the Judge was perfectly correct. The fallacy in the defendant's case arises from the Judge at the trial referring to the decision of the Court of Exchequer, in *Poole v. Huskinson*, where it was intimated that the soil in such a case remained in the lord of the manor; but he merely referred to that decision as shewing what might be the case: he by no means told the jury that the soil was absolutely in the lord of the manor. On the contrary, he said, "Whoever was the owner of the soil, a dedication by that person may be presumed." Without, therefore, entering into the other points, I agree that the rule should be discharged.

ERLE, J.—There was fifty years' uninterrupted user of this road by the public. Then the learned Judge was quite right in leaving it to the jury to say, whether from that user they could presume a dedication. He might have gone further and told them that there was very strong evidence of a dedication, but he left it in fact more favourably for the defendants.

*Rule discharged.*

BAIL COURT. }

1848. }

May 5, 9. }

NIND v. RHODES.

*County Court—Jurisdiction—Bills of Exchange—Costs—Suggestion on the Roll—Affidavit, Negating Exceptions in.*

*The 129th section of the 9 & 10 Vict. c. 95, which prohibits a plaintiff from recovering costs in an action brought in a superior court, for which a plaint might have been entered in the county court, applies to actions on negotiable instruments in the same manner as to other actions.*

*Upon an application to enter a suggestion to deprive the plaintiff of costs under that*

*section, the defendant need not aver that the Judge did not grant a certificate that the cause was fit to be tried in the superior court.*

This was an action against the acceptor of a bill of exchange for 12*l.*, in which a verdict had been obtained for that amount.

In Hilary term a rule had been obtained, calling upon the plaintiff to shew cause why the judgment should not be entered for the amount of the verdict alone, or why a suggestion should not be entered to deprive the plaintiff of costs, on the ground that the action ought to have been brought in the county court. It appeared on the affidavits that both parties resided within the jurisdiction of the county court for the Clerkenwell district, and that the bill was accepted at the residence of the defendant, within the jurisdiction of the said court. The affidavits stated the facts *prima facie* requisite to bring the case within the 128th and 129th sections; but it did not allege that the Judge had not granted a certificate that the action was not fit to be brought in the superior court (1).

*Lush* shewed cause (May 5).—The affidavit on which this rule was obtained is insufficient. All the facts stated may be quite true, and yet the plaintiff ought not to be deprived of his costs, as it is not alleged that

the Judge at the trial did not certify on the back of the record that the action was fit to be tried in the superior court, which he may have done when this cause was tried. The plaintiff is entitled to the costs under the Statute of Gloucester, and he cannot be deprived of that right, unless the defendant shews clearly that the provisions of the County Courts Act apply; and the 129th section expressly excludes any case where the Judge certifies. This ought, therefore, to have been negatived.

The rule must, at all events, be discharged, because bills of exchange are not within the 128th section. That section excludes cases where the causes of action did not "arise wholly, or in some *material point*, within the jurisdiction of the court within which the defendant dwells," &c. In point of law bills of exchange have no locality as contracts. The right of action follows the holder of the bill wherever he may be, for which reason the venue cannot be changed in actions on bills upon the ordinary undertaking. The terms used in this section must therefore refer to causes of action which accrue in a particular place, and not to bills of exchange.

*Barstow*, contra.—The word "unless" in the 129th section, is the same as "except," and that part of the section is therefore an exception, to be noticed by the party who relies upon it. If the certificate was granted, it is within the plaintiff's own knowledge, for he has possession of the record, and the statute does not require the certificate to be given forthwith after the trial is concluded. The defendant, therefore, cannot be required to negative this exception. It is another answer to the objection, that this is a proceeding to satisfy the conscience of the Court. The suggestion, when entered, is not conclusive: the plaintiff may demur or plead to it. Moreover, the suggestion in the terms of the affidavit would be correct; and if the record were so made up, and judgment thereon given to deprive the plaintiff of costs, a court of error would uphold the judgment, in the absence of any affirmative allegation that there was a certificate.

The words used in the 58th section, which gives jurisdiction, are "all pleas of personal actions," which are large enough to include bills of exchange; and the ar-

(1) The 128th section gives a concurrent jurisdiction to the superior court of record, where "the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof."

The 129th section enacts, that, "if any action shall be brought in a superior court for any cause other than those lastly hereinbefore mentioned, for which a plaintiff might have been entered in any court holden under the act, and a verdict shall be found for the plaintiff for a sum less than 20*l.* if the said action be founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court."

gument is only founded upon a supposed analogy to the practice of changing the venue, which is attempted to be supported because the words "material point" are used. The exceptions are carefully stated in the statute; and no reason can be assigned why actions upon small bills of exchange should not be brought in the county court as well as other claims of a small amount. In the 97th section of the act bills of exchange are mentioned, so that the subject-matter was before the legislature; and the general words must include them in the absence of any special exception.

[Lush admitted that there was jurisdiction to try actions upon bills of exchange, but contended that the 128th section did not apply to them.]

COLERIDGE, J.—I understand it to be admitted, that the county court has, at least, concurrent jurisdiction over actions of this kind; but then it is said, they are not within the 128th section. The 58th section, which gives jurisdiction, is as follows:—"That all pleas of personal actions where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the county court without writ." Then follows in a proviso various specific exceptions, as actions of ejectment, or actions in which the title to any corporeal or incorporeal hereditament, &c. shall come in question. It is clear that bills of exchange are within the general words, and it follows therefore that the county court has general jurisdiction in actions upon them. How then are they to be excluded from the 129th section? It says, if any action shall be commenced in any of the superior courts for any other cause than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, &c., the plaintiff shall have judgment to recover such sum only and no costs. I think there is no foundation for the objection. On the other point, as to the affidavit, I will take time to consider.

[Bastow referred to *Bishop v. Marsh* (1).]

*Cur. adv. vult.*

On a subsequent day (May 9) his Lordship gave judgment as follows:—The re-

(1) 6 Bing. N.C. 12; s. c. 9 Law J. Rep. (N.S.) C.P. 98.

maining question on which I suspended my judgment, because it promised to be of frequent occurrence, was raised by the following circumstances:—The affidavit, on which the rule was founded for entering a suggestion to deprive the plaintiff of his costs, stated all the circumstances which were necessary *prima facie* to bring the case within the 129th section of the 9 & 10 Vict. c. 5, but it did not negative that a certificate had been granted, by the Judge who tried the cause, that it was fit to be tried before him; and in shewing cause, Mr. Lush relied on this, alleging truly that everything in the affidavit might be true, and yet there might be no ground for the rule. But I am of opinion that the answer given by Mr. Bastow is satisfactory. *Prima facie* the statute deprives the plaintiff of his costs under the circumstances stated in the affidavit. The fact relied on by the plaintiff would make the case an exception, and it is one particularly within his knowledge. If the certificate was granted at all it would have been so on his application. If therefore he intended to rely on it, it was for him to bring it forward. As he has not done so, he cannot rely on the silence of the other side. The rule, therefore, will be absolute.

*Rule absolute.*

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BAIL COURT. }  
1848. } THE QUEEN v. THE JUSTICES OF  
May 8. } MIDDLESEX.

*Poor Law—Bastard—Appeal, Notice of  
—Witness—Time—Lord's Day—Middlesex Sessions.*

*Under the 8 & 9 Vict. c. 10. s. 6. the mother of a bastard child is a competent witness to prove that she had due notice of appeal under 7 & 8 Vict. c. 101. s. 4.*

*Sunday is to be excluded in computing the twenty-four hours within which the putative father must give notice of appeal against the order of affiliation, under the 7 & 8 Vict. c. 101. s. 4.*

*The 7 & 8 Vict. c. 71. s. 2, which empowers the Justices of Middlesex to try appeals at General Sessions in the same manner as at the General Quarter Sessions, only confers an optional jurisdiction, and the appellant may proceed, therefore, as*



*before, to the Quarter Sessions, and is not bound to go to the General Sessions.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 111.]

BAIL COURT. }  
1848. } GINGER v. PYCROFT.  
May 9, 12. }

*Practice—Notice of Trial—Setting down Cause.*

*A notice of trial may be given after a cause is set down for trial.*

*No particular form is necessary to make a good notice of trial; and therefore a notice correct in other respects, but incorrectly stating that the cause had been made a remanet from the preceding term, was held a good notice of trial.*

A rule nisi had been obtained to set aside the verdict in this cause, and all subsequent proceedings, for irregularity. It appeared that issue was joined on the 17th of November 1847, and notice of trial was given for the sittings after Michaelmas term. It was then postponed upon an application of the defendant, until the sittings after Hilary term. The cause was set down for trial, but without a fresh notice for those sittings. The cause was then entered in the list as a *remanet*, and on the 8th of April a notice was given in the following form:—"Take notice of trial in this cause, for the first sitting in next Easter term to be holden in Westminster Hall, in the county of Middlesex, the same having been made a *remanet* from last Hilary term." The cause was tried as undefended, and a verdict found for the plaintiff. The rule was granted upon two objections—first, that the notice, being a notice of continuance, was not a good original notice; second, that the notice was bad, because given after the case was set down.

*Addison* (May 9,) shewed cause.—It is admitted there was no notice for the sittings after Hilary term; and that the cause was not therefore properly a *remanet*. But no particular form is necessary, if the notice gives the defendant the requisite information of the plaintiff's intention to try, and within sufficient time before the trial—*Tyte v. Ste-*

*venton* (1). In other respects the notice is sufficient, and there is no rule that it must be given before setting down the cause.

*Pickering*, in support of the rule.—No notice of trial is necessary where the cause is a *remanet*; and this ought not to be treated as a fresh notice. It is clear there was no notice before it was set down in Hilary term, and the postponement of the cause by the Judge's order made a notice necessary. He referred to *Jacks v. Mayer* (2), and *Ellis v. Trusler* (3). The notice is bad, because given after the cause was set down, and it was set down before any notice having reference to that trial, for a fresh notice was necessary after the postponement.

*Cur. adv. vult.*

The judgment of the Court was now (May 12,) delivered by—

COLERIDGE, J.—This was a rule for setting aside a verdict for irregularity, and the ground in effect was, that the cause had been set down for trial originally without notice of trial previously given. It was set down in Hilary term for the last sittings, and made a *remanet* to the said sittings in Easter term. In due time before those sittings, notice of trial was given, in which were inserted the words "the same (*i. e.* the cause) having been made a *remanet*," so that it did not purport to be an original notice. The objection was not much insisted on, nor does it appear to me of any weight. The case of *Tyte v. Steventon*, cited by Mr. Addison, is a satisfactory authority that the form of notice of trial is immaterial if it be delivered in time and clearly and unequivocally inform the defendant that the plaintiff intends to proceed to trial at a certain specified time. There, the notice purporting to be a continuance only of a former notice, was held to be good as an original notice. But it was said, that no cause can be properly set down until notice of trial has been given. No authority was cited for this. The two cases cited of *Jacks v. Mayer* and *Ellis v. Trusler* do not apply, nor can I find such a rule laid down anywhere in the books of practice. Certainly, in far the greater number of instances notice

(1) 2 W. Black. 1298.

(2) 8 Term Rep. 245.

(3) 2 W. Black. 798.

of trial is in fact given before setting down, because in far the greater number of instances it is indorsed on the issue delivered; but this is not necessary, nor does the marshal inquire whether notice has been given or not before he receives the record. Looking at the principle on which notice is required, I cannot see the necessity for holding the rule so strict. I therefore discharge this rule; and as it was an experimental motion, on the ground of irregularity, with costs.

*Rule discharged, with costs.*

BAIL COURT. }

1848.

May 5.

SPARROW v. REED.

*County Court—New Trial—Jury—Waiver by Acceptance of Costs.*

*On motion for a new trial of a plaint in the county court, which had been tried by the Judge alone, the Judge ordered that the second trial should be had before a jury, and that the costs of the application should be paid to the party opposing the application:—Held, that whether the Judge had power to make such order or not, the opposing party had, by accepting such costs, precluded himself from afterwards objecting to the order.*

This was a motion for a rule for a mandamus, commanding the Judge of the county court of Sussex to give effect to his judgment of the 12th of November 1847. It appeared that in October the plaintiff levied a plaint in the county court of Sussex, which came on to be heard on the 12th of November. No notice for a trial by a jury had been given, and it was, therefore, heard by the Judge, who decided in favour of the plaintiff, with costs. The defendant applied subsequently, after due notice, for a new trial, and then asked that it should be tried by a jury. The plaintiff opposed the application, and also objected that the Judge had no power to grant a trial by jury when the first trial had been without a jury. The Judge ordered the new trial, and granted a jury, but ordered the defendant to pay the costs of the application and other costs incurred by the plaintiff. These costs were received

by the plaintiff. The second trial took place on the 10th of December, before a jury, and the defendant had a verdict.

*Hugh Hill*, in support of his motion.—It is submitted that under the 20th rule of practice, approved by the Judges, the Judge had no power to order a jury. That rule directs that "every notice of a demand of a jury where the debt or demand claimed shall exceed 5*l.* must be made in writing to the clerk of the court two clear days before the return day of the summons."

[COLERIDGE, J.—Did the plaintiff receive the costs ordered to be paid by the Judge's order?]

Yes; and it will, no doubt, be a question whether he can now be heard to object to the order.

COLERIDGE, J.—The point intended to be raised is a very important one; but in the present case it would be in vain to grant the rule, as the answer would be that the plaintiff has acquiesced in the order. If he had merely attended the trial he would not, I think, have lost his right to object; but he was not bound to accept the costs, and by so doing he has precluded himself from making any objection (1).

*Rule refused.*

1847.

Nov. 10.

1848.

Feb. 26.

THE QUEEN v. THE INHABITANTS OF DUKINFIELD.

*Poor Law—Order of Removal—Evidence—Entry in Discharge of Duty—Estoppel—Prior Order quashed.*

*The examinations on which an order of removal was made stated that G. was employed by the overseers of the respondent parish to remove the paupers to the appellant parish, under a prior order of 1826, and that after he returned from removing them he signed this indorsement on the order*

(1) So in *Pearce v. Chaplin*, 16 Law J. Rep. (n.s.) Q.B. 49, it was held that acceptance of costs, under a Judge's order, precluded the party from moving to set aside so much of the order as directed no action to be brought. But consent to a trial under a writ of trial not within the statute, does not make the trial valid—*Lawrence v. Willcock*, 11 Ad. & El. 941; a. c. 9 Law J. Rep. (n.s.) Q.B. 284.

—"Delivered to Mr. W, overseer of D, by T. G;" that G. was dead, and his handwriting was proved. On the trial of the appeal, it appeared that G. was not an overseer, but had been employed by the overseers to remove the paupers, and that they had been seen on the morning in question leaving the respondent parish with G, and that they returned the same night with 4s. The appellants objected to the admissibility of the indorsement in evidence; and also contended that the respondents were estopped by a prior order of removal in 1844, which was quashed without entering into the merits of the settlement, "by reason of the informality and insufficiency of the examinations." The Sessions held this decision not conclusive:—Held, that the examinations contained evidence of the removal under the prior order of 1826; and—

Semle, that the indorsement was evidence, as being made by a person deceased, in the course of his duty.

Held, also, that the Sessions having decided on the effect of the quashing of the order of 1844, this Court would not interfere with their decision.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 113.]

1848. } WILLDING v. TEMPERLEY.  
May 12. }

*Bankruptcy—Affidavit—5 & 6 Vict. c. 122. ss. 11, 19.—Set-off—Reasonable and probable Cause—Costs.*

The plaintiff filed an affidavit in bankruptcy, under the 5 & 6 Vict. c. 122. s. 11, against the defendant, for 99l. 19s. 7d. In the account previously delivered, as provided by that section, 10l. 15s. was given credit for as a set-off, but the balance was made by mistake to appear 99l. 19s. 7d., instead of 89l. 19s. 7d. At the trial the plaintiff recovered 86l.:—Held, that the defendant was not entitled to have his costs allowed, pursuant to the 19th section.

Quære—Whether a creditor is justified under the above statute in making an affidavit for the whole amount of his demand, without noticing any set-off, which he knows to exist on the other side.

In this case the defendant being a trader, and indebted to the plaintiff, the latter, under the provisions of the 5 & 6 Vict. c. 122. s. 11, on the 24th of December 1847, caused an account to be delivered of the particulars of his debt, with a notice requiring payment, according to the form (Schedule 2) of that statute. The particulars contained items of—

Goods sold, delivered, and money lent, amounting to . . . . £100 14 7

At the foot of these items was written

Creditor's balance, for coals supplied 10 15 0  
£99\* 19 7

The notice required payment of 99l. 19s. 7d.

On the 27th of December the plaintiff also filed an affidavit, in the Court of Bankruptcy, according to the form (Schedule 1.) of the above statute, that the defendant was indebted to him in 99l. 19s. 7d., and that an account had been delivered, &c., and the summons was therefore issued, calling on the defendant to appear at the Bankruptcy Court, on the 3rd of January 1848. The defendant appeared to the summons in the Court of Bankruptcy, and deposed that he had a good defence to the action as to the sum of 54l. 15s. 10d., and an action of debt was thereupon commenced by the plaintiff against the defendant, claiming by the indorsement on the writ 100l. 14s. 7d. The defendant pleaded *nunquam indebitatus*, and a set-off; and at the trial, before Lord Denman, C.J., at the sittings in London, after Hilary term, the plaintiff had a verdict for 86l. On affidavit of the above facts,

Butt, on a former day, had obtained a rule *nisi*, for allowing the defendant his costs under section 19. of the above statute, on the ground that the plaintiff had not reasonable or probable cause for making the affidavit in the amount of 99l. 19s. 7d.

Shee, Serj. now shewed cause.—The affidavit referred to the account; and by the simplest calculation it would appear from that that the 99l. 19s. 7d. was a mistake in the process of subtraction, and that 89l. 19s. 7d. was the sum which the plaintiff really claimed. If so, he has recovered the whole amount of his demand except 3l. 19s. 7d., and the Court will not deprive him of his

\* It was admitted that this was a mere error.

costs on the ground of so slight an excess—*Sherwood v. Taylor* (1). In that case Tindal, C.J. observes, that in order to entitle a defendant to costs the sum claimed should be “materially larger” than the sum recovered. It was not necessary to allow the amount of the set-off at all—*Smith v. Temperley* (2), where all the authorities are collected. The defendant is not aggrieved in respect of the security required, in consequence of such an affidavit, as he is only to give security to pay such sum as shall be recovered by action. It is not certain that the defendant will plead a set-off.

*Butt and Maynard*, in support of the rule.—The amount for which the bond is taken must depend on the amount specified in the affidavit; and it is not even contended on the part of the plaintiff, that he had reasonable and probable cause for making an affidavit for the whole sum. The plaintiff ought to have deducted the set-off, which by giving credit for, he shews to have been within his knowledge—*Dronefeld v. Archer* (3), *Mitchell v. Jenkins* (4).

[*PATTESON, J.*—The statute 43 Geo. 3. c. 46. allowed the defendant the costs, when there was no reasonable and probable cause for making the arrest, not *the affidavit*. If under that statute a creditor made an affidavit for 100*l.*, knowing that his debtor had a set-off of 30*l.*, and issued a writ indorsed for 70*l.*, I am not prepared to say that he might not have had reasonable and probable cause for making the affidavit.]

The statute 5 & 6 Vict. refers expressly to the affidavit alone. It is no answer to say it was occasioned by carelessness. In *Smith v. Temperley* the Court of Exchequer gave no opinion on the point now raised, as the defendant was there held to be too late in his application.

*LORD DENMAN, C.J.*—We wish to decide this application on an intelligible principle. I think that an affidavit, which shews what is the amount of the debt remaining, after giving the debtor credit for everything for which he is entitled to credit, is sufficient.

(1) 6 Bing. 280; s. c. 8 Law J. Rep. C.P. 60.

(2) 16 Moo. & Wels. 273; s. c. 16 Law J. Rep. (N.S.) Exch. 105.

(3) 5 B. & Ald. 513.

(4) 5 B. & Ad. 588; s. c. 3 Law J. Rep. (N.S.) K.B. 35.

Is that done here? I think it is. The plaintiff swears to an actual balance, and he shews how he makes it out; for he refers to the account. He could not be indicted for perjury. The figures forming the account are correct, and it is admitted that the error of 10*l.* arises from miscalculation. The rule must be discharged.

*PATTESON, J.*—I should be sorry to lay it down as a rule, that in making an affidavit under this act, a creditor has a right to refuse to give credit for any set-off which he may know to exist on the other side. But that is a question we are not now called on to decide, as when we look at the affidavit, we see that the plaintiff refers to an account, by which he shews how the sum is made up. There is a mistake in the figures; but no one would be deceived by that; and we cannot say there was not reasonable and probable cause for making the affidavit for the amount mentioned.

*WIGHTMAN, J.*—I am clearly of the same opinion; and without deciding whether it is necessary to give credit for a set-off in these cases, it is enough to say that here the plaintiff, by referring to the account, which must be read in connexion with the affidavit, does give credit for the set-off.

*ERLE, J.*—If the plaintiff were indicted for perjury, he must of course be acquitted, as he swears by reference to the account annexed, and he could not be said to have sworn falsely when the mistake was manifest. By the view thus taken this rule is therefore disposed of. I think it, however, right to add that there seems to me a great difference between an affidavit which is intended to be the foundation for an arrest, and an affidavit in bankruptcy, which is only to compel a party to come in and answer; and a creditor may well take upon himself to swear to an account, admitting that there is a set-off to some amount. It is true that it is highly proper that he should give credit for the exact amount due from him, but I am not aware that he is liable to any penal consequences for omitting to do so.

*Rule discharged.*

BAIL COURT. }

1848. }

April 20. }

M'GREGOR v. FISKEN.

*Arrest, under 1 & 2 Vict. c. 110. s. 3.—Protection under 2 & 3 Vict. c. 41, (Scotch Sequestration Act).—"In meditatione fugæ."*

*The 2 & 3 Vict. c. 41, (Scotch Sequestration Act) empowers the Lord Ordinary to grant to the debtor a warrant of protection or liberation, and, by section 18, it is enacted "that the warrant, granting protection or liberation, or a copy thereof, certified by one of the bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in meditatione fugæ," &c. :—Held, that a departure from England, for the purpose of returning to Scotland, was not a fuga within this exception, and that the defendant having been arrested by a Judge's order, under 1 & 2 Vict. c. 110. s. 3, made after such order of protection was granted, was entitled to his discharge.\**

In this case the defendant had been arrested by a Judge's order, under the 1 & 2 Vict. c. 110. s. 3, on the ground that he was about to leave England; and it appeared upon affidavit that he was a Scotch bankrupt, and had received a warrant of protection, from the Lord Ordinary, under the 2 & 3 Vict. c. 41. ss. 18, 19. The debt had been contracted prior to the sequestration.

*Montague Smith* now moved for a rule calling upon the plaintiff and the sheriffs of London to shew cause why the defendant should not be discharged out of the custody of the said sheriffs.—The defendant is privileged from arrest. By section 17, the Lord Ordinary is empowered to grant to the debtor a warrant of liberation or protection, which, by section 58, may be enlarged, or be renewed for a limited period. By the 18th section it is enacted, "that the warrant granting protection or liberation, or a copy thereof, certified by one of the

bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in *meditatione fugæ*, or *ad factum præstandum*, or for any criminal act." That warrant had been duly renewed, and during its continuance the defendant was arrested.

[WIGHTMAN, J.—The question is, I suppose, whether the exception in *meditatione fugæ* applies?]

That is the only point. The exception must mean a flight from the jurisdiction of the Scotch Bankruptcy Court, and not when the bankrupt is going within the jurisdiction, where his presence may be required by his creditors. In the recent case of *Jones v. Anstruther* (not reported) in the Court of Exchequer, the defendant was discharged on a similar application.

*Willes* shewed cause, in the first instance.—This question depends upon the construction of the 18th section. No particular meaning is shewn to belong to the words in *meditatione fugæ* (1), and the words must be taken to mean flight from the country where the debtor is. The creditors will not be prevented from obtaining the attendance of the bankrupt, as by section 67. a warrant may be issued to bring him up from any prison in England. If the present arrest is not valid, an arrest because he was going to Ireland would be equally invalid, so that there would be no difficulty in his effecting his escape altogether.

[WIGHTMAN, J.—Must not in *meditatione fugæ* mean going out of the jurisdiction of the Scotch court?]

In a similar case, before Mr. Baron Parke, the discharge was refused.

*Montague Smith* replied.

WIGHTMAN, J., after having retired to consult Mr. Baron Parke, said—My Brother Parke informs me that he refused the dis-

(1) A *meditatio fugæ* warrant is issued by any Scotch magistrate, or Judge ordinary, when the debtor is about to leave Scotland to avoid payment of his debts, and the debtor is imprisoned until he finds caution—*judicio sisti*.—See Bell's Dictionary of the Law of Scotland, p. 639.

\* See M'Gregor v. Fiskien, post, Exch. 201.

charge in the case referred to, because the defendant was going to Toronto. In this case it seems to me the rule ought to be made absolute. No *fuga* is contemplated. The defendant here intends to go back to Scotland, within the limits of the very Court which has jurisdiction, and this cannot be said to be the *fuga* contemplated by this statute. It must mean some escape from the dominions of Great Britain, and not going from one part to another, and least of all, going back to Scotland. This statute is subsequent to the 1 & 2 Vict. c. 110, so that if there is any inconsistency the latter must prevail.

*Rule absolute.*

1848. }  
April 27; } THE QUEEN v. PETER A. LE COMTE  
May 10. } FONTAINE MOREAU.

*Evidence—Award of Arbitrator—Indictment for Perjury.*

*A. was indicted for perjury, on occasion of making an affidavit to hold C. to bail for 50l.*

*At the trial of the indictment it was proved that A. had prosecuted the action against C; that, at the trial, a verdict was taken for A, subject to a reference; and that the arbitrator awarded in favour of C:—Held, that the award was not admissible against A. on the trial of the indictment.*

This was an indictment for perjury charging that the defendant wilfully contriving, &c. to aggrieve, &c. one Emile Encontre, and to put him to expense, and to cause him to be arrested for 50l., by virtue of a writ, &c., on the 18th of February 1846 came, in his own proper person, before Sir J. W. Knt., since deceased, then being one of the Justices, &c., and then and there produced a certain affidavit in writing of him (the defendant) and then before the said Sir J. W., in due form of law, was sworn, &c., and deposed, amongst other things, that Emile Encontre was indebted to him in 50l. and upwards, for work and labour done by the defendant for the said Emile Encontre, and also for money lent, &c., and that the said Emile Encontre, at the time the defendant swore, &c., was not indebted to the

said defendant in the sum of 50l. and upwards, on any account whatever, but was indebted to the defendant in a small sum of money only, under the sum of 20l., to wit, the sum of 15l. 11s., and no more, as he the said defendant, at the time he so swore and made affidavit as aforesaid, well knew, &c. There was also a second count in the indictment.

*Plea—Not guilty.*

At the trial of this indictment, before Lord Denman, C.J., at the sittings in Middlesex, after Trinity term, 1847, it appeared that the defendant, who was a patent agent, having been employed by M. Encontre in 1844 and 1845, sent in his account at the end of 1845, which, after giving credit for various sums received by the defendant from Encontre, exhibited a balance due to the defendant of 54l. 14s. 3d., and this not being paid, an action of debt was brought by the defendant against Encontre. The declaration in that action contained the common counts for work and labour, goods sold, money paid, &c. The defendant pleaded *nunquam indebitatus*, payment and set-off. The defendant, after action commenced, made the affidavit the subject of the indictment before a Judge at chambers, that Encontre was indebted to him in the sum of 50l., and that he was about to quit England, and the defendant was accordingly arrested on a *capias*. M. Encontre disputed in particular two items in the account delivered, one being for 27l. 2s. 8d., and the other 11l. 12s. 7d. The cause was set down for trial, at the Spring assizes for Surrey 1847, after the finding of the indictment at the Central Criminal Court, and a verdict was taken for the plaintiff, (the present defendant), subject to the award of a barrister. By the award the arbitrator directed a verdict for the defendant in the action (the prosecutor of the indictment). The award was tendered in evidence on the part of the prosecution. It was objected to on the part of the defendant, but was admitted. The jury having returned a verdict of guilty,

*Sir F. Thesiger*, in Michaelmas term, obtained a rule *nisi* for a new trial, or for entering a verdict for the defendant, on the ground that the award was improperly admitted. He referred to 1 *Stark. Evid.* 3rd edit. p. 261.

*Shee, Serj. and Bovill* (April 27) shewed.

cause. — The question whether Encontre owed the defendant 50*l.* or not, depended on the question whether the defendant was entitled to charge two sums of 27*l.* 14*s.* 8*d.* and 11*l.* 12*s.* 9*d.* If there was no pretence for charging those sums, the defendant was guilty of perjury. The affidavit was the commencement of proceedings, which the result of the arbitration shewed to be groundless. The award was, therefore, admissible. The objection taken is, that the parties to the civil action are not the same as those to the criminal proceeding, and that as it could not be used for the defendant, if made in his favour, it cannot now be used against him. It is true that in this case the award was made after the indictment was preferred, but the rule laid down in *The King v. St. Pancras* (1) nevertheless applies.

[LORD DENMAN, C.J.—I admitted the evidence on the ground that the defendant having consented to the appointment of the arbitrator, the decision of that arbitrator was evidence as against him. If an admission made by him out of court would be admissible, is an admission in court less so?]

*Sir F. Thesiger* and *T. Jones* (*Montagu Chambers* with them), in support of the rule.—First, on the face of the indictment the award is inconsistent with the charge which is the foundation of the indictment. The indictment admits a debt of 15*l.*, while the award finds that there was no debt at all from Encontre to the defendant. But the evidence was inadmissible on principle. The question is put on the proper footing, by *Parke, B.*, in *Blakemore v. the Glamorgan-shire Canal Company* (2), and the principle of mutuality regulates the admissibility of verdicts. The verdict in a criminal matter could not be evidence in a civil case—*Brownsword v. Edwards* (3), *Gibson v. M'Carty* (4), *Jones v. White* (5): if so, a verdict for the defendant in the civil action would have been no evidence against the plaintiff in a criminal proceeding.

[LORD DENMAN, C.J.—Suppose the defendant had said "go to my clerk, and he will tell you the true state of the account,"

would not he have been bound by the statement of the clerk?]

The clerk would then be the agent; the arbitrator is not an agent for either party. He is placed by the order of the Court in the place of the jury. The arbitrator decides the case; he makes no declaration; he was not the agent for the defendant, for the purpose of confessing that he had made a false statement; but he disposes of the cause. If the award is to be treated as a verdict, which it must be, then it is also *res inter alios acta*.

[LORD DENMAN, C.J.—I have some difficulty in treating it as *res inter alios*, the parties being in effect the same (6)].

The parties are not the same as regards the rules of evidence. The admission of the prosecutor is not receivable; and the question is decided more by the preponderance of the evidence in criminal cases than in civil. If in a civil action a prosecutor cannot be allowed to put in evidence a conviction which has been obtained on his own testimony, the converse of the rule must also hold—*Gilb. Evid.* 28, *Stark. Evid.* 261, 262, 3rd edit., *Phill. Evid.* 9th edit. 23, 25, *The King v. the Warden of the Fleet* (7).

*Cur. ado. vult.*

The judgment of the Court was now (May 10,) delivered by—

LORD DENMAN, C.J.—This was an indictment for perjury, in an affidavit to found an application for a *capias*, alleging that the defendant in that suit, the prosecutor of this indictment, was indebted to him in the sum of 50*l.* In order to prove the falsehood of that allegation, an award was put in evidence at the trial. After the indictment was found, the cause between the parties came on at the assizes, and was then referred to the arbitration of a barrister, who decided in favour of the defendant, that he owed nothing to the plaintiff. His award is the document

(6) His Lordship referred to a passage in 2 *Phil. Evid.* p. 203, 1 *Phill. Evid.* 338, 7th edit., (referred to in *Roscoe on Evid.* p. 137), where it is said in a note, that Lord Tenterden had at Nisi Prius rejected in an action for an assault a verdict under a plea of guilty in an indictment for the same assault. This is not, however, noticed in the ninth edition of *Phil.* on *Evid.* p. 25, where this question is discussed; and see 2 *Pitt Taylor on Evid.* 1114.

(7) 12 *Mod.* 339.

(1) 1 *Peake, N.P.C.* 220.

(2) 2 *Cr. M. & R.* 133; s. c. 4 *Law J. Rep.* (n.s.) *Exch.* 146.

(3) 2 *Ves. sen.* 246.

(4) *Rep. Temp. Hardw.* 311.

(5) 1 *Str.* 68.

objected to, but admitted. On a motion for a new trial on this ground, we are of opinion that it was improperly received, not because the untruth of the statement was necessarily inconsistent with the defendant believing it to be true, for his knowledge of its falsehood would require to be proved by other evidence, but because the decision of the arbitrator in respect of that fact, is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against the party to be affected by the proof of it in any criminal case.

*Rule absolute.*

[IN THE EXCHEQUER CHAMBER.]

1847. } HOOPER AND ANOTHER v. LANE  
May 13.\* } AND OTHERS.

*Sheriff—Negligence—Void Writ—Discharge under Judge's Order.*

*In an action on the case against a sheriff for negligence in not arresting A. B. while he was in the bailiwick, on a ca. sa. issued by the plaintiff, and also alleging as a breach of duty that the defendant illegally arrested A. B. under a false writ, and detained him until discharged by a Judge's order, whereby, while A. B. was so imprisoned, and for a reasonable time after his discharge, the defendant was unable to arrest him under the plaintiff's writ, but was obliged to let him depart out of custody, whereby the plaintiff's writ became useless; the defendant pleaded not guilty, and traversed that he could have arrested A. B. modo et formâ. It appeared that after the delivery to the sheriff of the plaintiff's writ, another writ (which was void) was delivered at the suit of J. S. and that the sheriff granted a warrant on this last-mentioned writ to the officer who arrested A. B. under it, having at the time no other warrant in his possession, and detained him in custody under that writ until he was discharged by a Judge's order. After that order the sheriff still detained A. B. in custody under the plaintiff's writ, until a second order for his discharge from that writ was made. A. B. immediately afterwards*

*left the country. The Judge directed the jury that there had been no arrest at the plaintiff's suit, and that the Judge's order was no justification to the sheriff; and that if the jury believed the evidence, the sheriff was liable for negligence in point of law, and that the plaintiff was entitled to a verdict:—Held, that the ruling was correct; that there had been no arrest at the plaintiff's suit; and that the Judge's order was no justification; but that it was a question of fact which ought to have been submitted to the jury, whether the sheriff had been guilty of negligence in arresting A. B. on the supposed writ at the suit of J. S. instead of the plaintiff.*

Error from the Court of Queen's Bench.

Case against the defendants below, who were sheriffs of Middlesex, for negligence in not arresting one A. Bacon under a writ of ca. sa., issued at the suit of the plaintiffs below.

The declaration alleged that the said A. Bacon, at the time of the delivery of the writ to the defendants below, and from thence for a long space of time, to wit, &c. was within the said sheriffs' bailiwick, and the defendants during that period (the same being then a reasonable and necessary time in that behalf) might have taken and arrested the said A. Bacon by virtue of the said writ, if they would so have done, &c. Yet the defendants, &c. not regarding, &c. but contriving, &c. did not, nor would at any time after the said writ was so delivered to them as aforesaid, during the space of time aforesaid, although often requested, &c., and although a reasonable time had elapsed for them so to do, take or cause to be taken the said A. Bacon under and by virtue of the said writ, as by the said writ they were commanded, but therein wholly failed and made default, and afterwards, and at the end of the said space of time, further contriving, &c. did not, nor would take the said A. Bacon under the said writ, and wrongfully, unjustly, and illegally by themselves, their agents and officers, to wit, on &c., took and imprisoned the said A. Bacon under the false and illegal pretence of a certain other writ to them, the said sheriffs, directed, whereas, in truth and in fact, there never was any such writ, and then wrongly and falsely detained and imprisoned the said A. Bacon for a long space of time, to wit, &c., by means whereof, the

\* The publication of this case has been unavoidably delayed.



said A. Bacon was afterwards, to wit, on &c., by a certain order of Sir T. Coltman, Knt., one of Her Majesty's Justices, &c., ordered to be and was discharged from and out of the custody of the defendants, and thereby the defendants during all that time last aforesaid, while they so wrongfully imprisoned the said A. Bacon, and for a reasonable time after his discharge from his said imprisonment, were unable, and could not and did not take, arrest, or detain the said A. Bacon under the said writ of the plaintiffs, but were obliged to suffer and permit the said A. Bacon to depart from their custody, and the said A. Bacon did then and immediately after his discharge from his said imprisonment, depart from and out of the custody of the defendants, and from and out of the bailiwick of the sheriffs of Middlesex, the defendants continuing and being such sheriffs as aforesaid, until a long time thereafter, to wit, until and on, &c., whereby the defendants continually from the time of the said wrongful arrest of the said A. Bacon, until the said A. Bacon so departed from their bailiwick, to wit, for the space of eight days, lost and deprived themselves of the means of lawfully taking or detaining the said A. Bacon; and by reason thereof and of such departure from and out of the said bailiwick, could not at any time thereafter take the said A. Bacon under the said writ of the plaintiffs, whereby the said writ of the plaintiffs became wholly useless, &c.

Pleas—(*inter alia*) not guilty, and that the defendants could not nor might have taken or arrested the said A. Bacon *modo et formâ*. Issues thereon.

At the trial, before Lord Denman, C.J., at the Sittings at Westminster, after Trinity term, 1845, it was proved that a writ of *ca. sa.* at the suit of the plaintiffs below against Bacon was delivered to the defendants below, they being the sheriffs of the county of Middlesex. It further appeared that a parchment was brought to the defendants' office, purporting to be a writ issued out of the Court of Exchequer at the suit of one Arundel against the said A. Bacon indorsed for bail; that the defendants granted a warrant on such parchment to John Swan, an officer, and the attorney's clerk who brought such parchment informed Swan where Bacon was to be found, and Bacon was arrested on such warrant, the officer

having at that time no other warrant in his possession, and he detained Bacon in custody until discharged by the order of Mr. Justice Coltman. It was further proved that the said parchment was not signed or marked in the manner required on writs issued from the Court of Exchequer; that no *præcipe* had been filed for such writ in the proper office, and that, in truth, it was no writ at all. Mr. Justice Coltman made an order for the discharge of Bacon at the suit of Arundel, and after the making of that order the defendants detained Bacon under the plaintiffs' writ until Mr. Justice Coltman made a second order for the discharge of Bacon at the suit of the plaintiffs. It was likewise proved that Bacon had, on his discharge, left the country. The Lord Chief Justice, on that evidence, directed the jury that there had been no arrest at the plaintiff's suit; that the order of Mr. Justice Coltman was no justification to the sheriff; that if the jury believed the evidence which had been given, the defendants were liable to an action for negligence and laches in point of law, and that the jury ought to find a verdict for the plaintiffs; and added that, if the jury believed, from the evidence, that the defendants had been guilty of such negligence, the only question was the amount of damages in the cause. On this direction, the defendants' counsel tendered a bill of exceptions, and insisted that the learned Judge ought not to have stated to the jury that if they believed the evidence they should find a verdict for the plaintiffs; and further insisted that the defendants had not been guilty of any negligence in having proceeded with the said pretended writ at the suit of Arundel, instead of the plaintiffs. The jury returned a verdict for the plaintiffs on both of the above issues, with \$251. damages.

Judgment having been accordingly signed, a writ of error was brought upon the record, and was (Dec. 3, 1846) argued by

*Kennedy*, for the plaintiffs in error.—The learned Judge was wrong in directing the jury to find for the plaintiffs below. There was an arrest under the plaintiff's writ, as it was in the sheriff's office when the arrest under Arundel's writ took place. It makes no difference that the writ under which the officer professed to act was bad, for he may

justify under any other good writ in the office at the time—*Dr. Grenville v. the College of Physicians* (1), *Crouther v. Ramsbottom* (2), *Lucas v. Nockells* (3), *Oakes v. Wood* (4). If Bacon had sued the sheriff in trespass, he would be justified by the plaintiff's writ, and the officer acting under the warrant is entitled to the same protection as the sheriff himself.

[PARKE, B.—The officer stands in the same position as the sheriff for the purpose of executing the writ. You cannot carry it further than that.]

If this is not an arrest by the sheriff, *cadit questio*. But a known officer of the law, like a bound bailiff, need not shew his warrant when he arrests—*Dalton's Sheriff*, c. 22. p. 110. The case is different of a special bailiff.

[MAULE, J.—Is not this a special bailiff, as he is appointed only *pro hac vice*, though, in fact, the sheriff always appoints the same person?]

There is no evidence that Bacon ever required production of the warrant. The cases where an arrest under one bad writ has not enured as an arrest under another good one, turn on there being collusion, which is not set up here—*Hodges v. Marks* (5), *The Countess of Rutland's case* (6), *Mackelley's case* (7), *Hall v. Roche* (8), *Robinson v. Fevens* (9). In *Ex parte Cogg* (10), the point that the sheriff might justify under any writ in his office was not made.

[MAULE, J.—If that argument is carried to its full length, a person arrested illegally out of the sheriff's bailiwick may be said to be arrested as soon as he comes within it if there is another writ in his office.]

*Reynolds v. Newton* (11) supports the proposition that unless there be misconduct by the sheriff an illegal arrest enures as a good arrest under other writs. Next, the

order of Coltman, J. was a justification to the sheriff. If it was wrong, the arrest remained good; if it was right, it gives the sheriff a defence—*Dalton's Sheriff*, c. 21. p. 106. Lastly, there was no negligence in the sheriff in not arresting on the writ at the suit of Lane: it should have been proved that the sheriff had an opportunity of arresting under Lane's writ, or had notice of Bacon being in the country.

[PARKE, B.—The allegation of notice is not traversable. The sheriff is guilty of negligence if, by taking proper means, he could have arrested.]

In *The Dean of Hereford v. Macknamara* (12) it was held there must be knowledge or means of knowledge by the sheriff: the mere fact of the party being within the bailiwick is not enough. Here there is no evidence of any knowledge by the sheriff. The utmost is that the officer knew where Bacon was just before he took him. It is not every constructive notice that will fix the sheriff—*Gibbon v. Coggon* (13), *Drake v. Sykes* (14). The proper question for the jury was, whether, independently of the writ at the suit of Arundel, the sheriff had any notice that Bacon was in his bailiwick.

*Watson*, for the defendants in error.—The question is, whether by using reasonable diligence, the sheriff might have arrested under Lane's writ, and notice to the officer, who is the sheriff's agent, that Bacon resided in the bailiwick is evidence against the principal. The sheriff ought to have seen, by merely looking at Arundel's writ, that it was mere waste paper, as the defect was a patent one.

[MAULE, J.—I do not see that any such question was put to the jury.]

The subsequent question as to the damages, leaves it in effect to the jury. Next, there never was a good arrest under Lane's writ; the only authority possessed by the bailiff was wholly void—*Barratt v. Price* (15). The cases cited on the other side were cases where the sheriff had adopted the unauthorized act of his bailiff, and, therefore, the question of collusion arose.

[MAULE, J.—How do you get rid of the

(1) 12 Mod. 386.

(2) 7 Term Rep. 654.

(3) 10 Bing. 157.

(4) 2 Mees. & Wels. 791; s. c. 6 Law J. Rep. (N.S.) Exch. 200.

(5) Cro. Jac. 485.

(6) 6 Rep. 53.

(7) 9 Ibid. 69.

(8) 8 Term Rep. 187.

(9) 5 Mees. & Wels. 149; s. c. 8 Law J. Rep. (N.S.) Exch. 166.

(10) 6 Dowl. P.C. 461.

(11) 1 G. & D. 153.

(12) 5 Dowl. & Ry. 95.

(13) 2 Campb. 188.

(14) 7 Term Rep. 113.

(15) 9 Bing. 566; s. c. 2 Law J. Rep. (N.S.) C.P. 56.

principle laid down in *Crowder v. Ramsbottom* ?]

That would have applied if the bailiff himself had held a good as well as a bad warrant, or had professed to arrest under all writs then in the office, for in such case only could the sheriff's ratification make good his act (16). The true rule is laid down in *Barratt v. Price* and *Robinson v. Yewens*, that if the first arrest is illegal, detainers do not attach.

[PARKE, B. — The difficulty is to say that the party is not in custody of the sheriff, though the arrest may be under an illegal writ.]

[ROLFE, B.—Suppose, after the sheriff had the party in custody under Arundel's writ, Lane brought an action of escape, could the sheriff say the arrest was illegal?]

That would be setting up his own wrong.

[WILDE, C.J.—When the sheriff gave notice to the officer of the other writ in the office, did not Bacon then become in his custody under that writ?]

Where the arrest amounts to actual false imprisonment, it is impossible to say the party is in custody at all. The arrest by the officer, who was only acting under a limited authority, is not equivalent to an arrest by the sheriff himself. The illegality of the former arrest prevented all other writs from attaching—*Pearson v. Yewens* (17), *Collins v. Yewens* (18). Then the decision of Coltman, J. was decisive.

Kennedy was heard in reply.

*Cur. adv. vult.*

The judgment of the Court (19) was now delivered by—

WILDE, C.J.—This was an action on the case against the sheriffs of Middlesex, by the plaintiffs, who complained of an alleged breach of duty in not arresting one Anthony Bacon, on a writ of *capias ad satisfaciendum*, at the suit of the plaintiffs, indorsed to levy the sum of 325*l.* At the trial, be-

fore Lord Denman, a verdict was found for the plaintiffs, damages 325*l.*, and a bill of exceptions having been tendered on the part of the defendants to the ruling of the learned Judge, the case now comes before the Court on a writ of error.—[The Lord Chief Justice stated the pleadings and substance of the bill of exceptions as before set out, and proceeded:—]The question before the Court arises on the second breach assigned in the declaration, and is, whether Lord Denman's ruling in the respect before mentioned was correct in point of law; and we are of opinion that that direction was correct in point of law in respect to there having been no arrest on the plaintiff's writ, and that the order of Mr. Justice Coltman was no justification for the defendant in the present action; but we are of opinion that it was a question of fact for the jury, whether the defendants had or had not been guilty of negligence in having arrested Bacon on the supposed writ at the suit of Arundel, instead of on the plaintiffs' writ; and we think the direction of the learned Judge to the jury, if they believed the evidence that the defendant had been guilty of negligence in point of law, was erroneous, and that it was a proper question of fact to be submitted to the jury; and as the question was not submitted, there must be a *venire de novo*.

The ruling of Lord Denman, that the arrest of Bacon on the supposed writ at the suit of Arundel was no arrest at the suit of the plaintiffs, was consistent with all the established authorities in the books, particularly the case of *Barratt v. Price*, followed by the cases of *Collins v. Yewens*, and *Barry v. Newton*. The rule will be found very distinctly laid down by Lord Coke, in *The Countess of Rutland's case*. He says, "But the truth of the case of the Countess of Rutland was, that the serjeants who had the sheriff's warrant to arrest the said Countess on the said *capias ad satisfaciendum*, being fearful that she would be rescued by her servants and friends, and so escape, for which the sheriffs (if she should be arrested on the *capias ad satisfaciendum* and escape) would be charged, the serjeants-at-mace advised the said S. to enter a feigned action of 1,000*l.* before the sheriffs in London, according to their custom, upon which they would first arrest the said Countess, and by force thereof carry her to

(16) *Wilson v. Tammon*, 6 Scott, New Rep. 894; s. c. 12 Law J. Rep. (N.S.) C.P. 306.

(17) 5 Bing. N.C. 489; s. c. 8 Law J. Rep. (N.S.) C.P. 255.

(18) 10 Ad. & El. 570; s. c. 8 Law J. Rep. (N.S.) Q.B. 332.

(19) Wilde, C. J., Parke, B., Alderson, B., Coltman, J., Maule, J., Rolfe, B., Platt, B., and Williams, J.

the Compter, and then take her body in execution on the *capias ad satisfaciendum*. And afterwards the said serjeants in Cheap-side, with many others, came to the Countess in her coach, and shewed her their mace, and touching her body with it, said to her, 'We arrest you, madam, at the suit of the said S,' which were all the words they used; and thereupon they compelled the coachman to carry the said Countess to the Compter, in Wood Street, and at the door thereof the sheriff came and carried the Countess to his house, where she remained seven or eight days, till she paid the debt. And it was resolved, that the sheriff, or any other by his authority, who makes an arrest of the person of another, ought on the arrest to shew at whose suit it is; out of what court, for what cause he makes it, and when the process is returnable, to the intent that if it be for any execution he might pay it, and free his body (if he will) from imprisonment; and if it be on meane process, either to agree with the party or to put in bail according to law, and to know when he should appear. And therefore it was resolved, that the said general arrest cannot be said by force of the said writ of execution; and that the said arrest of the Countess by the serjeants-at-mace of their own heads without other warrant, is against law, and the said countess was falsely imprisoned." Assuming, then, the law, as laid down by Lord Denman, to be correct, that the defendant in the original cause was not in lawful custody on the writ at the suit of the plaintiff below, by reason of the wrongful act of the sheriff in arresting him on the supposed writ, or rather no writ at all, the plaintiff's case against the sheriff was, that he was guilty, in fact, of a breach of duty towards him, by causing the defendant (Bacon) to be arrested, on the supposed writ, whereby he was disabled from holding him in custody on the valid writ then in his possession, and the defendant was, therefore, discharged, and escaped from their bailiwick, so that he could no longer be arrested thereon. But, in order to make out that case, it was not enough to shew that the said supposed writ was void; he must shew that the defendants were guilty of a culpable neglect of duty and a breach of duty towards the plaintiff in acting upon it, since he must shew the defendants knew, or could, with reason-

able care, have discovered, it to be void. The writ, no doubt, being void, would be no defence to the sheriff in an action of trespass by a person arrested thereon, whether the sheriff knew it to be void or not, or could have discovered its defect with ordinary care, because the sheriff in depriving a man of his liberty acts at his peril. If he authorize one who assumes to act upon a writ that is invalid, he is responsible to the party injured; but whether he be guilty of a breach of duty towards the party employing him to execute another writ is quite another and different question. He only engages to use proper care, and not wilfully and carelessly to do any act to prevent the arrest; and if without any default of the sheriff the party is not arrested, the sheriff is not liable. If at the time the sheriff had the plaintiff's writ delivered to him, he had several valid writs in his hand, the sheriff would without doubt perform his duty towards the plaintiff if he arrested on either of those valid writs: it would be an arrest in point of law on all, and he could not be bound to put the plaintiffs in all the writs to the expense of executing each. Now, if instead of executing a valid writ, he executed one which he had every reason to suppose was valid; as, for instance, if there was perjury, which by the exercise of skill and caution could not be discovered, he would not be guilty of any misconduct towards the plaintiff. The fact of the writ being really invalid could not be enough to charge the sheriff as against the plaintiff, who gives no guarantee that the writ he executes should be valid; but only undertakes to use due and reasonable care; and it is a question in every case when he chooses to act on it, whether he has used due care in acting on it—whether he knew or ought to have known, by the use of reasonable care, of the defect.

The second branch of the declaration is framed upon the supposition that the defendant was guilty of a breach of duty towards the plaintiff in arresting Bacon upon the pretence of a writ, when in truth there was no such writ, and so causing the discharge and departure of Bacon. If the breach is well assigned upon the supposition that it purports to charge negligence and want of care on the part of the sheriff in arresting the defendant on the supposed writ, and

thus employed the word "wrongful," in that view the defendant's liability can only be established by evidence that, in arresting on the pretence of the alleged writ, he was guilty of negligence; and, if so, the summing up is incorrect for the reasons before mentioned, that it omits to leave the important question to the jury, whether the sheriff did know or ought to have known that the parchment delivered to him, on which he arrested Bacon, was, in fact, no writ at all; and, therefore, we are of opinion, there must be a *venire de novo*. If any doubt arises whether the second breach is well assigned or not, if the plaintiff obtains a verdict upon a second trial, it will be proper to consider if the damage should not be assessed separately upon each.

*Venire de novo.*

1848. { JACOBS v. TARLETON.

*Trial—Evidence, in reply—Course of Proof—Bill of Exchange—Indorsement.*

*In an action by the indorsee of a bill of exchange and an issue raised on a plea denying the indorsement, the plaintiff rested his case, in the first instance, on proof of the handwriting of the indorser. The defendant then gave evidence that the plaintiff was too poor to have discounted the bill, or to have had it indorsed to him, and that he had disclaimed having done so, or having anything to do with the bill:—Held, that the plaintiff ought not to be allowed to give evidence in reply, for the purpose of shewing the plaintiff's ability to discount the bill, and that, in fact, he had discounted it, as such evidence was merely confirmatory of the plaintiff's *prima facie* case, and not in contradiction of the defendant's witnesses.*

This was an action on a bill of exchange, drawn by Gadderer, and accepted by the defendant, and by Gadderer indorsed to the plaintiff. Third plea, that Gadderer did not indorse to the plaintiff; and issue thereon. There were also pleas of fraud and covin, and that the bill came to the plaintiff's hands without consideration.

At the trial, before Parke, B., at the Summer assizes for Surrey, 1847, the plaintiff, in support of the issue raised by the

third plea, proved the handwriting of Gadderer, and rested his case on that evidence. The defendant then called witnesses, who stated that the plaintiff was too poor to have discounted the bill, or to have had it indorsed to him, and that he had disclaimed having done so, or having anything to do with the bill. The plaintiff then called, in reply, a witness named Lawrence Levi, for the purpose of proving that the plaintiff had the means of discounting the bill, and had in fact discounted it for Gadderer. This evidence was objected to, and rejected by the learned Judge; and the jury returned a verdict for the defendant on the issue raised on the third plea, and for the plaintiff on the other issues. A rule *nisi* for a new trial, on the ground that the evidence of Levi had been improperly rejected, and also on affidavits, having been obtained,—

*Sir F. Thesiger, Shee, Serj., and Ogle shewed cause (Jan. 29.)*—The learned Judge was quite correct in refusing to allow the plaintiff to patch up the insufficient case which he had proved in the first instance, by giving evidence in reply, which he might have introduced in the course of his case. A plaintiff may, in some instances, wait till the defendant has proved his case, and then call evidence in reply to that case; but he cannot rely upon a *prima facie* case in the first instance, and then be allowed to prove the rest of the issue in reply. [The argument as to the affidavits is omitted.]

*Montagu Chambers and Petersdorff*, in support of the rule.—On a plea, denying the indorsement, it is sufficient for the plaintiff to prove the handwriting of the indorser. If the defendant gives evidence to shew that there was no indorsing mind, that is a new case started on the plaintiff, which he may rebut by evidence in reply.

[COLERIDGE, J.—The rule is, that a plaintiff cannot divide the evidence applicable to one issue into two parts; he must give all his evidence at once.]

The rule is not imperative or universal, but is merely a rule of convenience; and the practice at *Nisi Prius* in actions on bills of exchange by the indorsee, and a denial of the indorsement, shews that it has never been understood to apply to such cases. If the argument on the other side be correct, the plaintiff must always, under such an issue, not only be prepared with evidence

to meet any possible case that may be set up by the defendant, but must adduce that evidence in the first instance.

[COLERIDGE, J.—Your only contest is, whether you are obliged to do this at one stage of the case or at another; you must be equally prepared with the evidence.]

[WIGHTMAN, J.—I find my Brother Parke's report to be, that he thought the plaintiff having made out a *prima facie* case of indorsement was bound to stand on that case. The defendant's evidence did not set up a new case, but only answered the plaintiff's *prima facie* case.]

That case might be answered in several ways; and the question is, whether the plaintiff was bound by anticipation to meet all possible answers. *Rees v. Smith* (1) is the case usually cited as to splitting evidence; and there Lord Ellenborough, C.J. says, "If indeed any one fact be adduced by the defendant to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact; he cannot go into general evidence in reply to the defendant's case." So here the specific fact, that the plaintiff was not in a condition to discount the bill, was one which the plaintiff might contradict by evidence in reply. In *Brown v. Murray* (2), it was decided that if the plaintiff had given any evidence in the outset to repel the defence, he should not be permitted to give further evidence in reply, as such a course would be inconvenient to the due administration of justice; but in *Williams v. Davies* (3), an action of assumpsit upon several bills of exchange, to which the defendant pleaded a set-off, the plaintiff was allowed to divide his evidence, by proving in the first instance a small demand, and upon the defendant proving a set-off, to give further evidence of a larger amount due. Lord Lyndhurst, in that case, in adverting to the inconvenience of disallowing such proof, observed, that the "consequences would be that the plaintiff might have to go into many years' transactions, when it would be quite unnecessary he should do so."

[COLERIDGE, J.—That comes within the general rule where the plaintiff has set up a

complete case, and the defendant sets up another totally new one: there the plaintiff gives the evidence in answer to the defendant's case, and not as part of his own.]

Suppose the consideration for a bill is not impeached on the cross-examination of the plaintiff's witnesses, he is surely at liberty to give evidence in reply to a specific case of want of consideration set up by the defendant. *Marston v. Allen* (4), cited at the trial, shews the meaning of the issue on the indorsement; but that case did not at all turn on the course of proof. Had it done so, can there be any doubt of the justice of allowing the plaintiff in reply to have contradicted the evidence of the defendant leading to the conclusion that the bill was not duly transferred by the indorsement? In *Hayes v. Caulfield* (5) Lord Denman lays it down that the only effect that a plea denying the indorsement can have is to call in question the handwriting of the indorser. The object of the New Rules was to oblige a defendant to disclose his case by his plea, and that object will be frustrated if the defendant be allowed to give evidence tending to shew that an indorsement to the plaintiff was improbable, and the plaintiff is to be precluded from rebutting that evidence by calling witnesses in reply. The consequence will be to compel the indorsee, where the indorsement is in issue, to prove in the outset not only the handwriting of the indorser, but the circumstances under which the bill was indorsed; thus, incidentally, requiring him to prove the consideration before it is impeached, and to negative fraud.

*Cur. adv. vult.*

LORD DENMAN, C.J., subsequently, in this term, delivered the judgment of the Court.—The question in this case was, whether the learned Judge was right in refusing to allow a witness of the name of Lawrence Levi to be called by the plaintiff in reply, upon the trial of the issue, whether a bill of exchange had been indorsed to him, the plaintiff, or not. The issue was single, and the onus of proof was upon the plaintiff. He might either rely upon a *prima facie* case, or go into all the evidence he had to confirm the *prima facie* case; but

(1) 2 Stark. N.P.C. 31.

(2) Ry. & M. 254.

(3) 1 Cr. & M. 464; s. c. 2 Law J. Rep. (n.s.) Exch. 102.

(4) 8 Mee. & Wels. 494; s. c. 11 Law J. Rep. (n.s.) Exch. 122.

(5) 5 Q.B. Rep. 81.

we think that he was not entitled to rely in the first instance upon a *prima facie* case upon that issue, and afterwards, when that *prima facie* case was called in question by the defendant, to call other evidence to confirm his *prima facie* case. It was not proposed to call Levi to *contradict* any statement made by the defendant's witnesses, but to *add a fact* tending to confirm the plaintiff's *prima facie* case. This, we think, he was not entitled to do, if objected to, and that the learned Judge was right in refusing to allow him to call the witness.

*Rule discharged.*

1848. } DAVISON v. WILSON AND AN-  
May 5. } OTHER.

*Trespass—Forcible Entry—Pleading—Aggravation.*

*The declaration alleged that the defendant, with force and arms, &c., and with a strong hand, and against the form of the statute, broke and entered the dwelling-house of the plaintiff, and broke open doors, windows, &c., and in a forcible manner and with a strong hand disseised and expelled the plaintiff. The defendant pleaded as to the breaking and entering, &c. that the dwelling-house, &c. was his soil and freehold:—Held, that the defendant might confine his justification to the breaking and entering, and that the plea was good; the circumstance of entering manu forti being matter of aggravation, which the defendants were not necessarily called on to justify in a civil action.*

Trespass, for that the defendants, on &c., with force and arms, and with a strong hand, and against the form of the statute in such case, &c., broke and entered a certain dwelling-house, messuage, and cottage of the plaintiff, then being in the actual occupation and possession of the plaintiff, and situate, &c., and made a great noise and disturbance, &c. for a long time, &c., and then in a forcible manner and with a strong hand forced, broke open, &c. the doors and windows, &c.; and also then, with force and arms, &c. assaulted the plaintiff, and beat, bruised, wounded, and ill-treated him, and pulled, pushed, and dragged him out of his said dwelling-house, and in a forcible manner and with a strong hand put out, disseised,

dispossessed, and expelled the plaintiff therefrom, for a long space of time, to wit, &c.

Pleas—first, not guilty; second, as to the breaking and entering, and making a noise, &c., and continuing, &c., and breaking the doors, &c., that the said dwelling-house in which, &c., and the said doors, &c. were not, nor was any or either of them, at the said time when, &c., the plaintiff's; third, as to the trespasses in the introductory part of the preceding plea mentioned, that the said messuage and dwelling-house was and is now the dwelling-house, messuage, and cottage, soil and freehold of the defendant Richard Wilson, wherefore the said R. Wilson, in his own right, and the other defendants as the servants and at the command of the said R. Wilson, at the said time when, &c., broke and entered the said dwelling-house and messuage, and committed the said supposed trespasses, as they lawfully might, for the cause aforesaid. Verification. ♦

Demurrer to the last plea, assigning for causes, that it appears by the declaration that the said last-mentioned trespasses were committed by the defendants under circumstances which, in point of law, amounted to a forcible entry within the meaning of the statutes relating to forcible entries, and, consequently, a plea of *liberum tenementum* affords no answer to the said trespasses. Joinder in demurrer.

The plaintiff's points were, that a freeholder cannot legally take possession of his freehold dwelling-house in a manner which amounts in law to a forcible entry, whilst such dwelling-house is in the actual occupation and possession of a third party.

The defendants' points were, that the plea answers all which it professes to answer. That the defendants are entitled to select from the declaration those parts which they profess to answer; but if they are not, then that the declaration is bad as not bringing the plaintiff's case within any of the Statutes of Forcible Entry, as it does not shew that the plaintiff had a freehold, which is required by statute 8 Hen. 6. c. 9, or that the defendants had no right of entry—statute 5 Rich. 2. c. 8. That a forcible entry when the defendant has a right to enter is matter for indictment, but does not entitle the plaintiff to damages for a trespass to what is not his. That the word "disseised" is in a separate sentence from and not connected with the

words "against the form of the statute," and is only introduced as aggravation of the assault.

*Hunter*, in support of the demurrer.—The plea of *lib. ten.* is no answer—*Newton v. Harland* (1).

[LORD DENMAN, C.J.—The plea does not profess to justify the indictable part of the trespass.]

If it is necessary to reply or new assign, the Court will allow the plaintiff to amend. But the plea is ill for omitting to justify the substantial trespass and injury to the plaintiff—*Harvey v. Bridges* (2), *Hillary v. Gay* (3), *Turner v. Meymott* (4).

[PATTESON, J.—In *Turner v. Meymott* Dallas, C.J. expressly remarks, that if the defendant had used force he might be indicted for the forcible entry.]

The declaration charges a trespass of a serious character; the plea justifies only a part. Besides, it would be very hard that any party—a leaseholder, for instance—should be called upon to shew his title when it is admitted that his possession has been intruded upon with violence. Trespass is maintainable whenever a party enters on the possession of another *manu forti*, though he have a good title—*Doe d. Stephens v. Lord* (5), *Anthony v. Hancy* (6).

*Cowling*, contra.—The plea is good even if the defendants are taken as justifying the entry with a strong hand, but they do not. The defendants are only bound to justify so much as the plaintiff would be bound to prove in order to support his count. If the defendants had only pleaded the general issue, the allegation of strong hand, &c. would only be matter of aggravation. In *Harvey v. Bridges* Alderson, B. appears to have thought that the plaintiff should have replied that the defendants entered with a strong hand.

[WIGHTMAN, J.—Here it is already in the declaration.]

This is like the case of *Fisherwood v. Cannon*, referred to by Buller, J., in *Taylor*

*v. Cole* (7), where in trespass for taking goods of the plaintiff, it was held sufficient to justify the taking, the conversion being only aggravation; and *Sir Ralph Bovy's case* (8), also referred to in the same judgment of Buller J., where, to an action for a voluntary escape, the defendant pleaded that he took the prisoner on fresh pursuit, without traversing the voluntary escape; and on demurrer it was held sufficient. If the defendants acted in violation of the Statutes of Forcible Entry, they may be proceeded against criminally. It was formerly considered that the words *vi et armis* were very important—1 *Saund.* 81, n. 1, *Com. Dig.* 'Pleader' (3 M. 7), and (3 M. 8); and it was afterwards expressly traversed for the purpose of avoiding being fined and imprisoned; but in 1 *Hawk. P.C.* c. 28. s. 3, it is said, that "even at this day, in an action of forcible entry . . . if the defendant make himself a title which is found for him, he shall be dismissed without any inquiry concerning the force. For howsoever he may be punishable at the King's suit, for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself." In *Taylor v. Cole*, Lord Kenyon says, "It is true that persons having only a right are not to assert that right by force; if any violence be used, it becomes the subject of a criminal prosecution; . . . and the question is, whether a person having a right of possession may not peaceably assert it, if he do not transgress the laws of his country. I think he may." This amounts to saying, that force makes no difference as to the civil remedy. The Statutes of Forcible Entry, 5 Rich. 2. c. 7, extended by 15 Rich. 2. c. 2, only enable the party injured to proceed criminally by fine and imprisonment. The statute 8 Hen. 6. c. 9. s. 6. first gave a civil remedy to the party aggrieved; but that only applies when the party so aggrieved has the freehold—*Cole v. Eagle* (9), *Fits. Nat. Brev.* 560, 8th edit. In *Newton v. Harland*, the question was, whether the defendants could treat the plaintiff's wife as a trespasser for

(7) 3 Term Rep. 297.

(8) 1 Vent. 211, 217.

(9) 8 B. & C. 409; s. c. 6 Law J. Rep. Q. B. 369.

(1) 1 Man. & Gr. 644.

(2) 3 Dowl. & L. P.C. 55; s. c. 14 Law J. Rep. (s. a.) Exch. 272.

(3) 6 Car. & Pay. 284.

(4) 1 Bing. 168; s. c. 1 Law J. Rep. (n. a.) C.P. 13.

(5) 7 Ad. & El. 610.

(6) 8 Bing. 186; s. c. 1 Law J. Rep. (n. a.) C.P. 1.



holding over after the expiration of the term, and was in fact a question of personal trespass. If the declaration had been in trespass *quare clausum fregit*, the defendants would have been justified. In *Perry v. Fitzhove* (10), it is observed, by Wightman, J., in the course of the argument, that the words, "with a strong hand," will not make that a trespass which would not otherwise be so. The law laid down in that case is not disputed; and it is not contended, on the part of the defendants, that they would be justified in demolishing a house, even though the plaintiff was not in it, *e. g.* if he were temporarily absent. *Hillary v. Gay* is the only authority against the defendants. *Doe d. Stephens v. Lord and Anthony v. Harvey* are not in point. What would be evidence of an entry *manu forti* would be another question. If the defendants, in company with nine or ten more, entered the dwelling-house, it might be an entry *manu forti*, and indictable, though the door was open: but that would not affect the legal character of the civil trespass, so far as the justification was concerned.

*Hunter*, in reply.—It is not true that the defendants are not bound to answer the forcible entry—14 Hen. 6. fol. 26. pl. 53, 15 Hen. 7. fol. 17. pl. 7.

[PATTESON, J.—It is quite clear law that when the justification is found for the defendant, the *vi et armis* cannot be inquired into. See the authorities collected in *Lowe v. King* (11).]

But it cannot be open to the defendants to admit that they committed a criminal offence, which they do in this plea. The Statutes of Forcible Entry must be taken to be cumulative.

[PATTESON, J.—When a trespass is substantially justified, it is not necessary to justify a conversion laid in the declaration.]

*Cole v. Eagle* only turned on the question of costs. The facts stated in this declaration make the trespass of a character different from that which is justified by the plea.

LORD DENMAN, C.J.—We thought at first that as to the matters of aggravation, the plaintiff might not have been able to give evidence on not guilty as it stands;

(10) 15 Law J. Rep. (n.s.) Q.B. 239.

(11) 1 Saund. 81, a.

but the question really before us is as to the goodness of the plea. It appears to me that the words "*manu forti*," &c. are merely matter of aggravation, and on the authorities to which we have been referred, I think the defendants have shewn enough to justify. In *Perry v. Fitzhove* all the circumstances appeared in detail on the declaration, and we held that under the circumstances of that case the law would not justify: here, the breaking and entering alone is justified, and the case falls within the principle of *Taylor v. Cole*. The plaintiff may take at the trial any points which he may think open to him on the present state of the record.

PATTESON, J.—The entry in a forcible manner is merely a circumstance of aggravation. I do not understand Mr. Cowling to contend, nor could he successfully do so, that if a declaration consisted of two parts it would be enough to justify one part only; but this is put like the case of the conversion in trespass, and the plaintiff would not be bound to prove it in order to maintain the action; and it is sufficient for the defendants to answer all that the plaintiff is bound to prove. How far the charge of acting *manu forti* may be entered into under the general issue I am not prepared to say.

WIGHTMAN, J.—I am of the same opinion. If the entering *manu forti* could be made a distinct ground of action, the question would have been different; but this is an action of trespass, with a further allegation of entering *manu forti*. That is a circumstance attending the trespass and an aggravation. The plea is sufficient if it justifies the gist of the trespass; and if the plaintiff intended to rely on a greater amount of force being employed than the law would allow, he should have replied it. I was struck with the passage referred to by Mr. Cowling from *Hawk. P.C.*, which is indeed quite in accordance with the other authorities. This is not an action on the Statutes of Forcible Entry, and I think the plea good for the reasons which have been given.

ERLE, J.—It seems to me that this being merely an action of trespass *quare clausum fregit*, and the defendants having so treated it, the plea is good.

*Judgment for the defendants.*

1848. { DOE d. THE EARL OF SHREWS-  
May 11. { BURY AND J. H. ALLEN v.  
T. KEELING THE YOUNGER.

*Evidence—Private Writings; Production of—Custody.*

*The agent of the lessor of the plaintiff not being in the assize town when a deed was required material to the proof of his title, his carpet bag, which was identified, was cut open in court, and the deed produced from it by the attorney for the lessor of the plaintiff, who also identified the deed:—Held, that there was sufficient prima facie evidence of proper custody.*

Ejectment for lands in Staffordshire.

At the trial, before Patteson, J., at the Spring Assizes for that county, it appeared that one of the lessors of the plaintiff claimed as reversioner on the expiration of a lease for ninety-nine years on three lives, granted by his father the late Earl of Shrewsbury. The last of the lives dropped in 1845. The defendant and his father had been in possession more than forty years.

It being necessary to produce the lease, Ward, Lord Shrewsbury's agent, in whose custody it was supposed to be, was called; but was not forthcoming when wanted. He had been at Stafford the previous evening, and had brought with him a carpet bag in which the lease as well as other documents connected with the property were. This carpet bag being at the inn at which Ward put up, was sent for and brought into court, and Cattlow, the attorney for the lessors of the plaintiff, cut the bag open in court. Cattlow was then put into the witness box, and stated that he had expected Ward to be in court, but that he produced the lease from Ward's carpet bag, and identified it as being the lease he had seen in 1846 in Ward's possession, after the death of the last of the lives. There was also an assignment of the lease which was made from Keeling to Allen, one of the lessors of the plaintiff, which was also produced from the carpet bag; and as to which Cattlow made the same statement, but did not know the handwriting of Keeling.

On behalf of the defendant, it was objected, that neither of the documents was receivable in evidence, as, Ward not being present, there was no one who could say whence he got them.

With respect to the assignment, *Talfourd, Serj.* submitted that the case of the plaintiff was strengthened, as Allen was in court, and might be considered as producing the document. Patteson, J. held that there was not sufficient proof that the deed came from the proper custody, and that he could not treat the possession of Cattlow as the possession of Allen. He therefore rejected the evidence, and the plaintiff was nonsuited.

In this term—

*Talfourd, Serj.* having obtained a rule nisi for a new trial, on the ground that the deed ought to have been admitted in evidence,—

*Whateley and Greaves* shewed cause.—No explanation was given of Ward's absence, and there was nothing to shew where he got the documents. If Ward had been present it would have been necessary to have called him. It is in all cases necessary to shew that the party who produces muniments of title is entitled to the custody of them—*Evans v. Rees* (1). Nothing is known of these documents further than that they were taken out of a carpet bag belonging to Ward. It would be most dangerous to depart from the strict rule of evidence in such a case, as Ward might have kept out of the way purposely—*Swinerton v. the Marquis of Stafford* (2), *Doe d. Neale v. Samples* (3), *Evans v. Rees, Doe d. Jacobs v. Phillips* (4). There was nothing to shew occupation and payment of rent under the lease—*Manby v. Curtis* (5). In *Randolph v. Gordon* (6), which was a suit for tithes, a book produced from the custody of the defendant in the action, who was the grandson of a former rector, was held inadmissible without strict proof of the mode in which he became possessed of it.—*Bertie v. Beaumont* (7).

*Talfourd, Serj.* and *Whitmore*, contra.—It is important to see how the case stood when the production of the lease was required. It was admitted that the lives had dropped in, and the only question was whether the

(1) 10 Ad. & El. 151; a. c. 9 Law J. Rep. (N.S.) M.C. 83.

(2) 3 Taunt. 91.

(3) 8 Ad. & El. 151; a. c. 7 Law J. Rep. (N.S.) Q.B. 140.

(4) 8 Q.B. Rep. 158; a. c. 16 Law J. Rep. (N.S.) Q.B. 47.

(5) 1 Price, 225.

(6) 5 Ibid. 312.

(7) 2 Ibid. 307.

close in question was parcel of a larger piece of land. The lease would not have been conclusive, but it was necessary to produce it. As to the assignment, Allen was in court, and was surely competent to produce it as from his own custody.

[LORD DENMAN, C.J.—The difficulty is, that we cannot say that any of these deeds came from Lord Shrewsbury's custody, unless there is some one to speak to the fact.]

[WIGHTMAN, J.—The evidence amounts to no more than if a witness had stated that Ward had given him the deeds.]

Was it necessary to call Ward at all? It is difficult to distinguish the case from that of *Doe d. Jacobs v. Phillips*. If the lease had not expired it might have been produced by any one on behalf of the lessee as a matter of course; and though it is essential to shew that an ancient instrument should be clearly shewn to come from the natural and legitimate repository—1 *Stark*. 383, *The King v. Ryton* (8), *The King v. Netherthong* (9), yet the agent is the same as an attorney for this purpose, and the counsel for the plaintiff might have produced it as Lord Shrewsbury's, out of the documents belonging to Lord Shrewsbury's attorney.

[PATTERSON, J.—I do not know that I should have rejected the assignment if Allen had produced it. If Ward had been there, could you have produced the document as from his custody, without putting him into the box?]

Yes; if Lord Shrewsbury had been in court, his counsel might have produced his title-deeds. *Plaxton v. Dare* (10) shews that expired leases produced by the lessor are evidence in questions of boundary.

LORD DENMAN, C.J.—This is a peculiar case: since it is for the Judge, sitting as it were in the place of a jury, to decide it as a question of fact; and we do not like to interfere in any way with his decision on the case presented to him, any more than we should like to interfere with the finding of a jury. I certainly think that in such a case a liberal construction of the rules of evidence ought to prevail; but the question is, whether, if we think the learned Judge was at the trial too strict, he was so far wrong that

we ought to reverse his decision. In *Rees v. Walters* (11), Parke, B. observes, "I rather think it is for the Judge to say whether a document is produced from the proper custody or not, and we cannot interfere unless we think him wrong." In *Doe d. Jacobs v. Phillips* we acted on that principle, and set aside the decision of Parke, B., considering that he had improperly rejected a deed when there was reasonable evidence that it came from the proper custody. I think that my learned Brother should have admitted the evidence. The rule must, therefore, be absolute.

WIGHTMAN, J.—I am of the same opinion.—Since the case of *Plaxton v. Dare* it must be considered that the custody of an expired lease is properly with the lessor, and therefore Lord Shrewsbury properly had the custody of this lease. But the question arises as to the custody of a person who was the agent of Lord Shrewsbury, as to the property in question. In *The Bishop of Meath v. Lord Winchester* (12), it is said, that "it is when documents are found in other than the usual place of deposit that the investigation commences whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that instruments found in such custody must be genuine." Now, it appears to me that the custody in which this document was, was so probably the proper place of custody for it that it should be for the other side to impeach it.

PATTERSON, J.—I am of the same opinion. I think I construed the rule too strictly.

*Rule absolute for a new trial.*

[See *The Queen v. the Inhabitants of Kenilworth*, 7 Q.B. Rep. 642; s.c. 14 Law J. Rep. (N.S.) M.C. 160; *Croughton v. Blake*, 12 Mee. & Wels. 205; s.c. 13 Law J. Rep. (N.S.) Exch. 78.]

(11) 3 Mee. & Wels. 527; s.c. 7 Law J. Rep. (N.S.) Exch. 138.

(12) 3 Bing. N.C. 183.

(8) 5 Term Rep. 259.

(9) 2 Mau. & Selw. 337.

(10) 5 Man. & Ryl. 1; s.c. 8 Law J. Rep. K.B. 98.

1848. } ROBERTSON AND ANOTHER v.  
May 1. } NORRIS.

*Baron and Feme—Conveyance by Husband of Reversion in Wife's Lands.*

*An issue, whether a husband conveyed to plaintiff the reversion, of which he and his wife were seised in right of the wife, to hold to the plaintiff during the coverture, is proved by an indenture, purporting to be made by husband and wife, but executed by him only, by which he professed to convey an estate during their joint lives.*

Covenant on an indenture of demise by the plaintiffs, as assignees of the reversion. The declaration stated the demise by W. Wood, who devised the premises to Margaret, his wife, for her life, with remainder in fee to Mary Jane Davis, who married J. D. Rymer, and that thereupon the said J. D. Rymer and Mary Jane his wife, in right of the said Mary Jane, became seised in their demesne as of fee of the reversion of and in the demised premises; and that, by an indenture, dated May 13, 1844, the said J. D. Rymer released the said reversion of and in the demised premises to the plaintiffs, to hold to them and their heirs, during the coverture of the said Mary Jane, as wife of the said J. D. Rymer. Averment, that, at the time of committing the breaches of covenant, the said Mary Jane was, and still is, wife of the said J. D. Rymer.

Plea (*inter alia*), that the said J. D. Rymer did not release the said reversion *modo et formâ*. Issue thereon.

At the trial, before Williams, J., at the Somersetshire Spring Assizes, 1847, the indenture of the 13th of May 1844 was put in evidence, and appeared to be executed by the husband alone. The plaintiffs had a verdict, leave being reserved to the defendant to move to enter a verdict on the above issue if the Court should be of opinion that the conveyance by the husband alone did not pass the freehold during the joint lives of himself and his wife. A rule *nisi* having been accordingly obtained,—

*Butt and Barstow* shewed cause (Feb. 11).—The husband took an estate of freehold during the coverture, which he could convey to another—*Co. Litt.* 326, *a*, *Com. Dig.* tit. 'Covenant,' B, 3, citing *Spencer's case*

(1), 1 *Roper's Husband and Wife*, p. 3, *Coote's Landlord and Tenant*, p. 322. A wife's lands may be extended, during coverture, under an *elegit* against the husband—2 *Wms. Saund.* 69, *c*, n. 1. A right of entry vested in husband and wife in right of the wife passes to the assignees of the husband, upon his bankruptcy, and they may recover the freehold by writ of entry—*Mitchell v. Hughes* (2).

*Crowder and Montague Smith*, contra.—The husband has no separate estate in his wife's lands during coverture, but only a title to the rents and profits—2 *Black. Comm.* p. 433, *Bac. Abridg.* tit. 'Baron and Feme,' *k*, 1 *Roll. Abridg.* p. 350.

[PATTESON, J.—A husband can make a lease during the coverture.]

This is a conveyance of the reversion, so as to give the assignees the benefit of the covenants, which it is submitted the husband cannot do. The mode of pleading shews that the husband and wife, not the husband alone, are seised of lands in right of the wife—2 *Chitt. Plead.* p. 376.

*Cur. adv. vult.*

The judgment of the Court (3) was now delivered by—

LORD DENMAN, C.J.—A question arose in this case, as to the interest which a husband takes in lands which belong to his wife in fee simple, and as to his power to convey to another person an interest in those lands for the joint lives of himself and his wife. It is laid down in *Co. Litt.* 351, *a*, that he is entitled to the pernaney of the profits; and that if he be attainted that pernaney will pass to the Crown, the freehold still remaining in his wife. But it is also laid down in *Co. Litt.* 326, *a*, and in the notes, that he may make a tenant to the præcipe of his wife's land, and that he has an estate which he may convey to another. He has not, however, any greater interest than during the joint lives of himself and his wife. Now the second issue raised by the pleadings in this case, which was an action of covenant on a lease made by a person who had afterwards devised to the wife,

(1) 5 Rep. 16.

(2) 4 Moo. & Pay. 577; s.c. 8 Law J. Rep. C.P. 249.

(3) Lord Denman, C.J., Patteson, J., Coleridge, J., and Wightman, J.

was whether the husband did by indenture convey to the plaintiffs the reversion of which he and his wife were seised in right of the wife, to hold to the plaintiffs during the coverture of the wife with the husband. This he certainly did. The indenture professed to be made by him and his wife, but was not executed by her, and it passed no more than his interest. That was an estate during the joint lives of himself and his wife, which was all that he professed to convey by the terms of the deed. The rule to enter a verdict for the defendant on that issue must be discharged.

*Rule discharged.*

1848. }  
May 2, 13. } DOE d. MILLETT v. MILLETT.

*Adverse Possession—Statute of Limitations—Presumption—Agreement for Partition—Recovery.*

*Three females being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. They all married, and their husbands entered into an agreement for partition by deed of the lands held in coparcenery, but for nothing more. No such deed appeared to have been executed, but the lands had been held according to the agreement from its date. An action being brought by the heir in tail of the parcener who did not suffer a recovery within twenty years after her death, and before the 3 & 4 Will. 4. c. 27, to recover her share, which had been held by the husband of one of the other coparceners:—Held, that the possession was under the agreement, and not adverse.*

*Held, also, that nothing could be presumed, beyond what was contemplated by the agreement, which provided for a deed and not for a recovery.*

Ejectment, to recover an undivided third part of lands in the parish of Tywardreath, in the county of Cornwall.

The cause was tried, before Patteson, J., at the Summer Assizes for that county, 1832, when a verdict passed for the plaintiff, subject to the opinion of the Court on a special CASE.

The lessor of the plaintiff made title under an estate tail created by the will of

one T. Constable, bearing date the 20th of February 1718, by which he devised the premises in question, called Pennick, amongst others, to his nephew N. Trevorian for life, remainder to his first and other sons successively in tail, remainder to his daughters in tail, remainder to W. Trevorian in tail, with the ultimate remainder to T. Constable the younger, in fee. T. Constable, the testator, died seised in fee, on the 20th of April 1719, without altering his said will, and his nephew, the said N. Trevorian, entered and took possession of the premises comprised in the will. The said W. Trevorian died on the 4th day of May in the year 1741, (and in the lifetime of the said N. Trevorian,) leaving three daughters, Mary, Dorcas and Elizabeth. The said Mary Trevorian, on the 29th of January, in the year 1746, married William Millett; and, on the 26th of July 1746, the said N. Trevorian, the tenant for life, died unmarried, and without issue, and the said W. Millett and Mary his wife, the said Dorcas Trevorian, and the said Elizabeth Trevorian entered, and took possession of the said premises. In Easter term, in the 21st year of the reign of George the Second, in the year 1748, a common recovery was duly suffered by the said W. Millett and Mary his wife and the said Dorcas Trevorian of their two undivided third parts of the said premises which was declared to enure, as to one undivided third part, to the use of the said W. Millett for life, remainder to the said Mary his wife for life, remainder to the use of the heirs and assigns of the survivor of them; and as to the other undivided third part to the said Dorcas Trevorian in fee. On the 15th of December, in the year 1748, the said Dorcas Trevorian married J. Millett, and on the 23rd of March 1759, the said Elizabeth Trevorian married Thomas Millett. On the 21st of June, in the same year, the said W. Millett, J. Millett, and T. Millett entered into an agreement for the division of Tresaire and Pennick, two of the estates comprised in the will of the said T. Constable, and for the recovery of the latter of which this action was brought, and some other estates referred to in the agreement, which is as follows:—“Memorandum, taken this 21st of June 1759, for drawing a deed of partition between W. Millett, of &c., and J. Millett, of

&c., and T. Millett, of &c., of certain messuages, lands, and tenements hereinafter mentioned, that is to say, all that tenement [describing the parcels, including the premises in question] all which said tenements are divided or intended to be divided in such manner as is here set forth, that is to say, he the said W. Millett doth agree to take the aforesaid tenement, called Tresaire, for his share in the sum or consideration of 430*l.*; likewise he the said J. Millett doth hereby consent and agree to take the aforesaid tenement, called Little Pennick, in the sum or consideration of 430*l.*, likewise the tenement, called South Legaun, in the sum of 110*l.*, for his share; he the said T. Millett doth likewise consent and agree to take the aforesaid tenement, called Collurian, in the sum of 260*l.*, and the aforesaid part, which is held by lease, as aforesaid, of the said tenement of Collurian, in the sum of 80*l.*, likewise the aforesaid tenement, called Truthal, in the sum of 80*l.*, with the aforesaid field, which he takes in the sum of 70*l.*; and it is hereby further agreed, by and between the said parties, that the money so arising from the estates, by means of this division, shall be shared, share and share alike, with all tin and tin bounds that shall now be, between the parties to these presents; and further it is hereby declared and agreed, and the true intent and meaning of these presents is, that every clause, sentence, and thing herein contained shall be and enure till the said deed or indenture of partition be drawn, signed, sealed, and delivered by the said parties hereto."

This agreement was duly executed by the said William Millett, John Millett, and Thomas Millett, and in pursuance of it they respectively entered and occupied the estates which they agreed to take under it, and such occupation has been continued by them and those who claim under them as to the freehold parts to this present time, and as to such parts as were leasehold until the terms expired. The said T. Millett died on the 8th of December 1798, having first duly made and published his last will and testament, dated the 21st of July 1798, which so far as it is material to the question before the Court is as follows:—

"I give, devise, and bequeath unto my son Thomas Millett, and his heirs and

assigns for ever, from and immediately after my decease, all that one field of land in Marazion, in the county of Cornwall, commonly called or known by the name of Venton Hall; and also I give, devise, and bequeath unto my said son Thomas Millett from and immediately after my decease, all that my dwelling-house and garden in the parish of Ludgvan, in the said county of Cornwall, commonly called or known by the name of Gilley House; and also I give and bequeath unto my said son Thomas Millett and his heirs and assigns for ever, from and immediately after my decease, all that my dwelling-house situate at White Cross, in the said parish of Ludgvan, now in the possession of one J. Nicholls; and also I give, devise, and bequeath unto my said son Thomas Millett, after the death of my wife Elizabeth Millett, all that my estate in the said parish of Ludgvan, both freehold and leasehold, commonly called or known by the name of Collurian, the freehold part to him and to his heirs and assigns for ever, and the leasehold part for and during the term which shall be then to come and expire therein; but my will and meaning further is, that from and immediately after my death, and during the lifetime of my said wife Elizabeth Millett, the rent and profits of my said estate of Collurian shall be equally divided, share and share alike between my said wife and my said son T. Millett."

After the death of the said T. Millett, the testator, the said T. Millett, who was the eldest son of the testator, and the said Elizabeth received the rents of the field in Marazion, and continued to receive the same up to the time of his death in 1802; and the said E. Millett and the said T. Millett, the son, received the rents of Collurian in the shares bequeathed to them by the will of the said T. Millett, the father, up to the time of his said death.

In the year 1802 the said T. Millett, the son, died, leaving T. T. Millett, the lessor of the plaintiff, his eldest son and heir-at-law. The said Elizabeth Millett, the widow of the said T. Millett, the father, died on the 15th of May 1818, having been in the receipt of the rents devised to her by the will of the said T. Millett, the father, in which were comprised the rents of the premises taken by the said T. Millett, under the partition

made in 1759, up to the time of her death, leaving the said T. T. Millett, the lessor of the plaintiff, her heir-at-law.

The following letter from the defendant to the said T. T. Millett, the lessor of the plaintiff, who was then stationed in the Preventive Service at Foundless Island, formed part of the evidence at the trial :—

"London, January 22, 1830.—My dear sir,—Since my return from Foundless Island I have found that it is necessary that your wife should be a party to the deed I mentioned to you as well as yourself, and it will save me much expense and hasten the business considerably, if you and your wife will come to London for the purpose of going through some legal forms, which it appears must, at all events, be done. I will pay your expenses to London and back to Foundless, and whatever expenses you may incur whilst in London. If you cannot come to London I shall be obliged to take two lawyers with me to Foundless, which will occasion me considerable expense and trouble, as it is a great object to be expeditious in the business whilst the Judges are sitting in London. I shall be much obliged if you will let me know by return of post whether you can come to London with your wife or not; only say Yes or No, and I will arrange accordingly. Will you in the same letter tell me whether you have any other christian name besides Thomas, and also tell me the christian name of your wife. Believe me yours, very truly, J. N. B. Millett.

"P.S.—When I have your answer I will write you again on the subject of your coming to London (if you can come) appointing the time. Be sure to write to me immediately. You need only be in London one day.—Mr. T. Millett, Coast Guard Service, Foundless Island, Essex."

The said J. Millett, the husband of Dorcas, died in the year 1793 intestate, and the said Dorcas in 1799 (having first duly made and published her last will, dated March 22, 1798, whereby she devised the premises in question, called Pennick, amongst others, to her son W. Millett, in fee), leaving several sons. William, the devisee, who was a younger son, died in 1801, having first entered and taken possession of the said premises devised to him by the will of Dorcas, his mother; and having first duly

made and published his last will, dated the 17th of November 1800, whereby he devised all his lands, tenements and hereditaments to his brother John Millett, in fee. And John Millett, the grandfather of the defendant, having entered and taken possession of the premises devised to him by William, his brother, died in the year 1815 intestate, leaving J. N. B. Millett, the defendant, his heir-at-law; and the possession of the said premises called Pennick has continued in these persons respectively up to the time of the commencement of this action.

The tenements called Collurian and South Legaun, and the field in Marazion were not included in the will of the said T. Constable, but descended upon the said three daughters, Mary, Dorcas, and Elizabeth, as the heirs of the said W. Trevorian. Evidence was given at the trial by the defendant to shew that since the death of the father of the lessor of the plaintiff, he, the lessor, had received from the tenants of Collurian certain portions of the rent, that is to say, on the 29th of January 1814, 1*l.*, on the 22nd of December, 18*l.*, on the 30th of May, 3*l.* The rent was 100 guineas a year.

The Court were to be at liberty to draw any inferences from the above facts which the jury might have drawn.

The questions for the opinion of the Court were: first, is the plaintiff barred by the partition begun in 1759? second, or by the Statute of Limitations? If he was, a non-suit was to be entered; if not, the verdict for the plaintiff was to stand.

*Montague Smith*, for the plaintiff (May 2).—The possession here was under an agreement for a partition, in which case no presumption of adverse possession arises. Until December 1798, when Thomas Millett died, there could be no adverse possession, and as Elizabeth acquiesced in the agreement for a partition, there could be no adverse possession during her life. Previously to the 3 & 4 Will. 4. c. 27, the doctrine of non adverse possession applied—*Nepean v. Doe d. Knight* (1), and this is clearly a case of non adverse possession within the earlier authorities—*Roe v. Ferrars* (2), *Doe d. Mil-*

(1) 2 Mee. & Wels. 894; s.c. 7 Law J. Rep. (N.S.) Exch. 335.

(2) 2 Bos. & Pul. 542.

*burn v. Edgar* (3), *Doe d. Smith v. Pike* (4). But here the possession of one tenant in common operates as the possession of his co-tenants, unless there is an actual ouster—*Fairclain v. Shackleton* (5) and *Peaceable v. Read* (6). This is shewn by the necessity of the special enactment in the 3 & 4 Will. 4. c. 27. s. 12. The agreement in the present case rebuts any supposition of actual ouster; the onus of proving which is on the defendant, who must give evidence of some unequivocal act.

*Crowder*, for the defendant.—There are two points arising here, independently of the effect of the statute. First, the parol agreement for a partition, acted upon by an occupation in severalty, is operative, though no deed was executed. The effect of the recovery was to turn the joint tenancy into a tenancy in common.

[*PATTERSON, J.*—The recovery was by the husband only, the wife being the tenant in tail.]

The wife might have set aside the partition after coverture; but she did not do so. Secondly, a presumption will be made that there was livery of seisin or a recovery suffered. An act of parliament may be presumed—*Eldridge v. Knott* (7), *Lopes v. Andrew* (8), and *Earl v. Baxter* (9). In *Tenny d. Whinnett v. Jones* (10) a reconveyance was presumed. *Doe d. Fisher v. Prosser* (11) is very like this case.

[*PATTERSON, J.*—We cannot presume both an ouster and livery.]

It is enough if either are presumed. A receipt of rent for seventy years under an agreement amounts to a disseisin, and that may be presumed. *Doe d. Smith v. Pike* merely shews that long possession is not sufficient.

*Montague Smith*, in reply.—What is called a partition, but is rather in the nature of an exchange, cannot bind the heir in tail; that effect could only be produced by a

recovery. Even if a deed carrying out all that is contended for on the other side had been executed, it could not have affected the entail. If that be so, the only adverse possession is since 1818. *Doe d. Fisher v. Prosser* is distinguishable. There it is said, that adverse possession is evidence of an ouster, and long unexplained possession is evidence of adverse possession; but here the origin of the possession is shewn, and the presumption of its being adverse is therefore rebutted. If the Court were to presume a recovery, it would be going further than has ever yet been done, and the doctrine of presumption has been lately much narrowed—*The Queen v. St. Peter's, Exeter* (12).

[*Crowder* referred to *Read v. Brookman* (13), where Buller, J. said, a recovery might be presumed.]

That was simply a reference to a MS. case: no such point appears in any reported decision. Besides, a presumption can only be made consistently with the agreement, and no recovery was ever contemplated by it.

[*WIGHTMAN, J.*—Why is the possession not adverse during the mother's life? She is no party to the agreement.]

She adopted and acted upon it, and is bound by it in equity, as she must have known of it: after her husband's death she finds another in possession of the estate, and acquiesces in it.

*Cur. adv. vult.*

The judgment of the Court (14) was now (May 13) delivered by—

*LORD DENMAN, C.J.*—This case was tried before the statute 3 & 4 Will. 4. c. 27. was passed; therefore the old doctrine as to adverse possession will apply to it. The case shews that three females being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. The lessor of the plaintiff is the heir in tail of that third female. All married, and their husbands in the year 1759 entered into an agreement to make partition of the lands in coparcenery as well as of other lands, part leasehold, part freehold;

(12) 12 Ad. & El. 512; s. c. 9 Law J. Rep. (N.S.) Q.B. 308.

(13) 3 Term Rep. 151.

(14) Lord Denman, C.J., Patterson, J., Wightman, J. and Erle, J.

(3) 2 Bing. N.C. 496.

(4) 3 B. & Ad. 738; s. c. 1 Law J. Rep. (N.S.) K.B. 105.

(5) 5 Burr. 2604.

(6) 1 East, 568.

(7) Cowp. 214.

(8) 3 Man. & Ryl. 329, n.; s. c. 5 Law J. Rep. K.B. 46.

(9) 2 W. Black. 1228.

(10) 3 Moo. & Sco. 472.

(11) Cowp. 217.



the leasehold having been devised by the same will which created the estates tail, and the freehold not being comprised in the will. The agreement provided for a deed of partition, but for nothing more. No deed was proved to have been executed. The lands have been held according to that agreement for partition from the date of it till this action. Those in dispute have been held by the husband of one of the women who suffered a recovery, and those who have taken under him and her, and the lessor of the plaintiff claimed one-third of them, on the ground that the estate tail in that one-third had not been destroyed, and he brought his action within twenty years after the death of the third woman, who did not suffer a recovery. The possession was plainly under the agreement, and not adverse; but we are asked to presume that something has occurred to destroy the estate tail. That something must be either a recovery or a fine. Now, assuming that such a presumption might be made from the mere fact of long possession, if not accounted for by facts actually proved, we do not feel ourselves at liberty to make it, when the possession is so accounted for. The most that we could do would be to presume that everything contemplated by the agreement for partition had been done; but if we make that presumption, the lessor of the plaintiff will not be affected by it, because all that was contemplated was a deed, and that deed, if executed, would not have barred the estate tail.

We cannot, therefore, find any legal principle upon which we can say that this lessor of the plaintiff is not entitled to recover, and our judgment must be in his favour.

*Judgment for the plaintiff.*

1847. }  
Nov. 11. { THE QUEEN v. THE JUSTICES OF  
1848. } THE COUNTY OF WILTS.  
Feb. 26. }

*Rate—County Rate—Borough—Jurisdiction of County Justices—Municipal Corporations Act.*

*Before the passing of the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, the borough of Marlborough was a place with a*

*separate jurisdiction, derived from charter, and also a place which, before the statute 55 Geo. 3. c. 51, was subject to rates in the nature of county rates, imposed by its own Justices, and therefore, by section 1 of that statute, exempt from county rates. After the passing of the 5 & 6 Will. 4. c. 76, the borough, which was in Schedule B. of that act, had no grant of a separate Court of Quarter Sessions; but the Justices of the borough had acted in some criminal matters concurrently with the county Justices, and the town council had maintained a gaol and repaired a bridge, and made a contract with the county for the maintenance of prisoners:—Held, that the borough was, under the provisions of the statute last mentioned, liable to be assessed to the county rate by the county Justices.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 106.]

1847. } M'EWEN v. WOODS AND  
Dec. 7. } ANOTHER.

*Money had and received—Principal and Agent—Vendor and Purchaser—Railway Shares—Scrip.*

*The defendants purchased in their own names railway scrip for the plaintiff, deliverable on the 29th August, for 148l. 10s., which sum the plaintiff paid the defendants on the 26th August. On the 22nd August the railway company called in the scrip for registration, and the share certificates were not delivered until December, and in the mean time a call was made in respect of the shares, which was paid by the holder. The plaintiff having repudiated the shares, the defendant declined to take them from the holder, and they were sold at a loss exceeding the 148l. 10s., and the defendants paid such loss to the holder:—Held, that they being liable to the original holder for such loss, and the plaintiff not having supplied funds to meet the call, an action for money had and received could not be maintained by him against the defendants for the 148l. 10s.*

*Assumpsit for money had and received. Plea—Non assumpsit.*

At the trial, before Cresswell, J., at the

Liverpool Summer Assizes, 1846, a verdict was found for the plaintiff, damages 148*l.* 10*s.*, leave being reserved to the defendant to move to enter a nonsuit.

The facts are fully stated in the judgment of the Court.

*Martin and Cowling* shewed cause, and relied on *Fletcher v. Marshall* (1).

*Knowles and Crompton*, in support of the rule.—Money had and received will not lie under the circumstances of this case, as the defendants have, according to the usage of trade, made a contract in their own names, by which they are personally bound. A principal, who has sent money to his agent to pay to a third party, may undoubtedly stop it; but that must be subject to this limitation, namely, that the agent has not done anything to render himself personally liable to the third party in consequence of the order of his principal—*Sutton v. Tatham* (2). The order here was to buy "shares," not "scrip." The agent buys in the shape of "scrip": when the scrip is called in, a transfer cannot be made, unless the call made since the purchase is paid. The shares are now liable to a call. *Fletcher v. Marshall* proceeded on the ground that the plaintiffs countermanded the purchase before the scrip was delivered.

*Cur. adv. vult.*

LORD DENMAN, C.J. now delivered the judgment of the Court (3).—This was a rule to enter a nonsuit, on the ground that upon the facts, the action for money had and received could not be sustained. The defendants, who were sharebrokers in partnership at Liverpool, had bought for the plaintiff on the 14th of August, in pursuance of instructions from him, thirty Limerick and Waterford scrip shares to be delivered on the next account day, which was to be on the 29th of August, at the price, including their commission, of 148*l.* 10*s.* This sum the plaintiff transmitted to the defendants on the 26th of August by letter, and requested them to acknowledge the receipt, and at the same time to forward

to him the scrip. On the 22nd of August the railway company had called in the scrip for registration, which made a delivery to, or by, the defendants impossible. Upon registration the scrip is turned into shares, and re-issues in the form of sealed certificates, which are transferable only by deed. The registration and re-issuing were not completed till the middle of December, and in the mean time the company had made a call of 5*l.* per share, which was necessarily paid by the party selling to the defendants, and he presented the shares to them, with the additional demand for the call. The plaintiff repudiating the transaction, they declined to accept, and the shares were resold at a loss of 226*l.*, which the defendants paid to the original seller. The action is brought to recover the 148*l.* 10*s.*

From the correspondence put in it appeared that the plaintiff was apprised in due time of the scrip having been called in, and the call made; and also that the call must be repaid to the seller before the certificates would be delivered. From the same correspondence and the evidence, we think it must be taken that the defendants purchased in their own names, and were themselves personally responsible to the sellers. The money, therefore, was transmitted to the defendants to enable them to meet the liability which they had incurred at the request of the plaintiff, and on his account. It was, therefore, not received, in the first instance, to his use. But it was urged, that the defendants by their own misconduct had produced a failure of the consideration for which the money was originally sent; and this misconduct was said to consist in their having of their own wrong given time to the seller for the delivery of the scrip, which by the contract was to be delivered as such on the 29th of August, and all the consequences which followed were owing to circumstances over which neither party had any controul; and there is abundant evidence that the plaintiff was aware of those circumstances and understood the contract made to be subject to them. The reasonable interpretation of the contract is, that it was for delivery of scrip on the 29th of August, if not then called in, otherwise of share certificates as soon as they should be re-issued. Accordingly, if the plaintiff had

1) 15 *Mee. & Wels.* 755.

(2) 10 *Ad. & El.* 27; *s. c.* 8 *Law J. Rep.* (N.S.) 4 B. 210.

(3) Before Lord Denman, C.J., Patteson, J., Coleridge, J., and Erle, J.

enabled them to pay for the shares when issued, by supplying funds to meet the call with which they had become saddled in the mean time, the defendants must have applied the money received for that purpose, and if they had neglected, it would have become money in their hands to the plaintiff's use. But he has wrongfully neglected to do so: and they have been compelled to add their own money to his in order to fulfil their contract; for the reselling of the shares on their account by the original seller and their payment of the loss is only another mode of so doing.

Upon these facts, we think the action not maintainable, and that the rule must be absolute.

*Rule absolute.*

1848. }  
April 18. } THE QUEEN v. VICKERY.

*Overseer — Crown Office Subpœna — Obligation to be sworn and give Evidence — Attachment — Justice of Quorum — Jurisdiction — Presumption.*

*It is no objection to granting an attachment against a party for disobeying a Crown Office subpœna, requiring him to appear before Justices, to testify, &c. concerning the place of the last legal settlement of A. B, &c., that it is not stated in the subpœna or shewn by the affidavits that one of the Justices was of the quorum.*

*An overseer is, since the statute 3 & 4 Vict. c. 26, compellable as well as competent to give evidence in proceedings before Justices touching the relief or removal of the poor.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 129.]

BAIL COURT. }  
1848. } THE QUEEN v. HENRY BROOME  
May 1, 5. } AND JOHN BROOME.

*Error, Writ of — Quashing under 8 & 9 Vict. c. 68. s. 5 — Affidavit.*

*Under 8 & 9 Vict. c. 68. s. 5. it is not necessary to rule the defendants to assign errors, previous to a motion to quash the writ of error for delay in the prosecution thereof.*

*The affidavit on which such a motion was made stated, that since the filing of the writ of error "no process or other proceeding has been had or taken by or on behalf of the said defendants to prosecute the same": — Held, a sufficient statement that error had not been assigned.*

In this case the defendants had been found guilty of a misdemeanour at the Oxford Spring Assizes, 1847, and in the Easter term following a writ of error was sued out, and they were admitted to bail, under the 8 & 9 Vict. c. 68. They had not been ruled to assign errors, and it did not appear that any step had been taken by either side.

On a former day in this term a rule had been obtained calling upon the defendants to shew cause why the writ of error should not be quashed, and why their recognizances should not be forfeited. The affidavit stated that since the issuing and filing of the writ of error "no process or other proceeding has been had or taken by or on behalf of the said defendants to prosecute the same" (1).

*Butt* (who appeared for John Broome) now (May 1) shewed cause. — The affidavit upon which this rule was granted is insufficient. It does not state who the prosecutor is, or that he makes this motion, or that the writ of error issued out of this Court. Further, it does not state positively that errors have not been assigned, or that the defendants have been ruled to assign errors.

*Phillimore*, in support of the rule. — Under the 5th section of the 8 & 9 Vict. c. 68, it is sufficient to satisfy the Court that the party has neglected to prosecute his writ of error, and the prosecutor is not bound to urge them forward. There is clearly wilful delay here, for the defendants have not attempted to account for it by any affidavit.

*Cur. adv. vult.*

(1) The 8 & 9 Vict. c. 68. s. 5. enacts, "That if the Court in which any such writ of error shall be pending, shall, upon motion in that behalf, decide that the defendant or defendants by whom it shall be brought, has or have wilfully delayed or neglected to prosecute the same with effect, it shall be lawful for such Court to order the writ of error to be quashed, and thereupon the defendant or defendants who brought such writ of error shall be liable to execution upon the judgment."

The following judgment was now (May 5) delivered by—

COLERIDGE, J.—Cause was shewn in this case against a rule for quashing the writ of error of the defendants, and estreating their recognizances, on the ground that they had wilfully delayed to proceed. No affidavits in answer were filed, but objections of a technical nature were relied on, which are hardly worth mentioning, except two; the one that the affidavit does not state that errors had not been assigned, and the other that the defendants ought to have been ruled to assign. I think that although the affidavit is in general terms, it is sufficient to call upon the other side for an answer. The language is, that no process or other proceeding has been taken to prosecute the writ, and I think that is sufficient. Then it is said that the defendants ought to have been ruled to assign errors, as was necessary by the old practice; and the question is, whether it is necessary under this statute. The words of it are so general that I think if the Court are satisfied there has been wilful delay, they may act upon that, and set aside the writ. The words are, "that if the Court in which any such writ of error shall be pending shall, upon motion in that behalf, decide that the defendant or defendants by whom it shall be brought, has or have wilfully delayed or neglected to prosecute the same with effect, it shall be lawful for such Court to order the writ of error to be quashed." It seems to me that those words are large enough to include the present case, and that I ought to take it that there has been wilful delay. The writ of error will, therefore, be quashed, and the recognizances estreated.

*Rule absolute* (2).

1848. } THE QUEEN v. THE INHABITANTS OF COLERNE.  
May 5. }

*Poor Law—Removal—Notice of Chargeability—Majority of Parish Officers.*

*A notice of chargeability, signed by three overseers, subscribing themselves as such, is*

(2) See *Geat v. Cutts*, ante, p. 55, as to the meaning of the words "without delay" in a replevin bond.

NEW SERIES, XVII.—Q.B.

*prima facie a good notice, though it does not purport to come from a majority of the parish officers.*

*Whether the parish officers sending such notice do or do not constitute the majority, is matter of evidence.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 121.]

1847.

Dec. 6.

1848.

Jan. 12;

May 9.

SIMMS AND WIFE v.

HENDERSON.

HENDERSON v. HENDERSON.

*Witness, Commission to examine—Return—Decree of Foreign Court—Pleading—Attorney and Solicitor—Authority to defend Suit—Amended Bill.*

*A Judge's order directed a commission to issue for the examination of witnesses at Newfoundland. The commission directed the Commissioners to summon the witnesses at a certain place, to be appointed by them for that purpose, in Newfoundland, and then and there examine them apart, viva voce, and directed the commission and depositions to be returned sealed up. It was proved that papers, in the handwriting of the Commissioners, and sealed up, purporting to be a return of the commission, were delivered at the Master's office; but no evidence was given by whom they were brought, or that they were in the same state as when delivered by the Commissioners. The commission returned was identified as that issued. The examinations of the witnesses did not on the face of them purport to be taken apart:—Held, first, that the commission sufficiently provided for the time, place, and manner of examining the witnesses. Secondly, that there was due proof of the return. Thirdly, that it must be presumed that the witnesses were examined apart.*

*The declaration was in debt on a decree of the Supreme Court of N. The plea alleged that the decree was in respect of an amended bill, and that before filing thereof the defendant was out of the jurisdiction of the said Court, and so continued, and was never served with a copy of the said bill, nor had notice of any process calling on him to answer the said bill, and that the*

*proceedings were taken in his absence and ex parte. Replication, that at the commencement of the suit the defendant was within the jurisdiction of the said Court, and was duly served with process in respect of the original bill in the said suit, and appeared and appointed H. E. attorney for him in the suit, and H. E. accordingly became and was the attorney of the defendant, and authorized to conduct his defence in the suit, and that while he was such attorney, and so authorized, he had notice of the amended bill. The rejoinder traversed that H. E. had notice of the amended bill, modo et formâ, on which issue was joined :—Held, that the defendant by this traverse admitted that H. E. had such an authority as would render the replication good, viz., that he was authorized to act as attorney as well in respect of the amended as of the original bill.*

*Held, also, that such authority given by the defendant about to leave the jurisdiction would support the decree.*

Debt upon a decree of the Supreme Court of Newfoundland.

Fifth plea, that the said decree was made in respect of the matters stated in a certain amended bill filed in the said court, and that before and at the time of the filing of the said amended bill the defendant was and thence hitherto hath been and still is out of, and resident out of, the jurisdiction of the said Court, and that he was never served with any copy of the said bill, and never had notice of any process calling upon him to answer the said bill, and that the proceedings in the said court towards, and in, making the said decree were proceedings had and taken in his absence, and *ex parte*. Verification.

Replication to the fifth plea, that at the time of the commencement of the said suit, wherein the said decree was pronounced and made, to wit, on &c., the defendant was within the jurisdiction of the said Court, and then and whilst he was within the said jurisdiction was duly served with and had notice of process sued forth of the said Court by which the said decree was pronounced and made, calling upon the defendant to answer a certain original bill of complaint in the said suit which had been then filed in the said court, and was the bill which was afterwards amended as in the said plea, and hereinafter

alleged, and which said original bill of complaint was the first proceeding in the said suit; that the defendant did afterwards, long before the making of the said decree and while he was within the said jurisdiction, to wit, on &c., appear in the said court, and did then appoint one H. A. Emerson, an attorney of the said court, to be the attorney for him, the defendant, in the said suit, and the said H. A. Emerson then accordingly became and was the attorney of the defendant, and authorized to conduct his defence in the said suit; and the said H. A. Emerson was from thence continually, at and during the several times hereinafter mentioned, and until the making of the said decree, within the jurisdiction of the said Court; that afterwards, and while the said H. A. Emerson continued to be and was such attorney for the defendant, and so authorized as aforesaid the said original bill was amended, and the said amended bill filed by leave of the said Court after hearing counsel on behalf of the defendant; that after the filing of the said amended bill in the said plea mentioned, and a reasonable time before the making and pronouncing the said decree, and while the said H. A. Emerson continued to be and was such attorney, and so authorized, to wit, on &c., the said H. A. Emerson had notice of the said amended bill, and was then served with process sued forth of the said Court in the said cause, calling upon the defendant to answer the said amended bill, and such proceedings were thereupon had that afterwards, to wit, on &c., the said decree was so made in and by the said Supreme Court of Newfoundland, in manner and form as in the declaration in that behalf is alleged. Verification.

Rejoinder, that the said H. A. Emerson had not notice of the said amended bill *modo et formâ*. Issue thereon.

After issue joined the following order was made by Lord Denman, C.J. :—

*"Simms and wife v. Henderson and Henderson v. Henderson.*—Upon hearing, &c. and by consent, I do order that a commission in the first-mentioned cause issue, directed to four Commissioners, two thereof to be named by the plaintiffs and two by the defendant, to take evidence by examination of Edward Mortimer, Archibald James Bayley, and others, as witnesses on the plaintiffs' behalf

*visd voce*, at Newfoundland, before such Commissioners or any two or more of them, returnable on or before the last day of Trinity term next, or within such further time as any Judge may order. And I further order that the defendant's attornies or agents shall give to the plaintiffs' agents, within two days, the names and descriptions of two Commissioners residing at St. John's, Newfoundland, on the part of the defendant, to be named in such commission with the Commissioners to be named on the plaintiffs' behalf; and that in default of their so doing, a commission in the said first-mentioned cause shall issue, directed to three Commissioners to be named on the part of the plaintiffs, to be executed by them, or any two of them, returnable as aforesaid. And I further order that the said commission, and the depositions taken thereunder, shall be returned to the office of the Master of this court, to be received in evidence on the trial of the said first-mentioned cause, saving all just exceptions. And I further order that the plaintiffs' attornies or agents shall give a copy of the said commission to the said defendant's attornies two days before it be sent out, with notice by what mail or other conveyance it shall be sent out. And I further order that the commission to be issued in the said first-mentioned cause, and the depositions to be taken thereunder, shall also be received in evidence in the secondly above mentioned cause, wherein Elizabeth Henderson is plaintiff, and the now defendant is defendant, as if the same respectively had been issued and taken in the said last-mentioned cause, subject to the like exceptions as are reserved by this order. And that in the mean time all further proceedings in both the said actions be stayed."

In pursuance of this order the plaintiffs issued the following commission, which (the defendant having neglected to name Commissioners on his part) was directed to the Commissioners nominated by the plaintiffs only:—

"Victoria, &c.—To Hugh W. Hoyles, Esq., Peter W. Carter, Esq., and Robert Prowse, notary public, all of St. John's, in the island of Newfoundland, greeting.—Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you,

any two or more of you, full power and authority diligently to examine, *visd voce*, and by examination and cross-examination, *visd voce*, as hereinafter mentioned, Edward Mortimer, Archibald James Bayley, and others, the witnesses on the part of Charles Simms and Joanna Charlotte his wife, the plaintiffs in an action of debt, now depending between them and one Bethel Henderson, in our court before us at Westminster. And therefore we command you, any two or more of you, that, *at a certain day and place, or certain days and places, to be appointed by you for that purpose*, you cause the said witnesses to come before you in Newfoundland, and then and there examine each of them the said witnesses *apart* on their respective corporal oaths first taken before any two or more of you, according to the form of their several religions, or in the case of any such witnesses being of the sect of people commonly called Quakers, then upon the solemn affirmation of such last-mentioned witnesses, and that you do permit the said plaintiffs and defendant, respectively, by themselves, or by their respective counsel or attornies, to examine and cross-examine the said witnesses, before you or any two of you, *visd voce*, and that you do reduce the said examination, so taken before you, into writing, on paper or parchment; and when you shall have so taken them, you are to send the same on or before the last day of Trinity term next, or such further time as any Judge of our superior courts of law at Westminster shall direct, to our said Court before us at Westminster, closed up under your seals, or the seals of any two or more of you, distinctly and plainly set together, with the several questions proposed by you on behalf of the said parties, their respective counsel or attornies, and the answers to such questions; and this writ to be filed of record in the office of the Masters of the same court. And we further command you and every one of you, that before you act in or be present at the swearing or examining of any witness or witnesses, you take an oath according to the form of your several religions that you will, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the said parties, take the examinations and depositions of all and every witness and witnesses produced

and examined by virtue of this writ; and we give you, two or more of you, full power and authority, jointly or severally, to administer such oath to the rest, or any other of you. And we further command that all and every the clerk or clerks employed in taking, writing, and transcribing, or ingrossing the deposition or depositions of witnesses, to be examined by virtue hereof, shall, before he or they be permitted to act as clerk or clerks as aforesaid, severally take an oath, truly, faithfully, and without partiality to any or either of the parties in the cause, to take, and write down, transcribe, and ingross the depositions of all and every witness and witnesses produced before and examined by you, the said Commissioners, or any two or more of you, as far forth as he or they is or are directed and employed by you the said Commissioners, or any of you, to take down, write, or ingross the said depositions, which oath any two or more of you are hereby empowered to administer to such clerk or clerks, according to the form of his or their several religions. Witness, Thomas Lord Denman, at Westminster, the 31st day of December, in the ninth year of our reign."

At the trial, before Lord Denman, C. J., at the sittings in Middlesex, after Michaelmas term, 1847, this commission was offered in evidence by the plaintiffs, but was objected to as not being warranted by the order. This objection was overruled, and the commission received. In order to prove the return to the commission, a clerk from the Master's office was called, who produced a packet of papers, which he stated he had received, sealed up, from a person who had brought them to the office, but whom he had never seen before or since, and did not know. The plaintiff's attorney was also called, who identified the commission produced as that issued under the order; and it was also proved that the persons named as Commissioners resided in Newfoundland, and that the handwriting on the papers, professing to be the return, was their handwriting. It was thereupon objected that no proper return to the commission was shewn, and that evidence should have been given, not only of the identity of the commission, but also that the documents produced were in the same state as when received from the Commissioners. This objection also was overruled. The examina-

tions being then put in evidence, it did not appear on the face of them that the two witnesses, whose depositions were returned, had been examined apart, and it was argued that evidence ought to be given that this had been done, but the learned Judge received the evidence.

It was proved that the defendant left Newfoundland on the 20th of July 1834, and never again returned, having previously appointed Emerson to act as his attorney in the suit then commenced. On the 6th of May 1837 the amended bill was filed, at which time the defendant was resident out of the jurisdiction of the Supreme Court. A subpoena to answer the amended bill was served upon Emerson on the 5th of May 1837; and on the 10th of May an order of the Supreme Court was made directing the defendant or his solicitor to appear on the 13th of that month, to shew cause why a commission should not issue to certain persons at Bristol to receive the defendant's answer to the amended bill. Emerson, assuming to act as the defendant's solicitor, consented to the commission issuing; on the arrival of which in England the Commissioners gave notice of it to the defendant; but he declined to put in any answer to the amended bill, and the commission was in consequence returned to Newfoundland unexecuted; and a declaration being made of the defendant's refusal, proceedings were instituted in the Supreme Court to take the bill *pro confesso*, and a final decree was accordingly made. The decree recited in terms that the subpoena to answer the amended bill had been served upon Emerson. It was then objected that these facts did not prove the issue raised on the rejoinder to the fifth plea; and the learned Judge reserved leave to the defendant to move to enter a nonsuit on all the above points. The plaintiffs had a verdict with 10,356*l.* 6*s.* 8*d.* damages.

*Barstow* having obtained a rule nisi for a nonsuit accordingly, or to arrest the judgment, on the ground that the decree appeared on the record to be contrary to natural justice,—

*Sir F. Kelly, Hugh Hill and E. Lloyd* shewed cause (Jan. 12.)—The first objection is, that the commission was not warranted by the order, as no time or place was named, and the argument is, that additional orders

specifying these details were requisite. But it is discretionary with the Judge to insert the time and place in his order. The Judge has directed that the evidence is to be taken *sine die*, and so the manner of conducting the examination is provided for. The time cannot frequently be pointed out otherwise than by providing for the time of the return.

[LORD DENMAN, C. J.—At present we agree with you on that point.]

Then, assuming the order to warrant some commission, it is said this commission is not warranted by it on account of the clause in it that at a certain day and place to be named by the Commissioners they should examine the witnesses; but those words do not give any greater power than the Commissioners would have had without them. Next, as to examining the witnesses apart: it will be presumed that everything was properly done till the contrary is shewn—*The Queen v. Douglas* (1). There the return to the commission being certified under the hands and seals of the Commissioners was sufficiently proved; besides, the attorney identified the commission as that set out, and the handwriting of the Commissioners was proved.

[LORD DENMAN, C. J.—*Cox v. Newman* (2) was referred to on this point.]

Rules of courts of equity will not affect the practice under this statute. As to the suggestion that the papers were not in the same state as when delivered up by the Commissioners, there was no erasure or anything to support such an imputation. Next, as to proof of the issue raised by the rejoinder on the fifth plea: it is merely a denial of Emerson's having notice, leaving out of the question all consideration of his being served with process. The fact that Emerson consented to a commission issuing for the purpose of taking the defendant's answer, is strong evidence of notice by which the plaintiff is entitled to retain his verdict. But it will be contended, on the other side, that Emerson had not authority to receive notice of the amended bill, and that therefore technically there was no notice at all to the defendant: but an amended bill is not a new suit, but merely a proceeding in the course of the original suit—*Mitford on*

*Pleading*, p. 26, 3rd edit. The argument will be, that at the time when the act establishing the Court of Newfoundland passed, an amended bill required to be served on the party himself.

[The argument upon the practice of the Court of Chancery is omitted, as the judgment proceeded on a different ground.]

The replication states (and under this traverse it must be taken to be admitted), that Emerson was appointed by the defendant's attorney to conduct the suit *in which the decree was made*: this it was clearly competent to the defendant to do if he chose; and if so, Emerson had express authority to receive service of the amended bill as well as of the original bill.

*Barstow and Bagshawe*, in support of the rule.—First, the order for the commission does not mention any place in Newfoundland where it is to be executed; this distinguishes the present case from *Greville v. Stuls* (3). Time and place must be either expressly fixed by the Judge, or the order must contain a direction to the Commissioners to fix time and place. This being a statutable authority must be strictly pursued. Secondly, there is no sufficient proof that the depositions returned are those taken under the commission. In Chancery the invariable practice is for the Commissioners to deliver the return sealed up to the messenger, who brings it to the court, and makes oath that it is in the same state as when handed to him. The same evidence should have been given here. Next, the return is perfectly silent as to the examination of the witnesses having taken place apart. It cannot therefore be assumed to have been done. Then the issue raised on the fifth plea was not proved by the evidence.

[ERLE, J.—Is not the issue only whether Emerson had notice? How can he be said not to have had notice when he consents to a commission being sent out?]

It does not appear at what time he so consented.

[ERLE, J.—It must be taken, on the whole evidence, that it was after the bill was amended.]

Then Emerson had no authority to receive process or appear to the amended bill. It is quite contrary to the practice in Chan-

(1) 16 Law J. Rep. (N.S.) Q.B. 417.

(2) 2 Ves. & Bea. 168.

(3) 17 Law J. Rep. (N.S.) Q.B. 14.



cery to treat the solicitor, who has appeared to an original bill, as having authority to accept process under the amended bill. The only answer here has been to the original bill, and the process which then issued will not extend to the amended bill. *Roberts v. Worsley* is recognized by *Smith v. the Hibernian Mining Company* (5) and *Murray v. Vissart* (6).

*Cur. adv. vult.*

The judgment of the Court was now (May 9) delivered by—

LORD DENMAN, C.J.—In this case, a rule for a new trial was moved for upon objections to the commission for examining witnesses. But it appears to us, that the place, the time, and the manner of examining witnesses was regularly provided for, as they were to be examined *vidé voce* at Newfoundland, before the return day of the commission. It is to be presumed that they were examined apart, as the depositions purport to contain separate examinations, and there is no reason for supposing that they were examined together; and the presumption is, that the Commissioners did their duty. There was more than sufficient proof of the due return of the commission. The defendant has further objected, that judgment ought not to be given for the plaintiffs, by reason of the facts appearing on the fifth issue. The declaration alleged a regular decree. The fifth plea alleges, that the decree was made in respect of an amended bill, and that before the filing thereof the defendant was out of the jurisdiction of the court, and has so continued; that he was not served with a copy of the said bill, and had no notice of any process therein, and that the proceedings were taken in his absence and *ex parte*.

The replication thereto alleges, that at the commencement of the suit the defendant was within the jurisdiction, and was duly served with process in respect of the original bill in the suit, and appeared and appointed H. E. to be the attorney for him, the defendant, in the suit, and H. E. accordingly became the attorney of the defendant, and authorized to conduct his defence in the suit, and that while he was such attorney

so authorized he had notice of the amended bill.

The rejoinder traverses this notice, and the issue thereon is found for the plaintiffs.

Upon these pleadings the defendant has contended, that H. E. had no authority to act as the attorney of the defendant in respect of the amended bill; because it was said, that by the rules of practice in the Court of Chancery, an authority to act as attorney in respect of an original bill was no authority so to act in respect of an amended bill. But we take it to be clear, that the plaintiffs intended to allege that H. E. had authority from the defendant to act as attorney for him during the whole suit, and as well in respect of the amended bill as of the original bill, and that the defendant by pleading over to this allegation, and merely traversing the notice to H. E., admits that it is to be taken in the sense which the plaintiffs must have intended, viz. the sense which makes the replication valid. Now, if an authority was given by the defendant about to leave the jurisdiction to an attorney to act for him in respect of the original and all amended bills that might be filed in the suit, such authority would support the present decree; whatever may have been the rules of practice in the Court of Chancery, in respect of an ordinary retainer to an attorney to appear to an original bill.

After the plaintiffs have incurred the expense of a trial upon an issue chosen by the defendant, justice and the rules of law require that we should endeavour so to construe the pleadings as to make the trial effective. The judgment, therefore, is for the plaintiffs.

*Judgment for the plaintiffs.*

1848. }  
May 9. } THE QUEEN v. CRISPIN.

*Indictment—Certainty—Repugnancy.*

*An indictment alleged that the defendant on Henry Bennett did make an assault, and him the said William Bennett did beat, wound, &c. — Held, good, on motion in arrest of judgment.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 128.]

(5) 1 Sch. & Lef. 238.

(6) 1 Phill. 52.

BAIL COURT. }  
 1848. } TASSIE v. KENNEDY.  
 May 9, 12. }

*Costs, Security for—Lord Mayor's Court  
 —Certiorari—Money paid into Court in  
 lieu of Bail.*

*An action was commenced in the Lord Mayor's Court, and goods attached. The cause was removed into the Court of Queen's Bench, and the defendant paid into court a sum of money in lieu of bail. He then obtained an order for the plaintiff, who lived in Scotland, to give security for costs, with the usual stay of proceedings:—Held, that after a long delay, the defendant was entitled to a rule, calling on the plaintiff to put in the security within a limited time, and, on his default, to have the money paid out of court.*

This was a rule calling upon the plaintiff to shew cause why he should not within four days give security for costs, or why, on his default, the defendant should not take out of court the sum of 164*l.* 2*s.* 6*d.*, which he had paid in, in lieu of bail. The action had been commenced in the Lord Mayor's Court, and the attachment issued on the 4th of June 1846, under which goods were attached. It was removed by *certiorari* into this court; and on the 19th of June 1846, an order was made that the defendant should pay 164*l.* 2*s.* 6*d.* into court in lieu of bail. On the 4th of July, in the same year, the defendant obtained an order for the plaintiff, who lived in Scotland, to give security for costs, with a stay of proceedings until given. No security having been given, and no step taken in the cause, the present rule was obtained, against which—

*Bosill* shewed cause.—This is quite contrary to the usual course. In *Kelly v. Brown* (1) the Court refused to add a term that judgment as in case of nonsuit might be signed if the security were not given within a specified time. The defendant must abandon his rule, or the proceedings will be stayed in accordance with it.

*Meymott*, contra.—That is true in ordinary cases; but this case differs, for the money paid into court is in consequence of the attachment of the goods, and the subsequent *certiorari*. According to the old

practice, where the defendant had been arrested and given bail, the bail were discharged if the plaintiff did not declare within a limited time—*Sykes v. Bauwens* (2). So here, the money ought to be released.

*Cur. adv. vult.*

The following judgment was now (May 12) delivered by—

COLERIDGE, J.—[After stating the facts, his Lordship proceeded.]—The plaintiff not having complied with the order, the defendant's money is locked up; he has no means of forcing the plaintiff to obey the order; he therefore now seeks either to compel the plaintiff to give security, or to obtain possession of his money. In ordinary cases the rule no doubt is, that the defendant must abandon his rule for security for costs before he can urge the plaintiff on; but here there is a sum of money paid into court to abide the result, and I think it unfair that it should be locked up, and the plaintiff allowed to hold back. I can find no authority against my making the rule which is asked for by the defendant, and therefore think it should be made absolute.

*Rule absolute; security to be given within a fortnight.*

BAIL COURT. { *Ex parte* THE LONDON AND  
 1848. { BRIGHTON RAILWAY COM-  
 May 6. { PANY v. THE LONDON,  
 { BRIGHTON, AND SOUTH  
 { COAST RAILWAY COMPANY.

*Sessions, Order of—Costs—Jurisdiction  
 —Certiorari.*

*At the hearing of a respited appeal against a poor-rate, the appeal was dismissed, on the non-appearance of the appellants, and the Sessions made the following order: "Surrey, to wit.—At the General Quarter Sessions of the Peace, holden at St. Mary, Newington, on &c. Whereas, at the last General Quarter Sessions of the Peace, holden in and for the county of Surrey, appeal was then made at this court." The appeal was then recited, and the entry and respite thereof "until the next General Quarter Sessions to be holden in and for the county of Surrey." It then*

(1) 5 Dowl. P.C. 264.

(2) 2 New Rep. 404.

ordered the appeal to be dismissed, and further "that the said appellants do forthwith pay to the said respondents the sum of 115*l.* costs":—Held, on motion for a certiorari, that the order was good, although no notice had been given that more than nominal costs would be asked for; that it sufficiently shewed that it was made at the Quarter Sessions holden in and for the county of Surrey; and that the term "costs" shewed, with sufficient certainty, that they were costs of the appeal.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 119.]

BAIL COURT. }  
1848. } BLAKE v. NEWBURN.  
May 11. }

*Sheriff—Extortion—Attachment—Rule.*

Where a sheriff's officer has been guilty of extortion, the injured party may, by one and the same rule, call upon the sheriff to shew cause why he should not pay over the excess, and upon the officer to shew cause why an attachment should not issue against him.

This was a rule, calling upon the sheriff of Cheshire to shew cause why he should not refund to the defendant a certain sum, taken, as was alleged, by one of his officers, for fees in an execution, beyond the amount allowed under 7 Will. 4. & 1 Vict. c. 55; and also calling upon the officer to shew cause why an attachment should not issue against him.

Watson shewed cause.—There is a preliminary objection, that the rule is too large. No doubt, by section 3. of the 7 Will. 4. & 1 Vict. c. 55, an officer taking excessive fees is punishable as guilty of a contempt; but the defendant has no right to treat the act at the same time as civil and criminal. This he does by seeking to make the sheriff and the officer answerable by the same rule. The application should have been either for an attachment against the officer only, or a rule against the sheriff only.

Cowling, contra.—There is nothing in the statute to alter the old remedy against the sheriff, which has for its object the refunding of money, while the officer is to be punished for the contempt. The new

remedy is cumulative, and may be well joined with the old one.

COLERIDGE, J.—As the old form of application against the sheriff alone may still be made, there is no objection to the rule in the present form. On the facts, the matter should be referred to the Master.

*Rule accordingly.*

BAIL COURT. }  
1848. } COLLETT v. CURLING.  
May 12. }

*Writ of Trial—Teste.*

*A writ of trial may be tested in vacation.*

A rule having been obtained in this case, for setting aside the writ of trial and subsequent proceedings for irregularity,—

T. Atkinson now shewed cause.—There are questions of fact, but the only point of law is, whether writs of trial may be tested in vacation. This is a proceeding within 2 Will. 4. c. 39. s. 11, which enacts, "If any writ of summons, *capias*, or detainer, shall be delivered or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as therein provided, be had therein without delay." The case cited on moving for the rule, of *Seaton v. Heap* (1) has no application, for a writ of *scire facias* is not issued under the Uniformity of Process Act. It has been the constant practice to test writs of trial in vacation.

Fitzpatrick, in support of the rule.—This writ is in the nature of a judicial writ, and should be tested in term. A subpoena cannot be tested in vacation—*Edgell v. Curling* (2). The statute refers to the pleadings and matters connected therewith, but not to writs of trial.

COLERIDGE, J.—Upon this point I have no doubt. The statute authorizes all "necessary proceedings" to be taken in vacation as well as in term time. This is a proceeding in the course of the cause, which in strictness a subpoena is not. This writ, therefore, is well tested in vacation.

*Rule discharged, with costs.*

(1) 5 Dowl. P.C. 247.

(2) 8 Sc. N.R. 663; s. c. 14 Law J. Rep. (N.S.) C.P. 27.

1848. } THE QUEEN v. THE JUSTICES  
May 8. } OF SUFFOLK.

*Highway Act, 5 & 6 Will. 4. c. 50. s. 85, 88.*—"Quarter Sessions"—Certificate—Notice of Appeal—Time.

The 85th section of the 5 & 6 Will. 4. c. 50. requires the certificate of Justices for stopping up a highway to be read at a "Quarter Sessions to be holden for the limit" within which the highway so stopped up shall lie, next after the expiration of four weeks from the day of the certificate having been lodged with the clerk of the peace, and section 88. gives an appeal to the "said Quarter Sessions" upon giving ten days' notice thereof:—Held, that this means the General Quarter Sessions for the county, and not any adjournment thereof; and where the sessions are held on certain fixed days at different places for different divisions of a county, but on each by adjournment from the preceding, the four weeks under the 85th section, and the ten days' notice of appeal required under the 88th section, must be reckoned with reference to the commencement of the sessions for the first division, though the highway is not situate within such division.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 143.]

1848. }  
May 9. } CUTLER v. BOWER.

*Pleading—Covenant, Independent—Patent—Partial Failure of Consideration.*

By an indenture, reciting that by a deed of 1842, the plaintiff had granted to the defendant a licence to make and vend a patent, subject to payment of a royalty, with a proviso for keeping the royalty at an average of 16l. 13s. 4d. per month, and also reciting that the defendant had agreed with the plaintiff to purchase one-half of the patent, (subject to the previous deed, but with the benefit to the defendant of one-half of the royalty thereby reserved), the plaintiff, in consideration of 2,200l. for

the purchase of one-half the patent and one-half the royalty, assigned to a trustee for the defendant the patent and the matters intended to be assigned as therein mentioned. The plaintiff covenanted in the usual form for the title; and the indenture contained a covenant by the defendant to pay the 2,200l. by certain instalments. In an action on this last covenant, alleging as breaches non-payment of two instalments, the defendant, after setting out the deed of 1842 and the letters patent, pleaded several pleas, merely denying the validity of the patent:—Held, to be no answer to the action: first, because the defendant, under the deed of 1842, would be at all events bound to pay 16l. 13s. 4d. royalty per month; and, secondly, because the defendant's covenant was independent of the covenant for title by the plaintiff.

Covenant on an indenture dated the 11th of October 1842. The pleadings are fully stated in the judgment of the Court, and it is unnecessary to repeat them.

The case was argued (1), May 2 and 5, by—

M. D. Hill, in support of the demurrer to the replications; and by—

Peacock, contra.

The following cases were cited:—*Carpenter v. Buller* (2), *Bowman v. Taylor* (3), *Hayne v. Maltby* (4), *Pordage v. Cole* (5), *Maythew v. Try* (6), *Taylor v. Hare* (7), *The Duke of St. Albans v. Shore* (8).

*Cur. adv. vult.*

LORD DENMAN, C.J. now delivered the judgment of the Court.—This was an action upon a covenant to pay a sum of 2,200l. by instalments, contained in an indenture dated the 11th of October 1842. The declaration merely stated the covenant to

(1) Before Lord Denman, C.J., Patteson, J., Wightman, J., and Erle, J.

(2) 8 Mee. & Wels. 209; s. c. 10 Law J. Rep. (N.S.) Exch. 393.

(3) 2 Ad. & El. 278; s. c. 4 Law J. Rep. (N.S.) K.B. 58.

(4) 3 Term Rep. 438.

(5) 1 Wms. Saund. 320.

(6) 3 Keb. 780.

(7) 1 New Rep. 260.

(8) 1 H. Black. 271.

pay the money at specified periods, and assigned a breach by non-payment of two of the instalments.

The defendant cravedoyer of the deed, which recited the grant of letters patent to the plaintiff, in 1841, for an invention entitled "Improvements in the Construction of the Tubular Flues of Steam Boilers." It also recited a deed dated the 23rd of July 1842, by which the plaintiff granted to the defendant the sole and exclusive liberty and licence to make and vend the patent invention, subject to the payment to the plaintiff of a royalty of 2*l.* 6*s.* for every ton of the tubular flues made under that licence, with a proviso for keeping the royalty at an average of 16*l.* 13*s.* 4*d.* per month. The deed of the 11th of October then went on to recite that the defendant had agreed with the plaintiff for the absolute purchase from him of one-half part of the letters patent (subject to the indenture of the 23rd of July), but with the benefit to the defendant of one-half of the royalty thereby reserved, and then stated that in consideration of 2,200*l.* for the purchase of one-half the patent and one-half the royalty, the plaintiff did, by that indenture of the 11th of October, assign and transfer to a trustee for the defendant the letters patent, and the matters intended and agreed to be assigned, as mentioned in the deed; and then followed (after certain other provisions) (9), the covenant declared upon for the payment of the 2,200*l.* by instalments. The letters patent, which were in the usual form, were also set out in the pleas after the deed declared upon.

The defendant pleaded in several pleas that the plaintiff was not the first inventor of the improvements; that the supposed invention was not an invention of improvements as represented by the plaintiff; that the supposed invention was not new; and that the invention was not properly specified, and the patent void. To these pleas the plaintiff replied estoppels by the recitals (10)

(9) Among them was a covenant by the plaintiff with the defendant, for title and quiet enjoyment of the patent in the usual form.

(10) These recitals were, that the plaintiff had invented improvements in the construction of tubular flues of steam boilers; that letters patent had been made granting to the plaintiff the sole privilege of

in the indenture of the 23rd of July 1842, which are set out in the replications, to which the defendant has demurred generally. Upon the argument, it was contended, on the part of the defendant, that though, since the case of *Bowman v. Taylor*, he might be considered estopped by recitals of specific facts in the deed declared upon, he was not *in this action* estopped by recitals in the deed of the 23rd of July, and that the only effect of reciting that deed in the indenture declared upon was, that he was estopped from denying that such an indenture was made, and that he was at liberty to dispute any specific fact stated in that deed only, and not in the indenture declared upon. It was also contended, that even if estopped from denying that there was *any* specification, he was not estopped from shewing that the specification did not support the patent. Many cases were cited upon the question of the estoppel, and much learning and ingenuity were displayed on both sides; but we think it unnecessary to give any opinion upon that question, as an objection was taken to the pleas of the defendant, which, we think, must prevail, and which, consequently, renders any question as to the validity of the replications immaterial.

The defence proposed to be set up by the pleas is, failure of consideration, and that the patent is invalid; and that the defendant is not bound by his covenant to pay the money, which appears by the deed to be the purchase-money for a patent which it is said turns out to be worthless. But it appears to us that there are two decisive objections to this defence. The first is, that there not having been any eviction the consideration does not wholly fail, for the defendant is, at all events, bound by the indenture of the 23rd of July to pay 16*l.* 13*s.* 4*d.* a month for royalty to the plaintiff, whether the patent were valid or not, as he would be estopped in an action upon that deed from denying the validity of the patent, and by the deed upon which the action is brought he becomes entitled to half that royalty: and, in the next place, the proposed defence could only be available in case the covenant upon which the action is

making and vending his said new invention; and that he had duly inrolled the specification according to the condition in the patent.

brought was a dependent covenant, to be performed only if some condition is observed by the other party; but in this case the covenant of the plaintiff relating to the patent, and that of the defendant for payment of the purchase-money, are wholly independent of each other, and each party may recover against the other for a breach of their respective covenants. There is no plea of fraud or eviction; and it appears to us that upon this deed and these pleadings, the invalidity of the patent as stated in the pleas affords no ground of defence at law to an action upon the covenant in question, which may be considered, in effect, as a mere covenant in gross for the payment of money. Our judgment, therefore, is for the plaintiff.

*Judgment for the plaintiff.*

BAIL COURT. } THE QUEEN v. THE DUKE OF  
1848. } GRAFTON AND ANOTHER,  
May 12. } JUSTICES.

*Bastardy Order—7 & 8 Vict. c. 101; and 8 & 9 Vict. c. 10.—Evidence.*

*Where the putative father appears before the Justices in pursuance of a summons, issued under the 7 & 8 Vict. c. 101, upon the application of the mother of a bastard child, it must appear upon the face of the order of bastardy that the evidence upon which the order was made was given in the presence and hearing of the putative father, or an excuse for the omission must be alleged.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 125.]

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END OF EASTER TERM, 1848.

# CASES ARGUED AND DETERMINED

IN THE

## Court of Queen's Bench.

TRINITY TERM, 11 VICTORIÆ.

BAIL COURT. { THE QUEEN v. THE GOVERNORS AND GUARDIANS OF THE POOR OF ST. MARY, NEWINGTON.

1848.

May 11, 27.

*Vestry—Election of Governors and Guardians—Mode of taking the Poll—Mandamus, to whom—Local Act.*

*A local act (54 Geo. 3. c. cxiii, relating to St. Mary, Newington) empowers "the governors and guardians to call a vestry meeting of the inhabitants of the said parish on the Easter Tuesday in every year; at which said vestry meeting all the vacancies in the list of governors and guardians shall be filled up by poll or ballot, or in such way of election as shall be deemed most proper and convenient:"—Held, first, that although the meeting so assembled must determine the method of election, as by poll, ballot, or other similar method, yet they must adopt some method which secures the expression of the will of the inhabitants in vestry assembled, as to each candidate; secondly, that on a poll being properly demanded, the vestry may be adjourned for the purpose of enabling all, who are entitled, to give their votes, and that the election is not confined to those then present.*

*The statute, after providing for the appointment of governors and guardians, and for the filling up of vacancies by the remaining governors and guardians, enacts, that after the first year, "the inhabitants of the*

*parish in vestry assembled," are to nominate and choose twelve persons, &c. :—Held, upon motion for a mandamus, that the meeting was to be called by, and therefore the writ directed to the governors and guardians.*

This was a rule, calling upon the churchwardens of the poor of the parish of St. Mary, Newington, in the county of Surrey, and the governors and guardians of the poor of the said parish, to shew cause why a writ of mandamus should not issue, directed to them to call a vestry meeting of the inhabitants of the said parish, to fill up the vacancies in the lists of governors and guardians of the poor of the said parish for the present year, and to nominate and choose a sufficient number of persons to complete the said list pursuant to the provisions of the stat. 54 Geo. 3. c. cxiii. (local act).

That statute, after appointing certain persons governors and guardians of the poor, enacts, by section 3, "That it shall be lawful for the said governors and guardians to call a vestry meeting of the inhabitants of the said parish, on the Easter Tuesday in every year; at which said vestry meeting all the vacancies in the list of governors and guardians shall be filled up by poll or ballot, or in such way of election as shall be deemed most proper and convenient." There is then a proviso, that after the expiration of one year, "the inhabitants of the parish, in vestry assembled," shall nominate and

choose twelve persons in lieu of those retiring each year.

On Easter Tuesday, in the present year, at a meeting of the vestry, held for the purpose of electing certain new governors and guardians of the poor, in place of those who had gone out by rotation or from other causes, an election of the requisite number took place in the following manner:—Two candidates were proposed for the first vacancy, and a shew of hands being had, the one in whose favour the majority was declared to be was elected to fill that vacancy, and then another pair of candidates were put up for the next vacancy, and the same course pursued in respect of each vacancy separately. This had been always the course pursued since the passing of the local act, 54 Geo. 3. c. cxiii. On the present occasion several candidates were so elected, without objection; but at length, on one being rejected, a poll of the parish was demanded, and refused by the chairman; and the vacancies were then filled up in the manner before described.

Upon these facts the above rule had been obtained, against which—

*Telford, Serj.*, on behalf of the churchwardens and overseers, shewed cause (May 11).—After *Campbell v. Maund* (1), the particular mode of election cannot be supported; but the question which the parties wish to have decided is, whether the election is to be confined to those present at the meeting. He then commented upon the words of the section, and the words used in the 57th section as to appointing overseers by the inhabitants “then present.”

*Collier*, on behalf of the governors and guardians, submitted that the act intended the vestry to be assembled in the ordinary way, and that the writ should, therefore, not be directed to them. He referred to 58 Geo. 3. c. 69, *Dawe v. Williams* (2), 1 & 2 Vict. c. 45, and the different sections of the local act.

*Lush*, in support of the rule.—It is clear that it is not a valid mode of election, and no reason can be given why all the electors should not have the opportunity to record their votes. He also referred to the various clauses of the local act on both points.

*Cur. adv. vult.*

On a subsequent day (May 27) judgment was delivered by—

*COLERIDGE, J.*—This was a rule for a mandamus to be directed to the governors and guardians of the poor, and to the churchwardens and overseers of the poor, of the parish of St. Mary, Newington, calling on them to hold a vestry meeting of the same parish, for the purpose of electing certain new governors and guardians in the place of those who had gone out by rotation, or for other cause, at or before Easter week. The requisite members had been, in fact, elected, but by a mode which, it was admitted, could not in itself be sustained; and the questions raised were, whether that mode had been effectually questioned on the last election; what was the right mode of election to be pursued for the future; and, as regards the governors and guardians, whether the writ could properly be directed to them.

The parish, as to the regulation of the poor, is under a local act, 54 Geo. 3. c. cxiii, by the 3rd section of which it is provided, that at a vestry meeting to be held on Easter Tuesday in every year, “all the vacancies in the list of governors and guardians shall be filled up by poll or ballot, or in such way of election as shall be deemed most proper and convenient.” Since the passing of the act the mode of election pursued, in case of any contest, has been to propose two candidates for each vacancy, separately, however many places there might be to be filled up. On a shew of hands being taken, the one in whose favour it appeared to be has been declared elected, and the other rejected; and then two other candidates have been proposed for the next vacancy. In this way, on the present occasion, several candidates were elected without objection; but at length, on the rejection of a candidate, he demanded a poll of the inhabitants of the parish, and this was refused by the chairman, who proceeded to complete the elections according to the mode hitherto in use. It is clear that mode cannot be sustained, for it does not ascertain the sense of the meeting with regard to all the candidates. The individual rejected for the first vacancy may have had a greater number of hands held up for him than the successful candidates for the second or any subsequent vacancy, and yet is rejected from all. So, again, the individual elected to fill the first

(1) 5 Ad. & El. 865; a. c. 6 Law J. Rep. (N.S.) M.C. 145.

(2) 2 Addams, 130.



vacancy who has only been opposed to one competitor, might have been rejected had he been opposed to all, or some of the succeeding competitors; and even if it could be considered that on the present occasion the meeting had decided this to be "the most proper and convenient way of election," which it would be difficult to hold on the facts stated in these affidavits, yet, I think, such decision would not have legalized it. Those general words in the act must receive a reasonable limitation so as not to defeat the very object, which is to secure filling up the vacancies by a real election made by the inhabitants in vestry assembled; and the right to determine the mode of election is limited to a choice among such modes as may secure that end, as the two specified modes of poll and ballot do. For the same reason, it appears to me that where many vacancies are to be filled, a shew of hands is always an objectionable mode of election: if the candidates are proposed separately, it is morally impossible to preserve accurately in the mind the comparative number of hands raised for each; if they are proposed in lists, the electors have not the opportunity of discriminating between the individuals of the several lists, but must vote for or against the whole of each list, though they might wish to make a selection from all. What shall be a proper mode of election the statute leaves open to question only on one or two points. It must be by poll, ballot, or such mode as shall be deemed most proper or convenient, the judgment as to this being limited in the manner I have already pointed out. The party to pronounce that judgment must be the meeting at large, for it is not of common right inherent in the chairman, nor is it given to him by this or any other statute, and he cannot have acquired it by custom.

But whatever the mode of election be, whether poll or ballot, or some other mode determined on by the meeting, the second and remaining question is, who are to be the electors? in other words, must the election be made by those only of the inhabitants present at the commencement of the poll, or, at all events, arriving during its continuance on that day? or is the poll to continue by reasonable adjournments, so that the inhabitants generally may poll in the election? It was admitted to be now clearly

settled that the latter was the proper course in general; but the words of the 3rd section of the local act were relied on in support of the former. A vestry meeting is to be called on Easter Tuesday in every year, "*at which said vestry meeting*" the vacancies are to be filled up. "The inhabitants in vestry assembled in such manner and at such time as aforesaid are to nominate and choose." This language does not appear to me strong enough to controul the general rule of law which is founded on reason, and by which alone in large parishes it is possible for elections to be made by the majority of those entitled to have a voice in them. The vestry meeting remains the same, however many times it may be adjourned in consequence of the number of electors. In the general act for the regulation of parish vestries, 58 Geo. 3. c. 69, both in the 2nd and 3rd sections are words that in a strict and literal sense might seem to restrain the right of interference to those vestrymen who are present when the vestry is first constituted; but they have never been so construed. I think, therefore, not only was the mode pursued wrong, but that it was properly questioned by the objector who demanded a poll of the inhabitants generally.

The remaining question as to the parties to whom the writ is to be directed, depends on the interpretation to be given to the 3rd section. By the 2nd section certain persons *ex officio*, and certain others named, are appointed governors and guardians; by the 3rd, provision is made for the temporary supply of vacancies occurring between Easter and Easter: this is to be done by the remaining or continuing governors and guardians, and *these* are at Easter to call a vestry meeting of the inhabitants of the parish on Easter Tuesday, at which the elections are to be made. Then follows this proviso:—"Provided always, that after the expiration of one year from Easter Tuesday next after passing this act it shall and may be lawful for the inhabitants of the said parish in vestry assembled, in such manner and at such time as aforesaid, also to nominate and choose twelve persons," &c. It was contended that the words "in vestry assembled" were to be separated from those which immediately follow; that the vestry was, therefore, to be called in the ordinary way; and that the governors and

guardians had nothing to do with the calling it. It seems to me a more reasonable way of reading the sentence to connect the words "in such manner and at such time as aforesaid" with the words "in vestry assembled;" and then "assembled in such manner" will mean, among other things, "assembled in virtue of a summons from the governors and guardians." I see no reason for supposing that the legislature intended to make any distinction between the vestry which was to supply vacancies at the first election and that which was to perform the same functions at the succeeding Easter. The vestry meeting is a special one, assembled for the special purpose of this election under the local act, the provisions of which generally the governors and guardians must be supposed to be better acquainted with than the ordinary parish officers; and it is more especially their duty to see that all necessary steps are taken for securing the proper elections into their own body. The rule, therefore, will be absolute, and the writ be directed to the governors and guardians, limited, of course, to the filling vacancies where the elections were made after the objection taken.

*Rule absolute accordingly.*

1848. } THE QUEEN v. HAYWARD AND  
May 28. } OTHERS.

*Borough Fund—Indictment, Costs of—  
Place where Offence committed—Trial—  
Judge's Order—Mandamus.*

*Three persons were indicted at the assizes for the county of S. for forging the will of C. D. It appeared that C. D. died in the borough of O, and that one of the prisoners took away the deeds, &c. of the deceased to his own house, which was in the county of S, but not in the borough of O; that the forged signatures of the testatrix and of one of the witnesses were written in the borough of O, and that the offence was completed in the county of D, where the forged signature of the second witness was written. The borough of O. did not contribute to the county rate, but had a borough fund of its own:—Held, that the order for payment of all costs and*

*expenses of the prosecution was properly made on the treasurer of the borough of O.*

*Secondly, that a mandamus would lie to the treasurer to compel payment.*

This was a rule calling upon George Cooper, the treasurer of the stock of the borough of Oswestry, in the county of Salop, to shew cause why a writ of mandamus should not issue, directed to him, commanding him to obey an order made by the Justices of assize at Shrewsbury in the said county, dated the 25th day of March, A.D. 1846; and, in pursuance of such order, to pay unto the prosecutor, Joseph Bassett, for his expenses, loss of time, and trouble in the prosecution of John Hayward, David Jones, and John Jones for felony, the sum of 73*l.* 8*s.* 6*d.*, and the further sum of 10*l.* 3*s.*, for the expenses of attending before the examining magistrate, as ascertained by his certificate, and to the several witnesses, that is to say, A, B, C, D, &c., the several sums stated in the rule.

It appeared that, at the Spring Assizes, 1846, an indictment was preferred, before the grand jury of the county of Salop, against the three persons named in the rule, for forging a document, purporting to be the will of Sarah Jones. It appeared that Sarah Jones resided in Oswestry, and that Hayward resided with her at the time of her death. As soon as she died he carried off the papers which were in her possession, to his own house, which was not in the borough of Oswestry, but was in the county of Salop. The signatures of the name of the testatrix and of one of the attesting witnesses were put to the will by the prisoners, in the borough of Oswestry; but the will was not complete so as to be uttered and pass as such until the signature of the second witness was put to it. This was done at Wrexham in Denbighshire. The prisoner Hayward, who uttered the will after it was forged, was apprehended in the county, and not in the borough. The warrant and information charged the offence to have been committed at Leominster, in the county of Salop. In the indictment the venue was laid in that county. It was also sworn that Oswestry was a borough not contributing to the county rate; but that in lieu thereof a rate, in the nature of a county rate, was raised within the borough.

*James Wilde* shewed cause.—The order of the Judge who tried the cause (the Lord Chief Baron) was made under a misapprehension. The borough fund is not liable to the costs. The offence, if not committed in the county, was at least supposed to be so; and it is treated throughout as a county prosecution. The offence was not complete, and it may be said, indeed, that there was no forgery until the will had the signature of the attesting witness.

[LORD DENMAN, C.J.—Is there any case deciding that there is no crime till the will is complete (1)?]

It cannot be called a will till it is attested. The statute 7 Geo. 4. c. 64. does not provide for cases where the offence has been committed partly in a county and partly in a borough, though the 12th section provides that if any felony or misdemeanour shall be begun in one county and completed in another "it may be inquired of and tried in any of the said counties in the same manner as if it had been actually and wholly completed therein" (2). The offence here

(1) In *Wall's case*, 2 East, P.C. 953, the prisoner "was convicted upon an indictment for forging and knowingly uttering a will of land of J. S. deceased. The will was attested by two witnesses, and it did not appear in evidence what estate the supposed testator had in the land so devised, or of what nature it was; wherefore it might be presumed to be freehold, and therefore the will void and of none effect by the express enactment of the Statute of Frauds for want of the attestation of three witnesses; the Judges, on conference, in Easter term, 1800, held the conviction wrong; for as it was not shewn to be a chattel interest, it was to be presumed to be freehold."

(2) Statute 11 Geo. 4. & 1 Will. 4. c. 66. s. 3. makes the forging a will felony. Section 24. provides, that the offence may be dealt with, indicted, tried, and punished, and laid and charged to have been committed in any county or place in which the person who forged shall be apprehended or in custody, as if his offence had been actually committed in that county or place. Statute 7 Geo. 4. c. 64. s. 22. provides that the Court, before which any person shall be tried for any felony, may order the payment of expenses of the prosecutor and witnesses on the trial, &c. as well as those incurred in attending before the magistrate, &c. Section 24, that except as after mentioned, such order is to be made on the treasurer of the county, &c., where the offence shall have been committed, or supposed to have been committed. By section 25, expenses, in respect of felonies committed in liberties, &c. not contributing to the county rate are to be paid out of the borough fund or rate, and the order is to be directed to the treasurer, &c.

was properly tried in the county; and there being no power of apportionment the whole costs ought to be paid out of the county rate.

[PATTESON, J.—There is nothing to shew that any part of the offence was committed in any part of the county of Salop, but the borough of Oswestry.]

[LORD DENMAN, C.J.—Is there any precedent for a mandamus in such a case?]

*Tomlinson*, contra.—The Court will enforce the order, rather than leave the parties to an indictment, when a single Judge would have to dispose of a difficult question of law. In *The Queen v. Clark* (3) a mandamus was refused, but that was on the merits of the particular application.

LORD DENMAN, C.J.—I think the order was properly made on the borough of Oswestry. It is a case which appears to me to be within the exception in the statute 7 Geo. 4. c. 64. s. 25. I also agree that we should not canvas these matters. The treasurer should obey the Judge's order.

PATTESON, J.—I am of the same opinion. The offence was committed partly in the county of Salop and partly in the county of Denbighshire; but in no part of Salop, except Oswestry.

COLERIDGE, J. and ERLE, J. concurred.  
*Rule absolute.*

1848. } THE QUEEN v. R. P. TYRWHITT,  
May 27. } ESQ.

*Pauper Lunatic*—8 & 9 Vict. c. 126. s. 62.—*Adjudication of Settlement—Order of Maintenance.*

*The adjudication of the settlement of a lunatic pauper, under the 8 & 9 Vict. c. 126. ss. 58, 62, may properly be comprehended in the order for payment of the costs of his maintenance.*

*Such order may be made on the overseers of the parish where he is adjudged to be settled, though such parish form part of a union.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 141.]

(3) 5 Q.B. Rep. 887; s. c. 13 Law J. Rep. (N.S.) M.C. 91.

1848. }  
 Feb. 12; }  
 April 15; } RUSSELL v. SMITH.  
 May 30. }

Copyright—Piracy—5 & 6 Vict. c. 45.  
 —Musical Composition—Place of Dramatic  
 Entertainment—3 Will. 4. c. 15.

The plaintiff was the original composer of the music of a song of a narrative character, which he sang publicly for profit, and accompanied it by gesture and expression. The defendant announced by handbills the performance of, and subsequently performed, the plaintiff's song at Crosby Hall, a place licensed for music and dancing under 25 Geo. 2. c. 36.

In an action for penalties under the 5 & 6 Vict. c. 45,—Held, first, that the plaintiff's song was a musical composition within the 20th section of that act. Secondly, that Crosby Hall was a place of dramatic entertainment within 3 Will. 4. c. 15. Thirdly, that the allegation in the declaration in the terms of the statute, that the plaintiff had the "sole liberty of representing a certain musical composition," was a sufficient statement of the plaintiff's right. Fourthly, that it was not necessary that the plaintiff, who was the assignee of the copyright of the words, should be registered under section 14. before bringing the action.

Debt for penalties under 5 & 6 Vict. c. 45. The declaration stated, that after the passing and coming into operation of the 3 Will. 4. c. 15, 'For amending the laws relating to dramatic literary property,' and after the passing and coming into operation of the 5 & 6 Vict. c. 45, 'For amending the law of copyright,' and before and at the time of the wrongful misrepresentation and performance, as hereinafter mentioned, the plaintiff had and still hath the sole liberty of representing and performing a certain musical composition called, to wit, 'The Ship on Fire,' yet that after the passing and coming into operation of the said acts of parliament, and whilst the plaintiff had such sole liberty of representing and performing the said musical composition as aforesaid, and before the commencement of this suit, to wit, on the 22nd of December, A.D. 1845, and within twelve calendar months now last past the defendant did, contrary to the true

intent and meaning, and against the provisions in that behalf of the said acts of parliament, and without the consent in writing of the plaintiff first had and obtained, to wit, at a place of dramatic entertainment, called, to wit, Crosby Hall, in the parish, &c., wrongfully and injuriously represent and perform the said musical composition contrary to the form, true intent and meaning, and against the provisions in that behalf of the statutes in such case made and provided, whereby and by reason of the premises, and according to the provisions of the said statutes, he, the defendant, forfeited and hath become and still is liable to pay to the plaintiff the sum of 40s. for the said offence, whereby, &c.

Plea—*Nil debet*.

At the trial, before Erle, J., at the Sittings in London, after Easter term, 1847, it appeared that the plaintiff was the original composer of the music of a song called 'The Ship on Fire,' which he sung and represented at public concerts; and that the defendant, after previous public announcement, sang the song at a place called Crosby Hall, in the city of London, for his own benefit. The following is a copy of the programme or advertisement of the performance, produced at the trial:—

"Crosby Hall, Bishopsgate Street.—Mr. Henry Smith (from America) begs respectfully to announce that his third vocal entertainment (interspersed with anecdotes) this season, will take place on Monday evening, December 22nd, 1845. Tickets 1s. each, reserved seats 2s., to be had of Messrs. Keith, Prowse & Co., Cheapside; Purday, St. Paul's Churchyard; Turner, Poultry; Peachey & Pearson, Bishopsgate Street; Folkiens, King William Street; at Crosby Hall; and of Mr. H. Smith, 4, Wilmot Street, Russell Square. To commence at eight o'clock precisely.

"Programme. Part 1, Descriptive Ballad, —'Land, ho!' words by G. P. Morris of New York. [Here a verse of the poetry is introduced.] This song is intended to describe the joy of passengers after a long and tedious voyage across the Atlantic. Descriptive scena,—'The Dream of the Reveller,' (a temperance song; words by Charles Mackay). Ballad,—'Woodman, spare that Tree:' words by G. P. Morris. Descriptive scena,—'The Shipwreck,' third

time: words by Alexander Johnson, Esq. Descriptive cantata,—‘The Maniac:’ words by Monk Lewis. Song,—‘The Boatmen of the Ohio,’ (a national American negro melody). Part 2. Descriptive scena,—‘The Gambler’s Wife.’ Descriptive song,—‘The Newfoundland Dog:’ words by F. W. N. Bayley, (founded upon an incident that occurred on board an East Indiaman, on her homeward voyage, in the year 1841). Song, ‘I’m afloat, I’m afloat!’ ‘The Rover’s Song:’ words by Eliza Cook. Descriptive scena,—‘The Ship on Fire:’ words by Charles Mackay, Esq. (This scene is founded upon the loss of the *Kent*, East Indiaman, which was totally destroyed by fire in the Bay of Biscay.) Finale, ‘Come along, my Darling,’ (a national American negro melody).”

In consequence of the above advertisement a numerous audience was collected, money being taken at the door for admission. Crosby Hall is a place licensed by the Justices at sessions, under the 25 Geo. 2. c. 36, for dancing, music, &c. It appeared that the defendant performed the song, accompanying himself at the piano, using gesture and expression, but without scenic dress, or scenic representation by other performers. There was a raised platform, on which he was placed in view of the audience. The plaintiff’s witnesses spoke of the song as an original dramatic song; and no witnesses were called for the defendant. It was objected, on the part of the defendant, first, that the song in question was not a musical composition within the 5 & 6 Vict. c. 45. s. 20. Secondly, that Crosby Hall was not a place of dramatic entertainment within the 3 Will. 4. c. 15. s. 2. (1) The learned Judge

directed the jury, that, in his opinion, the song was a dramatic composition, and Crosby Hall, in this instance, a place of dramatic entertainment. It was further objected that the plaintiff, who was the assignee of the copyright of the words of the song, should have been registered under the 24th section of the 5 & 6 Vict. c. 45. The jury, under the learned Judge’s direction, re-

trary to the intent of this act, or the right of the author, &c. represent, or cause to be represented, without the consent of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount of not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietor, in any court having jurisdiction in such cases in that part of the United Kingdom, &c. where such offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same.

The 5 & 6 Vict. c. 45. s. 20, after reciting the last-mentioned statute, and that it was expedient to extend to musical compositions the benefits of that act, enacts that the provision of the said act, 3 Will. 4. c. 15, shall apply to musical compositions, and that the sole liberty of representing, &c. or causing, &c. any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the terms in this act provided for the duration of the copyright in books, and provides for the registering, &c., and that the first representation or performance of any dramatic piece shall be deemed equivalent in the construction of the act to the first publication of any book.

Section 24. enacts that no proprietor of copyright in any book shall maintain any action, &c. in respect of any infringement of such copyright, unless he shall before commencing such action, &c. have caused an entry to be made in the book of registry of the Stationers Company of such book pursuant to the act. Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of 3 Will. 4. c. 15.

Section 2. provides, (amongst other things) that the words “dramatic piece” shall be construed to include and mean every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment.

(1) See *Russell v. Smith*, 15 Law J. Rep. (N.S.) Ch. 340.

The statute 3 Will. 4. c. 15, after reciting the 54 Geo. 3. c. 156, and that it was expedient to extend the provisions of that act, provides, that after the passing, &c. the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed or published by the author thereof or his assignee, or which hereafter shall be composed, &c. shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of Great Britain, &c. any such production as aforesaid.

And by section 2, if any person shall, during the continuance of such sole liberty as aforesaid, con-

turned a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit on the objections made at the trial.

*Watson*, in Trinity term, having obtained a rule nisi accordingly; and also for arresting the judgment, on the ground that the "sole liberty" of representation was a claim of a more extensive right than was conferred by the act of parliament,—

*Talfourd, Serj., Locke, and Wise* shewed cause (3).—It cannot be said that a song such as this is not within the letter of the act. No one will deny that a song is a "musical composition;" but it is said that the act was meant to apply only to musical compositions of a dramatic character, *i. e.* to musical dramas or operas. It is to be remembered that a performance is not the less dramatic because it is musical, or that it is less a dramatic performance because it comprehends but one act. The statute does not define or limit the nature of musical composition. The Greek dramas were musical in their character, and the mono-dramatic performance of the late Mr. Mathews would of course have been within the protection of the statute. Secondly, Crosby Hall was clearly a place of dramatic entertainment. The statute is not confined to theatres—*Gallini v. Laborie* (4). If this question had been merely one of fact, the defendant should have required that it should be left to the jury. As a question of law the Court will look at the various clauses of the act of parliament. According to the Interpretation clause "dramatic" includes "musical." Crosby Hall by the representation of this piece, became a place of "musical" (and therefore of "dramatic") entertainment. As to the motion in arrest of judgment, it is said that the plaintiff should not have claimed the sole liberty of representing, &c., but should have limited it to "places of dramatic entertainment in England," &c.; but it is enough to have followed the very words of the act—*Lee v. Simpson* (5), *Macmurdo v. Smith* (6). As to the registration, the right of representation is quite distinct from copyright, and the words of the 24th section plainly point to books only.

*Watson and J. Brown*, contra.—First, according to the argument on the other side, the statute must extend to every song; but it never could be the intention of the legislature to subject every man or woman singing, it may be in a private room, to the penalty of the act. The intention was to protect musical compositions of a dramatic character, and in order to bring them within the penal provisions of the statute they must be performed at a place of dramatic entertainment. Would a piece of sacred music performed at a chapel or church render the performance liable to the penalty? That would be so by arguing in a circle: the plaintiff would make out that the place of performance becomes a place of dramatic entertainment by reason of the performance itself, and that the thing performed or represented becomes dramatic by reason of its being performed at a place of dramatic entertainment.

[*LORD DENMAN, C. J.*—You invite the public.]

But it is not enough that the public are allowed to enter. A benefit concert given at a private residence would not be considered within the act. The performance should have a dramatic character independently of the music, *e.g.* 'The Beggars' Opera.' This was a narrative song. There was no acting, as the defendant was the only performer, and he played the piano whilst he was singing. Secondly, Crosby Hall is not a place of dramatic entertainment. It is a library where singing occasionally takes place. If it is a place of dramatic entertainment Exeter Hall is so also.

[*ERLE, J.*—Why should the composer of an oratorio have less protection than the composer of 'The Beggars' Opera' ?]

[*PATTESON, J.*—If this composition is once made out to be a dramatic entertainment, it is difficult to say that the place where it is performed is not a place of dramatic entertainment. When Punch is performed in the street, the street becomes a place of scenic entertainment.]

A performance such as that proved in this case would not have been an infringement of copyright under the earlier statutes—*Coleman v. Wathen* (7), *Planché v. Braham* (8),

(3) Before Lord Denman, C.J., Patteson, J. and Erle, J.

(4) 5 Term Rep. 242.

(5) 16 Law J. Rep. (N.S.) C.P. 105.

(6) 7 Term Rep. 518.

(7) 5 Term Rep. 245.

(8) 4 Bing. N.C. 17; s.c. 7 Law J. Rep. (N.S.) C.P. 25.

*The King v. Handy* (9). If this is a place of dramatic entertainment it will be necessary for the proprietor to have a licence from the Lord Chamberlain, under the 5 & 6 Vict. c. 68 (10), and persons frequenting it are at present liable to be taken into custody under the 2 & 3 Vict. c. 47 (11). Lastly, the judgment ought to be arrested. *Macmurdo v. Smith* is not in point; the plaintiff here states a right which the law does not give him. The "sole right of representation" must mean a right to represent the piece everywhere, and the breach does not cure it, as it is stated that the defendant performed the piece, to wit, at a place of dramatic entertainment. As the declaration stands the defendant would have been equally liable if he had sung the song in a private room. Lastly, unless this is clearly a dramatic piece the plaintiff should have been registered under section 24. before he could maintain the action. This was a musical composition to which the provision as to registry would apply.

*Cur. adv. vult.*

LORD DENMAN, C.J. subsequently (May 30th) delivered the judgment of the Court. —This action was brought for performing a musical composition, of which the plaintiff was the composer, at Crosby Hall. At the trial the Judge was taken to have directed,

(9) 6 Term Rep. 286.

(10) Which provides (sect. 2), that it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain for the public performance of stage plays, without authority, by virtue of letters patent from Her Majesty, or without licence from the Lord Chamberlain of Her Majesty's household, under a penalty of 20*l.* for each day of performance.

By the interpretation clause (sect. 23), the words "stage play" are to be taken to include every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof. Provided, that the act is not to apply to any theatrical representation in any booth or show allowed by Justices of the Peace at a lawful fair.

(11) By 2 & 3 Vict. c. 47. s. 36. power is given to the Commissioners of the Metropolitan Police to authorize, in writing, any superintendent of the police, and with such constables as he may think necessary, to enter into any house or room kept or used for stage plays or dramatic entertainments, into which admission is obtained by payment of money, and which is not a licensed theatre, at any time when it is open for the reception of persons resorting thereto, and to take into custody all persons found therein without lawful excuse.

and the jury to have found such matters, as were requisite for maintaining the plaintiff's case, liberty being reserved to the defendant to move to reverse that decision; and the defendant has since contended before us, first, that the 5 & 6 Vict. c. 45, by enacting that the provisions of 4 Will. 4. c. 15. shall apply to musical compositions, extends only to the performance of musical compositions in places of dramatic entertainment, and that Crosby Hall was not such a place. And, secondly, that the musical compositions to be protected were those composed for performance with dramatic pieces, the composition in question not being in that class. It is not necessary for us to decide whether the statute is to be so restricted in respect of the compositions and places of performance comprised within it, because we are of opinion both that 'The Ship on Fire' was a dramatic piece, and that Crosby Hall became upon the occasion of this performance a place of dramatic entertainment within the meaning of these statutes. It was proved that bills had been issued by the defendant announcing a vocal entertainment, with the price of tickets of admission, and giving a programme of the two parts of the performance. Of the particulars in the first part: 'The Dream of the Reveller' and 'The Shipwreck' are named descriptive scenes, and 'The Maniac' a descriptive cantata. Of the five particulars in the second part, 'The Gambler's Wife' and 'The Ship on Fire' are named descriptive scenes. The Hall was prepared with seats for the audience, and a stage for the performer, and the defendant, without scenes or appropriate dresses, accompanied his singing with a piano, and gave considerable expression to the matters described. The song in question is stated in the bill to be founded on the loss of the *Kent*, by fire, in the Bay of Biscay. It represents a storm at sea, the burning of the ship, and an escape by the boat to another ship, and so a safe return to land. It moves terror and pity and sympathy by presenting danger and despair, and joy and maternal and conjugal affection. A witness of great experience in publishing music deposed that this was considered a dramatic song, and published with the title of a dramatic and descriptive song, and there was no evidence that any one considered it not dramatic. Thus, the nature of the production places

it rather in the representative than the narrative class of poetry, according to Lord Bacon's division of dramatic from epic; and the evidence states it to be known as dramatic among those who are conversant with such things. If the interpretation clause of the 5 & 6 Vict. c. 45. be referred to, the second section declares that "dramatic piece" within that act, includes tragedy, comedy, play, opera, farce, or any other scenic, musical, or dramatic entertainment. These words comprehend any piece which could be called dramatic in its widest sense; any piece which on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience. They comprehend, therefore, the production in question, the nature of which in this respect was above pointed out. On holding this production to be a dramatic piece, we give effect to the intention of the legislature, as we collect it from the series of statutes relating to literary property, namely, to give authors the profits arising from the publication of their works. After the decision of *Murray v. Elliston* (12), it seems to have been considered, that publication to an audience was not within the provisions of the act relating to copyright; consequently the 3 Will. 4. c. 15. was passed, and in respect of dramatic literary property, gave to authors the profits arising from publication by representing the piece on the stage. As there appears no reasons for favouring one kind of literary property more than another, it is probable that this protection was intended for all productions adapted to this mode of publication. Now, the use of the production in question, both by the plaintiff and the defendant, shews that it is so adapted and is supposed to be profitable to those who publish it. The absence of scenes and appropriate dresses and a regular theatre has been urged for the defendant; but we should take away a part of the protection conferred on authors if we held that there could be no public representation without these accompaniments.

Upon the whole, therefore, we are of opinion, that 'The Ship on Fire' was a dramatic piece within the meaning of the statute.

(12) 5 B. & Ald. 657.

It follows, that as Crosby Hall was used for the public representation for profit of a dramatic piece, it became a place of dramatic entertainment for the time, within the statutes now in question.

The use for the time in question, and not for a former time, is the essential fact. As a regular theatre may be a lecture room, ball room, and concert room on successive days, a room used ordinarily for either of these purposes would become so for the time being. A theatre is used for the representation of a regular stage play. In this sense, as 'The Ship on Fire' was a dramatic piece, in our view Crosby Hall when used for the public representation and performance of it, for profit, became a place of dramatic entertainment. In thus deciding, we do not declare that the defendant's performances at Crosby Hall were unlawful without a theatrical licence, within the 6 & 7 Vict. c. 68; and as to this we would remark, that the generic term in this statute is "stage play," whereas in the 5 & 6 Vict. c. 45, it is "dramatic piece," and there is some difference in the interpretation given of these terms in the respective statutes; and also that the purview of the last statute is the maintenance of good order by the police, and that of the first is compensation to composers, by securing literary property.

It was further contended that the action would not lie, because the plaintiff's right was not registered, and the 5 & 6 Vict. c. 45. s. 24. was relied on, which enacts, "that no proprietor of the copyright in any book should sue for infringement, unless he shall be registered, and provides that this shall not extend to the proprietor of the sole representing of a dramatic piece. The answer is, first, that the prohibition relates only to copyright of books, and does not comprise the sole liberty of performing a musical composition. Secondly, if it did, the proviso would except it, for the proviso excepts the sole liberty of representing a dramatic piece; and section 20. applies to musical compositions the provisions of the 4 Will. 4. c. 15. and of this act. An exception, therefore, in favour of the sole representation of a dramatic piece is extended to the performance of a musical composition. Thirdly, the enactment in section 20. does not assist the defendant, for by that the provisions thereinbefore enacted "in



respect of the property of copyright and registering the same, are applied to the representation of dramatic pieces and musical compositions ;" but this of course does not comprise the provisions thereafter enacted, viz. by section 24.

With respect to the motion in arrest of judgment, on the ground that the plaintiff has claimed too large a right in his declaration, we are of opinion, that as he has followed the words of the 20th section of the 5 & 6 Vict. c. 45, which gives the right, the declaration is sufficient. Whatever the act means by the words used in that section, the plaintiff means the same by his declaration, as was said by the Court, in delivering the judgment in the case of *Lee v. Simpson*. The rule of the defendant is, therefore, discharged.

*Rule discharged.*

1848. { *Re THE WESTMINSTER COUNTY*  
June 9. { *COURT OF MIDDLESEX.*  
          { *FOSTER AND ANOTHER v. TEM-*  
          { *PLE, EXECUTOR.*

*County Court — Practice — Summons — Second Summons to save Statute of Limitations.*

*The plaintiffs described the defendant in a summons out of the county court as executor of A. B, and on the defendant's appearance opened the case against him as executor of C. D. The cause of action having accrued in 1842, the Judge directed a fresh summons to be issued, describing the defendant as executor of C. D, and bearing the same date as the first summons, in order to save the Statute of Limitations :—Held, that it was not a case in which this Court ought to interfere with what the Judge had done.*

This was a rule obtained in Easter term last calling on "D. C. Moylan, Esq., Judge of the county court of the district of Westminster, and the plaintiffs in a certain plaint or action in the county court for the district of Westminster, in the county of Middlesex, between Edward Foster and Edward Foster the younger, plaintiffs, and Henry Temple, executor, &c., defendant, to shew cause why a writ of prohibition should not issue to prohibit the said Court, the said Judge, high

bailiff and other officers of the said court from further proceeding in the plaint or action in the said court."

It appeared from the affidavits on which the rule was obtained, that on the 3rd of April 1848 the defendant was served with a summons issued out of the above court, and which summons, numbered (a) 3967, was dated the 30th of March 1848, in which he was summoned as one of the executors of W. Thompson, to appear on the 14th of April 1848, to answer the above-named plaintiffs in an action for goods sold and delivered by the plaintiffs to the testator in his lifetime, and for money paid, &c. to the testator. In the particulars annexed to the summons, the goods were alleged to have been sold and delivered on the 9th of April 1842; and that the sum sought to be recovered of the defendant as executor as aforesaid, on account of the goods, &c. was 7*l.* 15*s.*, together with the expense of the summons, &c.

The defendant attended the court by counsel, in pursuance of the summons, on the said 14th of April; and on the hearing the solicitor for the plaintiffs opened the case against the defendant as executor of Frederick Welham Taylor, and not as executor of W. Thompson as the summons mentioned; whereupon the defendant's counsel objected to any evidence being given against the defendant, except as executor of W. Thompson as mentioned in the summons. The Judge held the objection fatal to the summons. Application was then made, on the part of the plaintiffs, to the Judge, to direct another summons to be issued bearing the same date and number as the first summons, for the purpose of saving the Statute of Limitations. This was objected to by the defendant's counsel, who requested the Judge to dismiss the summons, or declare the plaintiffs nonsuited. This the Judge refused to do; but directed another summons to be issued out in compliance with the plaintiffs' application. This was done accordingly, and the defendant was on the 24th of April served with a summons, numbered (a) 3967, dated the 30th of March 1848, and summoning him as one of the executors of F. W. Taylor, and to this second summons particulars were annexed exactly corresponding with the particulars annexed to the first sum-

mons. In the affidavit of the attorney for the plaintiffs, it was stated that on the 30th of March he made application in writing to the clerk of the *Westminster County Court of Middlesex*, and requested him to enter a plaint, wherein E. Foster and E. Foster the younger were plaintiffs, and H. Temple, one of the executors of the last will, &c. of F. W. Taylor, was defendant; and that the clerk of the court furnished him with a copy of the entry in the book of plaints, and interlocutory proceedings in the Westminster County Court of Middlesex. He further stated in his affidavit, that the Judge of the court held that the summons not having been issued in accordance with the 59th section of the stat. 9 & 10 Vict. c. 95 (1), it amounted to a nullity; and on his urging that the plaintiffs would be barred by the Statute of Limitations, if the Judge ordered

a nonsuit to be entered, the Judge referred to the 12th Rule of Practice of the Court, and after examining the book of plaints, and finding the plaint correctly entered pursuant to the before-mentioned application of the plaintiffs, which application the Judge also examined, he directed the said second summons to be issued. He also stated in his affidavit that there was no such court as the county court of the district of Westminster, in the county of Middlesex; and that the title of the court set out in No. 2. of the Order of Council made by virtue of the said statute is the "*Westminster County Court of Middlesex*."

*Sir John Jervis (Attorney General)*, shewed cause on the part of the Judge of the court.—The plaint was right, and the plaintiffs therefore had commenced the action correctly. The summons or warning was wrong. In this court, if the writ were right and the declaration wrong it might be amended.

*Udall*, on behalf of the plaintiffs in the action.—The affidavits on which the rule was obtained are defective: first, for not setting-out the particulars of the plaintiffs' demand correctly: if that had been done, it would clearly have appeared that the defendant had full notice that he was sued in respect of goods supplied by Taylor; secondly, for misdescribing the court itself. There is no such court as the county court of the district of Westminster. There is a court styled the Westminster County Court of Middlesex.

*Horry*, contra.—The Judge decided that the objection was fatal, and the only question was, whether he could then issue a fresh summons. The 10th and 11th rules of the court only direct the mode of service of a summons, and do not apply. As the defendant had no notice of the nature of the demand until the summons was issued, no evidence could be given on the first summons; but it had been served, and therefore, rule 12. does not apply. He appears as executor of W. Thompson; and for anything that is now shewn to the contrary, he may be so. The mistake was occasioned by no act of the defendant, who ought not to be deprived of the power of pleading the Statute of Limitations—*Roberts v. Bate* (2).

(1) 9 & 10 Vict. c. 95. s. 59. enacts, "That on the application of any person desirous to bring a suit under this act, the clerk of the court shall enter in a book to be kept for this purpose in his office a plaint in writing, stating the names and the last known places of abode of the parties, and the substance of the action intended to be brought, every one of which plaints shall be numbered in every year according to the order in which it shall be entered; and thereupon a summons, stating the substance of the action, and bearing the number of the plaint on the margin thereof, shall be issued under the seal of the court according to such form, and be served on the defendant so many days before the day on which the court shall be holden at which the cause is to be tried, as shall be directed by the rules made for regulating the practice of the court, as hereinafter provided; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules of practice, shall be deemed good service; and no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known."

Section 75. enacts, "That no evidence shall be given by the plaintiff on the trial of any such cause as aforesaid of any demand or cause of action, except such as shall be stated in the summons hereby directed to be issued."

By the rules of practice for the county courts it is provided:—

Rule 1. Every plaint must be entered upon application at the office of the clerk, pursuant to the form in the plaint-book in the schedule to the rules.

Rule 12. Where any summons has not been served as hereinbefore directed, the Judge may in his discretion, in order to save the Statute of Limitations, direct another summons or successive summonses to be issued bearing the same date and number as the first summons.

LORD DENMAN, C.J. — The putting Thompson for Taylor was simply the mistake of the officer of the court. I think we cannot interfere with what the Judge has done.

PATTESON, J.—The first summons appears to have been altogether a nullity.

COLERIDGE, J. and ERLE, J. concurred.

*Rule discharged.*

an application to strike an attorney off the roll for inducing a party to give false evidence in a cause, the affidavits were entitled as these are. Suppose the action were in the Common Pleas, an application might be made in this court, and then it is clear the affidavits could not be entitled in the cause. There is nothing in the objection. No cause is shewn on the merits; and the rule, therefore, will be—

*Absolute, with costs.*

BAIL COURT.

1848.

June 14.

} *Ex parte RANDALL in re*——.

*Affidavits, entitling—Attorney.*

*Upon a motion against an attorney to pay over a sum of money received by him for his client in a cause, the affidavits may be entitled in the matter of the attorney.*

A rule nisi had been obtained, calling upon an attorney to pay over a sum of money to his client, Mr. Randall, under the following circumstances:—Mr. Randall's goods having been seized by the sheriff of Middlesex, he instructed the attorney against whom this application was made to commence an action for the seizure. This was done, and the action was afterwards compromised, by payment of 69*l.* and costs to the attorney for Mr. Randall. The affidavit, upon which the rule was obtained, was entitled "in the matter of" (the attorney).

*Hawkins* shewed cause and objected that the affidavit was wrongly entitled, as it should have been entitled in the cause in which the money was received. The affidavit of the execution of a power of attorney must be entitled in the cause—*Doe d. Clarke v. Stillwell* (1). In *Simes v. Gibbs* (2) it was held, that upon a motion to compel an attorney to deliver up a document received in the course of a cause, the affidavits may be entitled in the cause; and if they may be so entitled, it is submitted that they must be, as there cannot be two modes of entitling affidavits.

*Sir F. Thesiger*, in support of the rule, was not called upon.

WIGHTMAN, J.—The Master informs me that, in the case of *Re Macey* (3), which was

1848.

June 29.

} THE QUEEN v. SHAW, CLERK.

*Rateability — Tithe — Inclosure Act — Commutation — Rent-charge — Poor-Rate.*

By a private inclosure act of 25 Geo. 2, it was enacted, that an annual rent or sum of 90*l.* should be vested in the rector of the parish of N. and his successors for ever, issuing out of and charged upon the lands and grounds intended to be inclosed, as well such as should be allotted to the rector in lieu of his glebe lands lying in the common fields, &c. as the lands of the other landowners in the said common fields, &c., "and should be paid and contributed free and clear of and from all deductions, defalcations, or abatements for or in respect of reprises and outgoings whatsoever, other than and except such proportion of the tax charged upon land by authority of parliament as the said annual rent of 90*l.* shall bear to the yearly value of the lands thereby charged with or made liable to the payment of the same rent." And it was declared that the yearly rent of 90*l.* should be in lieu and satisfaction of all tithes, &c. arising and renewing in the said common fields, &c. and payable by the inhabitants of the town of N, with certain exceptions; but the rights of the rector to the tithes of other parts of the parish of N. were reserved as before. For the tithes of these last-mentioned portions of the parish, the rector had always since the passing of the act been rated to the poor:—Held, that he was not rateable in respect of the yearly sum of 90*l.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 137.]

(1) 6 Dowl. P.C. 305.

(2) 6 Ibid. 310.

(3) Not reported.

1848. }  
 April 28; } CLEGG AND OTHERS v. DEARDEN.  
 June 7. }

*Pleading—Case—Trespass—Consequential Injury—Continuing Grievance—Former Recovery—New Assignment—Damages.*

*Case, for breaking and entering a coal mine whilst in possession of S, and before the plaintiffs were possessed of it, and getting coal therefrom, and causing an aperture to be made therein, and the declaration alleged that though the defendant, after the plaintiffs became possessed of the mine, was requested to stop up the aperture, yet he had neglected to do so, whereby water deluged and damaged the plaintiffs' mine.*

*Plea, that H, the former owner of the plaintiffs' coal mine, brought an action on the case against the defendant for breaking and entering the mine, in possession of S, and making excavations, and carrying away coal therefrom, and thereby injuring his reversionary estate, and that several sums were on that occasion awarded and paid to H, and to S, and to the plaintiffs, in respect of the injuries sustained by them respectively by the matters in the declaration in that cause alleged, and that the breaking and entering in the present action was part and parcel of the grievances in the declaration in the said action of H. mentioned, and in respect of which such damages were awarded, and that the same were so awarded and paid in respect of such damages and all consequential damages to arise or happen in consequence thereof.*

*The plaintiffs new assigned that the defendant, after the commencement of the first action, and after the making of the award in the plea mentioned, kept and continued the aperture open and unfilled up and neglected to divert or turn off the water, whereby it flowed into the plaintiffs' mine.*

*To the new assignment the defendant pleaded the action brought by H, and the award in his favour, and averred that the grievances newly assigned were merely consequential damages arising to the plaintiffs by reason of the matters and injuries in the declaration in the said action by H. alleged.*

*The plaintiffs set out the award, and replied *absque hoc*, that the damages were consequential damages, arising to the plain-*

*tiffs by reason of the matters and injuries in the declaration in the action by H. alleged.*

*At the trial it was proved that the coal mine was demised to the plaintiffs by S, in 1839, and that at that time H. was mortgagee, S. being mortgagor in possession, and that before the demise to the plaintiffs the defendant broke and entered and took away the boundary coal; that in 1840 the plaintiffs worked the mine till they came to the place where the excavations were made by such breaking and entering, and the water came in and had continued to flow in ever since; that according to the custom of mining the defendant, whose mine was on the rise, had a right to work to the extremity of his mine without leaving any barrier. It further appeared that, in 1841, H, the mortgagee, brought an action against the defendant for the breaking and entering above mentioned, and that the cause was referred to an arbitrator, with liberty to the now plaintiffs and S. to become parties to the reference; that substantial damages were awarded to H. and the now plaintiffs, and nominal damages to S:—Held, that, on the above facts, the defendant was entitled to a verdict on not guilty, and on the issue raised on the plea to the new assignment.*

*Case.* The declaration stated that the defendant at the time of the committing, &c. was possessed of and entitled to a certain coal mine, lying and being under certain land in the county of Lancaster, and contiguous and next adjoining to a certain coal mine in the said county, formerly in the possession and occupation of one James Starky, but at the time of the committing, &c., and now, in the possession and occupation of the plaintiffs under a demise heretofore to them thereof made by the said James Starky; and that while the said last-mentioned coal mine was in the possession and occupation of the said James Starky, to wit, on the 31st day of December, A.D. 1838, the defendant broke and entered the said last-mentioned coal mine, and dug out of the same divers large quantities of coal, to wit, &c., and took and carried away the same, and thereby then made and caused a large, wide and extensive aperture and excavation into the said last-mentioned coal mine from the said coal mine of the defendant, and although the

defendant after the said plaintiffs became possessed of the said coal mine under a demise to them thereof made by the said James Starky, to wit, on the 1st of August, A.D. 1841, was requested by the plaintiffs to fill and stop up the said aperture and excavation so made by the defendant as aforesaid; yet the defendant, well knowing the premises, but contriving, &c., to wit, on the 8th of August, A.D. 1841, and on divers other days &c., and while the said coal mine was in the possession and occupation of the plaintiffs as aforesaid, wrongfully and injuriously kept and continued and caused to be kept and continued for a long and unreasonable time, to wit, thence hitherto, the said aperture and excavation open and unfilled up, and during all the time aforesaid, neglected and refused and still neglects and refuses to fill and close up the same; whereby and by reason of the continuing and keeping by the defendant the said aperture and excavation so open and unfilled up as aforesaid, divers large quantities of water, which had gathered and collected, and were then standing in the said coal mine of the defendant next immediately adjoining to the said coal mine in the possession and occupation of the plaintiffs afterwards, and after the plaintiffs became possessed of the said last-mentioned coal mine, to wit, on &c., burst through and then ran and flowed from and out of the said coal mine of the defendant, through the said aperture and excavation in, upon, into and over the said coal mine then in the possession and occupation of the plaintiffs, and inundated and greatly damaged and injured the same, and the said large quantities of water have thence hitherto run and flowed, and still continue to run and flow from and out of the said coal mine of the defendant through the said aperture and excavation in, upon, into and over the said coal mine in the possession and occupation of the plaintiffs as aforesaid; whereby and by reason of the said large quantities of water inundating the said coal mine of the plaintiffs, and still continuing to run and flow in, upon and over the same, the plaintiffs and their servants and labourers have been hindered and prevented from working their said mine with profit and advantage, and from getting, cutting and digging the said coal from and out of the

said coal mine of the plaintiffs, and the plaintiffs were forced to incur, lay out and expend divers large sums of money amounting, to wit, &c., in and about the raising and pumping the said large quantities of water from and out of their said mine, and in otherwise putting and placing their said mine in a fit and proper state and condition for the plaintiffs, their servants and labourers, to enter into and upon the said mine, to work the same, and dig, get, cut and take coal therefrom, &c.

Pleas—First, not guilty. Second, that the causes of action did not accrue to the plaintiffs at any time within six years before the commencement of the suit. Third, that the coal mine was not at the time of the committing, &c. in the possession or occupation of the plaintiffs, *modo et formâ*. Fourth, that the defendant was not requested by the plaintiffs to fill and stop up the aperture so alleged to have been made by the defendant as aforesaid, *modo et formâ*. Fifth, that heretofore, to wit, on the 16th of February, A.D. 1841, one Hugh Hornby (clerk) impleaded the defendant in the Court of Exchequer in an action of trespass on the case, and therein declared that before and at the time of the committing of the grievance hereinafter mentioned, one James Starky held and enjoyed a certain close or piece of land called the Holmes, in the county of Lancaster, with the appurtenances, and a certain other close or piece of land, parcel of the bed of the river Roach, and covered with water of the said river, in the county aforesaid, as tenant to the said Hugh Hornby, the reversion thereof in his demesne as of fee expectant on the determination of the tenancy of the said James Starky, then belonging to and vesting in the said Hugh Hornby, and that the defendant did, whilst the said James Starky held and enjoyed the said closes as tenant thereof as aforesaid, and whilst the said reversion thereof belonged to and was vested in the said Hugh Hornby, to wit, on the 1st day of January, A.D. 1840, and on divers other days, &c., wrongfully and unjustly, and without the leave and licence of, and against the will of the said Hugh Hornby, break and enter into the said closes or pieces of land, and then made divers, to wit, 100 holes and 100 excavations in the strata and mines by and in the said closes under the

surface thereof, and then dug and excavated divers, to wit, 1,000 tons of coal and 1,000 cart-loads of earth and soil from and out of the said closes in, under and below the surface thereof, and then carried away the same, and thereby caused divers, to wit, two acres of the roofs, and earth and soil, and coal and land of the said two closes immediately above, about and around the said holes and excavations to fall in, upon, about and in the said closes, and then and thereby choked up, damaged and spoiled divers, to wit, 5,000,000 tons of coal, and 50,000,000 tons of earth and soil of and in the said closes, &c., and thereby caused divers drains and watercourses and quantities of water to empty themselves, run, escape and flow unto and into the said two closes under and below the surface, flooding and injuring and spoiling the coal strata, earth and soil of the said two closes in, under and beneath the surface thereof, and thereby also then injured the said closes, and greatly thereby also then weakened and undermined and rendered insecure the surface of the said closes, and permanently injured the reversionary estate and interest of the said Hugh Hornby of and in the said two closes, and the mines, coal, strata, and soil thereof, by reason of which premises the reversionary estate of the said Hugh Hornby was greatly and permanently lessened in value; whereupon the said defendant afterwards, to wit, on &c., pleaded that he, the said defendant, was not guilty of the said grievances, or any or either of them, and divers other pleas in this behalf, and issues were thereupon joined upon the said pleas between the said Hugh Hornby (clerk) and the said defendant, and such proceedings were thereupon had, that afterwards, to wit, on &c., at the assizes holden at Liverpool, before &c., the said issues came on to be tried in due course of law by a jury of the county of Lancaster, duly summoned &c., between the said Hugh Hornby (clerk) and the said defendant, and thereupon by a rule or order then and there made at the assizes so holden as aforesaid, with the consent of the said Hugh Hornby, and the said defendant, their counsel and attorneys, and of the said James Starky, who thereby consented to become a party to the said rule or order, it was ordered by the Court at the said assizes, that the said

jury should find a verdict for the said Hugh Hornby, damages 10,000*l.*, costs 40*s.*, subject to be reduced or vacated, and instead thereof a verdict for the defendant, or a nonsuit to be entered according to the award thereafter mentioned; and that the said cause and also all matters in difference between the said Hugh Hornby and the said defendant, and between the said James Starky and the said defendant, should be referred to the award, order, arbitration, final end and determination of one W. A. H., barrister-at-law; and it was also ordered by and with such consent as aforesaid, that the persons composing a joint partnership or mining company called the Heywood Colliery Company, or the Captain Fold Colliery, might if they should think fit, and should notify their desire and intention by writing under their hands, or under the hand of the attorney, to the said arbitrator, before he entered upon the hearing of the matters hereby referred to him, become parties to the said rule or order as to any alleged injury to them, or any of them, by any of the matters in the declaration in the said cause alleged; and that the said persons composing the said joint partnership or mining company, called the Heywood Colliery Company, or Captain Fold Company, who are the now plaintiffs in this suit, did, before the said arbitrator entered upon the hearing of the matters referred to him as aforesaid, to wit, on &c., certify their desire and intention, by writing, under the hand of their attorney, to become parties to the said rule or order, as to any alleged injury to them, or any of them, by any of the matters in the declaration in the said cause alleged, and that the said W. A. H. did, by virtue of the said order or rule of reference, take upon himself the burthen of the said arbitration, and did, on &c., duly make and publish his award, in writing, under his hand, of and concerning the matters so to him referred as aforesaid, and did thereby award, order, and determine that the said verdict for the said Hugh Hornby should stand, but that the damages should be reduced to the sum of 436*l.* 19*s.* 3*d.*; and the said W. A. H. did further award, order, and adjudge that the said James Starky had sustained damages by the matters in the said declaration alleged, and did assess such damages at the amount of 1*s.*;

and the said W. A. H. did further award, order, and determine that the said persons composing the said joint partnership or mining company, called the Heywood Colliery Company, and which said persons are the plaintiffs in this suit, had suffered damages in respect of certain injuries to them by the matters in the said declaration in the said cause alleged, and did assess such damage to the amount of 244*l.* 8*s.* ; and the said W. A. H. did further award that the last-mentioned sum of 244*l.* 8*s.*, and the said sum of 1*s.*, should be paid by the said defendant to the said James Starky and the said persons composing the said joint partnership, and who are the plaintiffs in this suit, or their attorneys respectively in that behalf, on or before the 7th day of March then next ensuing, at the office of, &c. Averment, that the defendant did duly pay the said respective sums of 436*l.* 19*s.* 3*d.* and 1*s.*, and 244*l.* 8*s.* to the said Hugh Hornby, James Starky, and the said persons composing the said joint partnership or mining company, called the Heywood Colliery Company and now plaintiffs in this suit respectively, who then respectively accepted and received the respective sums of money so paid after the making of the said award, to wit, on the 7th day of March next ensuing the said award, that is to say, A.D. 1842, and that the said James Starky, in the declaration of the now plaintiffs named and mentioned, and the said James Starky, in the said declaration in the said action of the said Hugh Hornby, and also in the said rule or order of reference and the said award named or mentioned, and to whom the said sum of 1*s.* was so paid as aforesaid, are and were one and the same person, and not other or different persons, and that the said persons composing the said joint partnership or mining company, called the Heywood Colliery Company, were and are the plaintiffs in this suit, and not other or different persons, and that the said coal mine in the said declaration of the now plaintiffs was and is part and parcel of the said two closes or pieces of land in the said declaration in the said action of the said Hugh Hornby above mentioned, and of the coal, strata, earth, and soil of the said two closes so flooded, injured, and spoiled, as therein mentioned, and that the said breaking and entering the said coal mine in the said de-

claration and digging out of the same the said quantities of coal therein mentioned, and taking and carrying away the same, and making and causing the said aperture and excavation into the said last-mentioned coal mine, from the said coal mine of the defendant, were and are part and parcel of the grievances in the said declaration in the said action of the said Hugh Hornby and in the said award of the said W. A. H. mentioned, and in respect whereof such damages were awarded as aforesaid to the said Hugh Hornby, James Starky, and the said persons composing the said company and the now plaintiffs respectively, and were so awarded and paid as aforesaid, in respect of such damages as aforesaid, and all consequential damages to arise or happen in consequence thereof to the said Hugh Hornby, James Starky, and the said company and now plaintiffs respectively, or any persons thereafter claiming any interest under them, or any of them respectively. Verification.

Replication to the third plea, that the said causes of action, &c. did accrue to the said plaintiffs within six years, &c. *modo et formá.*

New assignment to the fifth plea, that the plaintiffs commenced their said action, and declared as aforesaid, not for the grievances in that plea attempted to be justified, but for that the defendant, after the commencement of the said action at the suit of the said Hugh Hornby, and after the making of the said award, to wit, on &c., and from the making of the said award thence hitherto *kept and continued the said aperture* and excavation so made by the defendant into the said coal mine of the plaintiffs, below the surface of the earth, *open and unfilled up and unclosed*, and after the making of the said award, and thence hitherto wrongfully suffered and permitted the said large quantities of water, which had gathered and collected, and were then standing in the said coal mine of the defendant, as in the declaration mentioned, to run and flow through the said aperture and excavation so made by the defendant as aforesaid, in, upon, into, and over the said coal mine of the plaintiffs, and to flood and inundate the same, and which, but for the making of the said aperture and excavation by the defendant as aforesaid, and digging

out and carrying away the said quantities of coal therefrom, and keeping and continuing the same by the defendant, thence hitherto, open, unfilled up, and unclosed, would not have so run and flowed as aforesaid, and flooded and inundated the said coal mine of the plaintiffs, and that by reason of the said premises, and of the defendant neglecting to divert or otherwise drain off and dispose of the said large quantities of water which had so collected and accumulated in his said coal mine as aforesaid, so as to prevent the same from flowing through the said aperture and excavation so made by the defendant as aforesaid, and thus flooding and inundating the said coal mine of the plaintiffs, the said large quantities of water from the time of the making of the said award in the said last plea mentioned, and thence hitherto continued to run and flow, and at the time of the commencement of this suit still ran and flowed, and still do run and flow from and out of the said coal mine of the defendant in, upon, into, and over the said coal mine in the possession and occupation of the plaintiffs as aforesaid, in the manner and form as in the declaration alleged, being other and different grievances than those in the said last plea of the defendant mentioned, &c.

To the new assignment the defendant pleaded—First, not guilty. Secondly, that the said Hugh Hornby impleaded the defendant in such action as in the said last plea of the defendant to the said declaration mentioned, and that such several proceedings were had therein as in that plea mentioned, and that the said cause, and all matters in difference between the said H. Hornby and the said defendant, and between the said J. Starky and the said defendant, were so referred as in that plea mentioned by such rule or order as in that plea mentioned, and that such persons became parties to the said rule or order, and that such award was made, and that such damages were thereby awarded, and the damages so awarded were respectively paid by the defendant to the said respective parties, to whom the same were respectively so awarded as aforesaid, as in that plea mentioned, and the said persons, to whom the same were respectively paid, were respectively such persons as in that plea in that behalf alleged, and that the said damages were so awarded and so paid

as aforesaid for and in respect of the matters in the declaration in the said action at the suit of the said H. Hornby alleged, and the injuries to the said persons in the said award mentioned by the matters in the said declaration in the said action at the suit of the said H. Hornby alleged, and for and in respect of all consequential damages thereafter to arise or happen, by reason of any of the matters or injuries in the said declaration in that cause alleged, to any of the said parties to the said reference, other than the said defendant, and all persons thereafter claiming any interest under them, or any of them respectively, and that though true it is that the grievances above newly assigned were grievances arising or happening after the commencement of the said action, at the suit of the said H. Hornby, and after the making of the said award, yet that the said grievances so newly assigned, and each and every of them, are merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration in the said cause at the suit of the said H. Hornby alleged, and the matters in difference and injuries so referred as aforesaid, and in respect of which such damages were so awarded and paid as aforesaid. Verification.

Replication, that the said award in the said last plea mentioned and referred to, was and is in the words following, that is to say, &c.—[the replication here set out the award *verbatim*, which was the same in substance as set out in the fifth plea,]—without this, that the said grievances so above newly assigned were merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration in the said cause, at the suit of the said H. Hornby, alleged, and the matters in difference and injuries so referred as aforesaid, or any or either of them, or any part, or in respect of which such damages were so awarded and paid as aforesaid, in manner and form, &c.

At the trial, before Wightman, J., at the Spring Assizes for Liverpool, 1845, the jury found the following special verdict.—That the plaintiffs were so owners of the colliery called Captain Fold Colliery, from 1830 to the time of the commencement of this suit; that by indenture made the



1st day of January 1839, between James Starky of the one part, and the plaintiffs of the other part, the said J. Starky granted, demised, leased, and set out to the plaintiffs all and every the mines, veins, and beds of coal and cannel, lying within or under all the tenement and estate and the demised lands of the said J. Starky, called the Heywood Hall estate in the township of Heap, in the parish of Bury, and in the county of Lancaster, for ninety-nine years; that the Heywood Hall estate comprised the lands from the west end or termination of a tunnel at Captain Fold, north-west to the defendant's colliery, comprising, amongst other things, the water-level from the said tunnel; that before the making of the said lease to the plaintiffs by J. Starky, the defendant had, by his servants, trespassed into that part of the Heywood Hall estate leased to the plaintiffs, which adjoined the defendant's mine, and got the coal out of the Heywood Hall estate, and, in getting that coal, had made an aperture and excavation into the coal of the Heywood Hall estate, at the north-westerly end of the water-level, which was so leased by the said J. Starky to the plaintiffs; that, afterwards and before the year 1839, the roof of the said excavation made by the defendant into the Heywood Hall coal, fell in by reason of his having got the coal and removed the pillars there, and the interstice became filled with water; that afterwards, in 1840, the plaintiffs drove a level from the said tunnel in and along the Heywood Hall estate coal, in a direction towards the defendant's mine, and until they came to a point at a distance, at from six to ten yards short of, and within their own boundary, when the waters which had collected in the defendant's mine flowed through the excavation and aperture at this point which had been made in the Heywood Hall estate as aforesaid; and that the defendant has not hitherto stopped or filled up the aperture, or done anything to prevent the flowing of the water from his mine through and into the said aperture and excavation made by him in the Heywood Hall estate; that neither the plaintiffs, nor the said J. Starky, nor the said H. Hornby (clerk), had any knowledge of the trespass, so as aforesaid committed by the said defendant, or of the aperture and excavation so made as aforesaid, or of the said

roof having so fallen in, and the interstice having so become filled with water, until the plaintiffs, in driving their said level, met the excavated workings of the defendant at the above-mentioned point; that the defendant had not pumped any water out of his mine adjoining the Heywood Hall estate since 1840, and has ceased to work his own mine since 1842; that the plaintiffs' and the defendant's mines are on the same bed of coal, the defendant's on the rise, and the plaintiffs' on the dip, and that it is the custom in working coal mines, for the owner of the mine or bed on the rise to work up to the boundary of his coal on the dip, and for the owner of the mine or bed on the dip to protect his own mine from the influx of matter from the mine or bed on the rise, by leaving a sufficient barrier of coal on his own side of the boundary on the rise, and that the said distance of from six to ten yards left by the plaintiffs, beyond the end of their water-level aforesaid, would have been a sufficient barrier for the purpose aforesaid, if the defendant had not, by his said servants, made the aperture and excavation aforesaid; that the water, after the plaintiffs so drove the said water-level, continued to flow from the defendant's colliery into the said water-level, at the point above mentioned, through the said aperture and excavation, and thence run along the water-level to the said tunnel, and flooded the coal at Captain Fold Colliery, which said continued flowing of the water through the said aperture and excavation so made by the defendants are the grievances complained of in this action; that, in consequence thereof, the plaintiffs, in order to win and get the said coal of the Heywood Hall estate have ever since, up to the time of the commencement of this action, been obliged to pump out and discharge, and have pumped out and discharged, the said water so flooding the coal at Captain Fold Colliery along the said tunnel, and thereby have incurred considerable expenses in pumping the water out of the said last-mentioned colliery beyond what they heretofore had incurred, and which said expenses are sought to be recovered in this action; that, on the 16th day of February, A. D. 1841, the said H. Hornby (clerk), in the said pleadings named, brought his action set forth in the fifth plea of the defendant, and declared therein, and the defendant

pleaded thereto, and such proceedings were had thereupon as in the fifth plea to the within declaration is mentioned; that before and at the time of the committing &c., the said H. Hornby was so seized of the closes in that declaration mentioned, and the same J. Starky was such tenant thereof, the said H. Hornby being mortgagee, and the said J. Starky his mortgagor in possession thereof; that the said closes respectively formed part and parcel of the said estate, called Heywood Hall estate, and that the plaintiffs' coal mine, mentioned in the within declaration, is underneath the surface of the closes mentioned in the declaration in the action mentioned by the said H. Hornby, and parcel of the same, and of the coal strata, and that such rule or order of reference as in the said fifth plea mentioned, was made as therein mentioned, and that such persons became parties to the said rule or order of reference, and that such award was made as in the pleadings in this suit mentioned, and that the damages given by such award were so paid by the defendant in pursuance of the said award to the said respective parties to whom the same were awarded, as in the fifth plea mentioned; that the coal in the declaration secondly-mentioned was, at the times of the committing, &c., to wit, from the 8th day of August, A.D. 1841, until the commencement of this suit, in the possession and occupation of the plaintiffs as within alleged by them; and that whether or not upon the whole matter aforesaid, by the jurors aforesaid, the defendant is guilty of the said grievances above laid to his charge as in the declaration and new assignment in this cause specified, and whether or not, upon the whole matter aforesaid, the said causes of action in the declaration in this suit mentioned or any of them accrued to the plaintiffs within six years next before the commencement of this suit, the said jurors are ignorant; and whether the said grievances, so newly assigned, were or were not merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration, at the suit of the said H. Hornby, and the matters in difference, and injury so referred as aforesaid, or in respect of which such damages were so awarded and paid as aforesaid, the jurors, &c. say that they are ignorant; and therefore they pray the

advice, &c. And if upon the whole matter it should seem to the Court that the said defendant was guilty of the said grievances, or any part thereof, then the jurors aforesaid say that the defendant was guilty of the several grievances aforesaid; and if it should seem to the said Court that the said grievances or any of them did accrue to the plaintiffs within six years next before the commencement of this suit, then they, the jurors, &c., say that they did so accrue within six years; and if upon the whole matter it should seem to the said Court that the said grievances so newly assigned were not merely and only consequential damages, then the jurors, &c. say that they were not merely and only consequential damages in the several cases aforesaid; that the jury assess the damages of the plaintiffs, by reason of the grievances newly assigned as aforesaid, at 820*l.* above their costs and charges in this suit, and for those costs and charges at 40*s.* (1)

(1) The plaintiffs' points were: that the grievances were not merely and only consequential damages happening to the plaintiffs by reason of the grievances complained of by H. Hornby, and the matters so referred to Mr. Hulton, but were continuing grievances for which the arbitrator had not the power, and has made to them no compensation. Because the cause in Hornby and Dearden, and all matters in difference between Hornby the mortgagee and Starky the mortgagor were referred to and satisfied by the arbitrator's award, but only any injury to the plaintiffs (the lessees of the mines), by any of the matters alleged in the declaration in Hornby's suit were referred to Mr. Hulton, and by his award their injury, up to the time of the commencement of Hornby's suit, was only satisfied and paid to them, and that the further injury sustained by them to the extent of 820*l.* since the commencement of Hornby's suit is a continuation of the said grievances sustained by them, by the continuing flows of water from the defendant's mine through the excavations made by the defendant in the Heywood Hall estate, and so on through the aperture, spreading over the coal bed of the plaintiffs, has not been considered or compensated by the arbitrator, and that the plaintiffs, for the entire injury sustained by them, have been paid for part, up to the commencement of Hornby's suit, by Hulton's award, and now claim payment of the residue, 820*l.* in the present suit.

The defendant's points were: that the grievance stated in the declaration is a mere nuisance, viz. the not filling up an aperture and excavation formerly made by the defendant from his coal mine into a coal mine, then J. Starky's, now the plaintiffs'. That there was no legal duty on him to fill up such aperture and excavation. That the custom of mining, as found by the jury, shows the defendant's right to work his mine to the extremity of his own

This case was argued (April 28,) by—

*Hoggins*, for the plaintiffs.—The plaintiffs are entitled to recover either on not guilty or on the new assignment. They could not foresee the damages which have

boundary, and therefore that he was under no legal obligation to erect a barrier on his own side of the boundary line between his mine and the mine now of the plaintiffs. That the accidental trespass by the defendant's servants in the coal strata of the adjoining Heywood Hall estate, afterwards leased to and now in the possession of the plaintiffs, did not create a legal obligation on the defendant's part to construct a barrier in the coal mine of the Heywood Hall estate (now the plaintiffs'), against the influx of water from the defendant's mine; but that the only consequence of that trespass was to give rights of action as well to the then occupier as to the reversionary owners of that estate respectively for such trespass and its consequences, in which actions full damages might be recovered for the diminished value of such estate, present and reversionary, comprehending the flooding of the coal, and the consequent future expense of working it. That the right of action for such trespasses, or any damage to be thereafter sustained from it, could not be assigned or transferred to the plaintiffs, who acquired their title after the trespass was completed. That the special verdict distinctly shews that the grievances complained of are the mere consequences of the original trespass, no wrongful act having been committed by the defendant or his servants since the plaintiffs acquired title and possession. That if in any case a duty on the part of a party trespassing specifically to reinstate property injured by the trespass could be implied, the jury should have found, as a fact, that such reinstatement was in this case practicable. That, on the contrary, it is obvious that such reinstatement was impossible, after the falling in of the roof, which occurred before the trespass was discovered, and before the plaintiffs acquired any title or interest. That any such duty, if existing, would be conditional upon the plaintiffs giving a licence to enter the plaintiffs' mine in order to perform it, and that such licence is not found as fact, nor any request from which it could be implied, though a request is alleged and traversed. That the former recovery by Hornby, the reversionary owner of the mine and coal strata (now the plaintiffs'), and Starky his tenant, of damages for the defendant's trespass, and payment of such damages as stated in the fifth plea to the declaration, and the further pleadings thereon, upon action brought, with reference to arbitration, after full discovery of the trespass, and of its irreparable nature, and of the consequent permanent injury to and diminished value of the coal strata (now the plaintiffs'), in the Heywood Hall estate (specifically complained of in Hornby's declaration) is a bar to the present action of the plaintiffs, who only derive title from Starky and Hornby, or one of them. That, at all events, the plaintiffs are barred by the recovery and payment of damages to themselves, as parties to that reference, which specifically comprehended any alleged injury to them from any

arisen in consequence of the wrongful act which was the ground of the former action, and they could not have been estimated by the jury—*Gillon v. Boddington* (2), *Roberts v. Read* (3), *Rosewell v. Prior* (4), *Firmstone v. Wheeley* (5). Besides, the leaving the aperture open is a continuing grievance—*Holmes v. Wilson* (6), *Hudson v. Nicholson* (7). The defendant was bound to prevent the continuance of the injury—*Thompson v. Gibson* (8). The former recovery in case, by the reversioner, was for a present injury. He could not have sued in trespass—the mine being in the possession of his tenant; but the continuance is a positive grievance to the present owners (the plaintiffs), and the case falls directly within the principle of *Rosewell v. Prior*, *Westbourne v. Mordant* (9), *Roll's Abr. 'Nuisance,' K, 2*.

*Martin* (Tomlinson was with him), for the defendant.—First, no action will lie upon the facts as found by the verdict. Secondly, the plaintiffs' cause of action has been disposed of and satisfied by what took place under the reference to the arbitrator mentioned in the pleadings. First, the keeping

of the matters alleged in Hornby's declaration, in which declaration the flooding of and permanent injury to, and permanently diminishing value of the coal strata (now the plaintiffs') were matters specifically alleged as damages consequent upon the defendant's trespass. That as the present plaintiffs could not have sued for the trespass itself, they could only be parties to the reference, for the purpose of receiving their proportion as leasees of the perpetual compensation to be made thereunder for the irreparable mischief and perpetual flooding of and consequent perpetually diminished value of the coal strata in question. That it is stated in the second plea to the new assignment, that the damages were awarded and paid to the plaintiffs in respect of all consequential damages thereafter to arise to the plaintiffs from the defendant's trespass; and this allegation is not traversed, but admitted by the replication, which only tenders the issue, that the grievances complained of are merely consequential damages from such trespass, whereas the special verdict distinctly shews that they are the mere consequences of such original trespass.

(2) Ry. & Moo. 161.

(3) 16 East, 215.

(4) 2 Salk. 459.

(5) 13 Law J. Rep. (N.S.) Exch. 361.

(6) 10 Ad. & El. 503.

(7) 5 Moo. & Wels. 437; a.c. 9 Law J. Rep. (N.S.) Exch. 71.

(8) 7 Ibid. 456; a. c. 10 Law J. Rep. (N.S.) Exch. 330.

(9) Cro. Eliz. 191.

and continuing is, at all events, an ambiguous act, and the verdict finds that the defendant had a right to work up to the boundary of the plaintiffs' land. If there was any cause of action or grievance at all arising from an act of the defendant, it was this, that he did not go upon the plaintiffs' land and stop up the aperture which had been previously made; but such an action is unprecedented. The defendant was not bound to commit a trespass, by going on the plaintiffs' land, to restore the portion where the excavation is, to its original state, damages having been already awarded for its being in that state. *Gillon v. Boddington*, which is relied on by the plaintiffs, does not support the right to bring two actions, one for the original grievance and the other for the consequential damage. In that case the same state of facts appears to have existed as in *Roberts v. Read*, and there the action was entirely for the consequential damage, the defendant never having entered on the plaintiffs' premises at all. In *Howell v. Young* (10), Holroyd, J. draws the distinction between a cause of action and a measure of damages, referring to *Fetter v. Beale* (11). In that case the declaration stated that the defendant beat the plaintiff's head against the ground, and that the plaintiff brought an action for the battery, and recovered; and that since such recovery, by reason of the same battery, a piece of his skull came out. The defendant pleaded in bar the recovery mentioned in the declaration, and the plaintiff demurred, and contended that the subsequent damage was a new matter, which could not be given in evidence in the first action, because it was not known, and compared it to the case of a nuisance where every new dropping is a new act; but Holt, C.J. said, "Every new dropping is a new nuisance; but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." That principle applies to the present case. In *Hodson v. Stallebrass* (12), Littledale, J. observes, "A fresh action could not be

brought unless there were both a new unlawful act and fresh damage." *Holmes v. Wilson* is distinguishable; for there the ground of action was the continuing buttresses formerly erected by the defendants, and as they might have removed them it was a continuous act. *Hudson v. Nicholson* is also distinguishable for the same reason—1 *Roll. Abr.* 176, F, pl. 1, 2, *Hambleton v. Veere*, 2 *Wms. Saund.* 169. The principle on which actions on the case for consequential damages are brought does not apply to land.

[PATTESON, J.—You would put it as if an action having been brought for breaking the plaintiff's window, a fresh action was afterwards brought because the rain came in.]

That illustration will well apply; and so an action will lie for erecting a wall on the plaintiff's land, but there can be no new action for not going on his land to remove the wall. In *Holmes v. Wilson*, Littledale, J. says, "If the defendant throws a heap of stones on the plaintiff's close, and there leaves them, will the trespass lie from day to day till they are removed?" The defendant, by entering the plaintiff's land to endeavour to prevent future mischief, would be a trespasser—*Taylor v. Stendall* (13).

The declaration also states, that the defendant was requested to enter the plaintiff's land, and stop the aperture. That allegation is expressly traversed; and it was not proved at the trial, nor is any request found by the verdict.

*Hoggins*, in reply.—The plaintiffs complain of a new and distinct grievance since the award of the damages, viz., the collecting by the defendant of a quantity of water, and allowing it to flow and come on the plaintiffs' land through the aperture, the making of which was the ground of the former action.

[PATTESON, J.—How does that appear?]

By the new assignment.

[PATTESON, J.—Your new assignment cannot be taken to enlarge or go beyond the cause of action stated in the declaration.]

If the new assignment states a grievance not comprehended in the declaration, the

(10) 5 B. & C. 259; s. c. 4 Law J. Rep. K.B. 160.

(11) 1 Salk. 11.

(12) 11 Ad. & El. 301; s. c. 9 Law J. Rep. (n.s.) Q.B. 132.

(13) 7 Q.B. Rep. 634; s. c. 14 Law J. Rep. (n.s.) Q.B. 301.

defendant should have demurred; but he cannot object to the form of the new assignment in this stage. Lastly, the request alleged to go on the land is immaterial.

[ERLE, J.—But it has been traversed, as it would seem, for the express purpose of preventing the plaintiffs from relying on its being admitted.]

It is admitted in the plea of "not guilty," and that raises the principal question in the cause.

[WIGHTMAN, J.—If you admit the plaintiff has got all the damages he was entitled to on account of the aperture being made, he is in the same situation as a plaintiff who has recovered damages for a hedge being pulled down. Could such a person recover in an action for consequential damages on every occasion that cattle strayed into his field, by reason of its being pulled down? Suppose the plaintiffs had themselves laid out money in stopping up the aperture and in taking precautions against future mischief, could they or could Hornby have recovered the sums so laid out as damages in the former action?]

*Cur. adv. vult.*

LORD DENMAN, C.J. subsequently (June 7) delivered the judgment of the Court.—This was an action on the case for wrongfully keeping and continuing open an aperture made by the defendant from a mine belonging to him, into a mine which, at the time of making the aperture, belonged to James Starky, but which he afterwards demised to the plaintiffs, who were in the occupation of the mine before and at the time of the bringing of the action, by means whereof quantities of water continued to flow from the defendant's mine into the plaintiffs'. The defendant pleaded not guilty and other pleas; one of which was a special plea, stating in substance the bringing of a former action on the case by Hugh Hornby the owner of the plaintiffs' mine, James Starky being in possession as his tenant, against the defendant, for injury to his reversion, by breaking and entering his mine, and making the aperture in question, and thereby causing the water to flood the coal strata, and that the cause and all matters in difference between the said Hugh Hornby and the defendant, and between Starky and the defendant, were referred to an arbitrator,

with liberty for the present plaintiffs to be parties to the reference as to any injury to them by reason of any of the matters alleged in that suit, and that the plaintiffs did become parties to that reference; and that the arbitrator awarded separate sums to Hugh Hornby, James Starky, and the plaintiffs for the damage they had sustained; that those sums were paid, and that they were awarded and paid in respect of all consequential damages arising from the matters complained of in the action by Hugh Hornby.

To the special plea the plaintiffs new assigned that they brought their action for keeping and continuing the aperture open after the award. To this new assignment the defendant pleaded, admitting that the grievances complained of in the new assignment happened after the award, that they were only consequential damages arising from the matters alleged in Hugh Hornby's action, and in respect of which damages were awarded and paid as before stated. To this plea the plaintiffs replied, setting out the award, and traversing that the grievances newly assigned were merely consequential damages as alleged in the plea.

Upon the trial the jury found a special verdict, by which it appeared that before and in 1839 James Starky was mortgagor in possession, and Hugh Hornby mortgagee of that part of the plaintiffs' mine into which the aperture was made; that in that year Starky demised to the plaintiffs the premises in question; that before that demise, and whilst Starky was mortgagor in possession, the defendant trespassed upon the mine in Starky's possession, by breaking into it from his adjoining mine, and taking the boundary coal in Starky's mine to the extent of several yards; that in 1840 the plaintiffs proceeded to work the mine, under the demise from Starky, and when they got to within from six to ten yards of the boundary between their mine and the defendant's, they came to the excavation made by the defendant, and the water from his mine came in upon them, and continued to flow in upon them to the time of the plaintiffs bringing their action. It also appeared that the plaintiffs' and defendant's mines were on the same bed of coal, but that the defendant's workings were on the rise, and the plaintiffs' on the dip, and that it is the

custom for the miners on the rise to work to their boundary, and for the miners on the dip to leave a barrier of from six to ten yards in their mine to protect them against the water from the mine upon the rise.

The facts of the case are fully stated upon the special verdict; but this short reference to them and to the pleadings is sufficient for the purpose of our judgment. The question is, whether upon the pleadings and the facts found by the jury, the verdict upon not guilty, and the replication to the plea to the new assignment, should be found for the plaintiffs or for the defendant, it being agreed that the issues upon the second and third pleas should be entered for the plaintiffs, and the issue upon the fourth plea for the defendant. We are of opinion, that the defendant is entitled to have the verdict entered for him upon not guilty, and upon the issue upon the replication to the plea to the new assignment.

The gist of the action as stated in the declaration is, "the keeping open and unfilled up an aperture and excavation made by the defendant into the plaintiffs' mine." By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier, and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiffs' side of the boundary, and within their mine. It is not, as in the case of *Holmes v. Wilson*, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiffs. Nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiffs, as in the case of *Thompson v. Gibson*. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiffs' land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiffs' land to fill up the excavation. Such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty. It was, however, contended, on the part of the plaintiffs, that, admitting this to be so, there

nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs, through the aperture he had made, and the case of *Firmstone v. Wheeley*, in the Exchequer, in Trinity term, 1844, reported in the 13th volume of the *Law Journal Reports*, was cited. The Court, however, in that case did not determine that there was any such duty or obligation; and if it had, that case would not be an authority applicable to the present, as the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon a breach of any such duty, if it exists, but upon the omissions to fill up the aperture made by them in the plaintiffs' mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of not guilty. The question that arises upon the new assignment is not very different from that which arises upon the plea of not guilty. The plaintiffs have already recovered damages against the defendant for making the aperture, and the omitting to enter the mine and fill up that aperture, in consequence of which the water continued to flow from the defendant's mine into the plaintiffs', affords no distinct ground of action, as for the continuance of a trespass or a nuisance. The flowing of the water and the damage thereby to the plaintiffs is merely consequential to the making the aperture, and for that the plaintiffs have already received compensation. The defendant, therefore, in our opinion is entitled to have the verdict entered for him upon the issue taken upon the replication to the plea to the new assignment.

*Judgment for the defendant accordingly.*

1848. }  
June 15. } *In re BOWDLER.*

*Habeas Corpus*—8 & 9 Vict. c. 127.—  
*Warrant of Imprisonment*—Gaol—Date.

*A party was committed under the 8 & 9 Vict. c. 127, by an order under the hand of a Judge of an inferior court, (being a barrister-at-law,) for the term of forty days, to the common gaol, where debtors under*

*judgment and in execution of the superior courts of justice may be confined within the county of Middlesex, in which he was then residing :—Held, that it was not necessary that the gaol in which he was imprisoned should be locally situate within the county of Middlesex, if it is the common gaol in which debtors resident within that county are confined.*

*Held, also, that the forty days would be calculated from the time when the party was taken into custody, and not from the date of the order.*

*Held, also, that the warrant need not be under seal.*

*Held, also, that the committal being in the absence of the party did not vitiate it.*

A writ of *habeas corpus* having issued to bring up the body of N. Bowdler, who was confined in Whitecross Street Prison, a return was made by the gaoler, stating that he received him on June 6, 1848, and detained him under the following warrant :

"In the court of Her Majesty's Palace at Westminster, an inferior court of record for the recovery of debts.

"At a court held the 2nd day of June, A.D. 1848, at the Court House, Westminster, within the jurisdiction of the Court.

"Whereas N. Bowdler at the time of the granting of the summons hereafter mentioned was and now is indebted to W. Y. Fell, in the sum of 8*l.* 9*s.* and no more, besides costs of suit, amounting to 5*l.* 14*s.* 2*d.*, by virtue of a judgment obtained in this court, for a cause of action within the jurisdiction thereof, on the 12th day of April, A.D. 1848, as appears to the Court here, by the record of the said judgment. And whereas the said W. Y. Fell did, on the 20th day of May in this present year, obtain a summons from this court in the form prescribed by an act for the better securing the payment of small debts, passed in the session of parliament held in the 8th and 9th years of the reign of Her present Majesty, and upon an application by him in writing, according to the form given by the said act; and the said N. Bowdler at the time of granting such summons, resided and was, and now resides and is, within the jurisdiction of this Court; by which summons the said N. Bowdler was required to appear before this Court at the court house aforesaid, this day. And

whereas the said N. Bowdler hath been duly served with the said summons within the jurisdiction of this Court, but he hath not attended as required by the said summons, and hath not alleged a sufficient excuse for not attending: Now I do therefore order that the said N. Bowdler shall be committed for the term of forty days to the common gaol wherein debtors under judgment and in execution of the superior courts of justice may be confined within the county of Middlesex, in which the said N. Bowdler is now residing. And I declare that I was a barrister-at-law and a Judge of this court at the time the said summons was applied for and from thence to the present time.

"William Brent Brent.

"To Henry Herrick, an officer of the said court, and to the keeper of the Debtors Prison (above mentioned) for the county of Middlesex."

The following indorsements were on the warrant :—

"Defendant is entitled to his discharge on payment of 1*l.* 3*s.* 2*d.*, and all subsequent costs.

"Taken in custody June 6, 1848, and lodged in the Debtors Prison for the county of Middlesex, the same day. Defendant a publican residing at Poplar.

"H. Herrick."

*Pashley* now moved that the prisoner should be discharged on the above return.—The place of imprisonment is wrong. The 8 & 9 Vict. c. 127. s. 1. only authorizes a committal to a gaol *within* the county, which this is not, being locally situate in London, though it is to be used as a debtors prison for both London and Middlesex. There is nothing in the 52 Geo. 3. c. 209. establishing Whitecross Street Prison, by which it is to be taken to be in the county of Middlesex, as is the case in some instances—*e. g.* of York Castle, which is deemed to be situate in each of the three ridings. This is evidently a *casus omissus* in the act; but the Court cannot go beyond the express provisions of the statute, especially where a wider construction would abridge the liberty of the subject—*Brandling v. Barrington* (1), *The Queen v. Savage* (2), and

(1) 6 B. & C. 46; s. c. 5 Law J. Rep. K.B. 181.

(2) 3 Irish Law Rep. 480.

— v. — (3). *The Queen v. Ellis* (4) was a similar kind of omission. Secondly, the commitment is bad for not appearing to be made in the presence of Bowdler. The power of imprisonment given by this statute can be exercised only in case of some delinquency, not of mere poverty. In *Ex parte Kinning* (5), Patteson, J. dissents from the opinion expressed by Alderson, B., in *Ex parte Foulkes* (6), that this is a limited *ca. sa.*

[PATTESON, J.—I think the power is a restitution of the old arrest in execution.]

The provision that the party shall only be discharged on payment, by leave of the Judge, shews that this is to be a punishment, not a mere means of enforcing payment of the debt.

[PATTESON, J.—The Judge can have no discretion in keeping him a prisoner after he has paid the debt and costs.]

It is submitted that he has under this act—*Evans v. Rees* (7). Thirdly, the order should state the time from which the period of imprisonment is to be calculated. In *re Fletcher* (8) is an authority that this omission will vitiate the warrant. Patteson, J. there says, "The gaoler ought to be able to ascertain from the warrant how long he is to detain the prisoner; and how can he ascertain that, when the warrant has no date?" *Ex parte M'Gee* (9) is to the same effect; and *The King v. Eriswell* (10) shews that this Court must have power to bring a party before it. This was thought necessary in a case of *In re Collett* (11), before Parke, B.

Lastly, this warrant should be under seal. It must be made by a person filling a two-fold character, viz. a Judge of the inferior court and a barrister of a certain standing. *The King v. Austrey* (12), 1 *Hale's Pleas*

*of the Crown*, 557, *Paley on Convictions*, 230, and *In re Clark* (13), were referred to.

Corrie, contra, was not called upon to support the return.

LORD DENMAN, C.J.—None of these objections ought to prevail. As far as relates to the necessity of the warrant being under seal, it is enough to say, there is nothing in the statute which requires this. As to the prison to which the committal is made, it is the debtors prison for London and Middlesex; and I think Whitecross Street Prison is such a prison. Then, as to the date not appearing in the commitment, that did not appear in the case of *In re Fletcher*, and my Brother Patteson seemed to think it bad on that ground. He is now, however, of a different opinion, and that case must be considered as so far overruled. If the party could be taken up immediately, it might be an argument for inserting the date of the commitment, but that very often is impossible. It is a matter of evidence at what time he is taken into custody, and the period of imprisonment must be calculated from that time. Here there is a note or memorandum giving the time when he was taken into custody. It is said he may not know that, but he may and most probably does know it. In *The Canadian Prisoners' case* there were many facts which it might have been said the prisoners did not know.

PATTESON, J.—The statute 8 & 9 Vict. c. 127. s. 1. is followed by this warrant. Here there was a judgment in the Palace Court, and the debtor did not attend or allege a sufficient excuse, and therefore the Judge had power to order his committal. I do not take the words of that act to mean that the building must be within the county, but that it is to be the prison in which debtors were usually confined who were resident in that county. Here the debtor was resident within the county of Middlesex, and the gaol is not merely for London, but for London and Middlesex, and persons resident in Middlesex may be committed there. Therefore this is a proper place of custody. Then it is said it should be under seal, but nothing in the act requires that, but only that the Judge may order the

(13) 2 Q.B. Rep. 619; s. c. 11 Law J. Rep. (n.s.) Q.B. 75.

(3) 3 Irish Law Rep. 478.

(4) 6 Q.B. Rep. 501; s. c. 14 Law J. Rep. (n.s.) M.C. 1.

(5) 16 Law J. Rep. (n.s.) Q.B. 257.

(6) 15 Mees. & Wels. 612; s. c. 15 Law J. Rep. (n.s.) Exch. 300.

(7) 12 Ad. & El. 55; s. c. 9 Law J. Rep. (n.s.) M.C. 83.

(8) 1 Dowl. & L. P.C. 726; s. c. 13 Law J. Rep. (n.s.) M.C. 16.

(9) 6 Madd. 206.

(10) 3 Term Rep. 707.

(11) Not reported.

(12) 6 Man. & Selw. 319.



committal, and such an order is returned. The party is committed for forty days; and according to *Fletcher's case*, I thought the warrant bad for not specifying at what time the warrant was dated; but in that case, the warrant had been kept in the pocket of the party beyond the time within which it ought to have expired. I should think the forty days must be meant to be calculated from the time when he was in prison. I do not mean within the walls, but arrested. He must know the time when he was actually taken by the gaoler. Then it is said the party ought to be before the Court before he can be committed. Cases were cited of Justices issuing distress warrants; I do not know what the practice there is, whether the Justice may not immediately issue his warrant if he is satisfied there are no effects. This act seems to me to authorize, if the party does not come or allege an excuse, that he may be at once committed. That is not, properly speaking, a contempt, but a delinquency, as my Brother Maule says, in *In re Kinning*, and it is the same thing as if he had appeared and had alleged no excuse. Accordingly the order goes on to commit him for forty days. That imprisonment is no discharge of the debt; but he is at liberty to pay the debt, and may be discharged by leave of the Court. I cannot think this would authorize the Commissioner or Court, if there is a payment and it is indorsed on the order, not to discharge the prisoner. However, this order is indorsed that the party is to be discharged if he pays. Then I do not see what is wrong in the case. In *Ex parte Kinning*, looking at the order, certainly it ran in language forty days from the time of his being arrested. That may be better so, but in sense and reason this must mean from the time of his being taken.

ERLE, J.—I am also of the same opinion that the prisoner must be remanded, and that the objections have not been sustained. The prisoner is committed by order of a Judge under the 8 & 9 Vict. c. 127. s. 1, which provides [his Lordship read the section]. Now the order in question is an order of a Judge in court; and the first objection is, that it ought to have been under seal. At the time of moving for the rule *The Queen v. Clarke* was referred to, and looking at that case, and the authorities there cited, there is no ground for saying that the order of a

Court committing a person to prison ought to be under seal. There are several authorities that ordinary warrants must be so, and there are some statutes which expressly require them to be under the hands and seals of the Justices making them; but independently of such requirements, there does not appear to be any general principle requiring a seal. Then an objection was made that it did not appear from what period the forty days was to be counted; whether from the date of the order or from the time when the party was first taken under it. It is clear the intention was, that the party should lose his liberty for forty days, and if the officer was a long time in finding him, he was not to be benefited by that. If it be alleged that it would be more clear to state that the forty days are to run from the time when he was taken, it may be answered, that it would in many cases be equally impossible for the gaoler to know the precise time when he was arrested. With respect to the allegation that the commitment is void, because he ought to be committed to the gaol for debtors of the county of Middlesex, and that Whitecross Street Prison is within the ambit of the city of London, I think the meaning is, that the party should be committed to the gaol in which debtors resident within the county are confined, for the words are, "the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, &c., in which such debtor shall be resident, or to any other gaol or debtor's prison within the same county." No doubt a gaol within the county would be the strict meaning of these words, but I think it was not the meaning of the act; but that it is the gaol in which debtors are confined, in respect of debts within that county. This man was resident in Middlesex, and it was the duty of the Judge to commit him to that gaol. If it were necessary to say whether this prison is within Middlesex or not, looking at the act, particularly section 54, I think by relation it adopts all the incidents attaching to Middlesex prisoners in Newgate, and that it would be taken to be a Middlesex county gaol for the purposes of that act. The last point is as to the committal being in the absence of the party. It is quite clear that

a debtor who, shortly before the statute, would have been liable to be arrested is, under this act, to be summoned to attend before a Judge or Commissioner, and in default of appearance to be committed. I cannot help thinking the meaning of this is to let the creditor have a power to imprison his debtor, and so to get paid his debt; and this is confirmed by the provision as to the leave of the Judge being obtained before he is discharged, on paying the debt and costs.

*The prisoner was remanded.*

1848. }  
May 2; } DAILS v. LLOYD AND ANOTHER.  
June 7. }

*Vendor and Purchaser—Broker—Principal—Railway Shares—Premium—Deposit—Account rendered—Set-off—Estoppel.*

*The defendants, who were share-brokers at Liverpool, on the 30th of August 1845, bought for the plaintiff, who was also a share-broker, thirty-eight T. and D. railway shares, at the price, according to the advice note, of 2l. 8s. 6d. per share. The scrip had not then issued, and the 2l. 8s. 6d. was therefore premium. The deposit of 1l. 7s. 6d. per share first appeared in the printed share lists (which were sent daily to the plaintiff) on the 2nd of September, and the amount of such deposits (41l. 5s.) was paid by the defendants to the persons from whom they bought the shares. In an account sent by the defendants to the plaintiff on the 19th of September, they omitted to charge the sum paid for the deposits, and the plaintiff, who purchased for other persons, as broker, (though he dealt with the defendants as a principal,) only charged 2l. 8s. 6d. per share, and had settled accounts with such other persons on that footing before any claim was made for the deposits.*

*The defendants, also, on the 18th of September, bought for the plaintiff eighty S. S. railway shares, at the price, according to the advice notes, of 4l. 10s. per share. The 4l. 10s. did not include the deposit of 2l. 10s. per share, which first appeared in the share lists about the 26th of September; and in settling with the vendors the defendants paid them the deposits, amounting to 200l. in addition to the 4l. 10s. per share. But on the*

*26th of September the shares were sold by the defendants for the plaintiff at 7l. per share, which sum included the deposits, and the plaintiff was credited with the full amount. In an account furnished to the plaintiff by the defendants on the 2nd of October, and also in subsequent accounts, the plaintiff was only debited with the 4l. 10s. per share, and he only debited his principals with that amount, and settled with them on that footing.*

*On the 19th of November, the defendants, having received a letter from the plaintiff demanding a balance of 605l. 14s. 10d., examined their books, and discovered the mistake with regard to the deposits, and immediately acquainted the plaintiff with it:—Held, that they were entitled to set off the 200l., and also the 41l. 5s.*

Assumpsit for the price of railway shares, for money paid, had and received, and on an account stated.

Pleas—First, non assumpsit; second, payment; third, set-off for work and labour, for the price of railway shares and scrip, money lent, paid, had and received, and on an account stated.

At the trial, before Alderson, B., at the York Spring Assizes, 1847, a verdict was taken for the plaintiff for 3,000l., subject to a special case, to be settled by a barrister, to whom it was referred, by order of Nisi Prius, to state the facts, with power to examine the parties.

The case stated the pleadings.

The particulars of demand contained various items for money and shares, and amongst others,

1845. Sept. 26.	£.	s.	d.	£.	s.	d.
To eighty South Staffords .....	560	0	0			
Less commission.	10	0	0	550	0	0
Oct. 7. Twenty-five Tean and Doves..	84	7	6			
Less commission.	1	17	6	82	10	0

and claiming a balance in the plaintiff's favour, after allowing various matters of set-off, of 605l. 14s. 10d.

The particulars of set-off contained, amongst other items, the following:—

1845. Aug. 30.	£.	s.	d.
Thirty Tean and Doves, at 2l. 8s. 6d. .	72	13	0
Sept. 19.			
Eighty South Staffords, 4l. 10s. ....	360	0	0

The defendants paid deposits on the

eighty South Staffords, purchased by them for the plaintiff on the 19th of September, amounting to 200*l.*; and the defendants also paid a deposit on the thirty Tean and Doves bought by them on the 30th of August, but never charged the plaintiff with the deposits so paid by them of 1*l.* 3*s.* 8*d.* per share, amounting to 41*l.*-5*s.*

The plaintiff was a share-broker at Goole, in Yorkshire; the defendants were share-brokers at Liverpool.

Various dealings in railway shares had taken place between the plaintiff and the defendants; and though acting as brokers, they were responsible to each other as principals, for the due performance of the contract entered into.

First, with respect to the Tean and Dove shares. On the 29th of August the plaintiff instructed the defendants to buy for him, on the following day, at the least price they could, thirty Tean and Dove shares. The defendants bought thirty shares on the following day of Messrs. Schroeder & Ashlin, at 2*l.* 8*s.* 6*d.* per share, and sent the advice note to the plaintiff, as follows:—

Bought for Mr. J. Dails, Goole.  
 Thirty Tean and Dove Valley Rail-  
 way Shares, at 48*s.* 6*d.*..... 72 15 0  
 Commission 6*d.*..... 0 15 0  
 Aug. 30, 1845. L. & P.

For account day, 15th September.

The following is a copy of the sold note from Messrs. Schroeder & Ashlin to the defendant:—

To Messrs. Lloyd & Price.

August 30th, 1845.

We have this day sold to you thirty shares in the Tean and Dove Railway Company, at 2*l.* 8*s.* 6*d.* per share premium.

Schroeder & Ashlin.

On the 30th of August the scrip in the Tean and Dove Valley Railway had not issued. The price, 2*l.* 8*s.* 6*d.*, which the defendants contracted to pay Messrs. Schroeder & Ashlin did not include the deposit, the course of business being when the scrip had not issued and consequently the deposit was not paid, to buy and sell at a price per share without including the deposit; and if the scrip issued, and the deposit was paid previous to the account day, the deposit was added to the price. The Liverpool printed share lists would shew whether the price at any time included the deposit. The deposit (1*l.* 7*s.* 6*d.* per

share) was first entered in the share lists on the 2nd of September, the deposit having been paid on the 1st.

On the 19th of September the defendants rendered an account to the plaintiff, in which the latter was debited (August 30th) thirty Tean and Doves, 2*l.* 8*s.* 6*d.*—72*l.* 15*s.*, and the balance as appeared by that account was 231*l.* 13*s.* 9*d.* This account was accompanied by a letter from the defendants requesting a remittance.

In addition to the price of 2*l.* 8*s.* 6*d.* the defendants paid Messrs. Schroeder & Ashlin the deposit, 1*l.* 7*s.* 6*d.* per share. This deposit has never been charged in account to the plaintiff at all. In the other transactions in Tean and Doves, which appeared by the account to have taken place, and which were after the issuing of the scrip, the price included the deposit. The plaintiff, in purchasing the Tean and Doves, acted as broker for other persons, and he rendered them advice notes of the purchases made by the defendants for him, and he charged them the same price as was mentioned in the advice note of the defendants, and as was charged by the defendants to him; and the plaintiff did not charge his principals for the shares anything beyond the 2*l.* 8*s.* 6*d.* per share and his commission, and on the footing of that price settled by payment with his principals before the defendants made any claim on him for the deposit. The Liverpool share lists were daily sent by the defendants to the plaintiff during the period over which the account extended. The above balance of 231*l.* 13*s.* 9*d.* was carried forward into the subsequent accounts.

As to the South Staffords. On the 18th of September the plaintiff gave the defendants by letter the following order:—

Please buy as low as you can fifty South Staffords for me, and if not exceeding 5*l.* you can buy eighty.

The defendants acting on this order bought eighty shares, and sent the following advice note:—

Bought for Mr. John Dails, Goole,  
 Eighty South Stafford Railway  
 Shares at 4*l.* ..... £360 0 0  
 Commission, ditto 1*s.* 6*d.* .... 6 0 0  
 £366 0 0

For account day, Sept. 30th, E. E.  
 Liverpool, Sept. 19th.

Of these eighty shares the defendants bought fifty of Messrs. Forsyth & Hamilton, and thirty of Messrs. Neile, and the following are copies of the sold notes of the respective vendors:—

To Messrs. Lloyd & Price.

Sirs,—We have this day sold to you fifty shares in the South Staffordshire Railway at 4*l.* 10*s.* per share nett premium. Paid £ nil. Premium £4 10*s.*

Yours, &c.

Forsyth & Hamilton.

To Messrs. Lloyd & Price.

We have this day sold to you thirty shares in the South Staffordshire Railway at 4½ per share, namely, £ paid. Premium £4 10*s.* Yours, &c.

F. & J. Neile.

The scrip in the South Staffordshire shares began to be issued on the 18th of September 1845, at Walsall. During the first three days the issue was to the allottees at Walsall and the neighbourhood. The original deposit was 1*l.* 7*s.* 6*d.* per share, but in compliance with the standing orders of the House of Lords the deposit was, by a resolution of the provisional committee, passed on the 22nd of September 1845, increased to 2*l.* 10*s.*, the shares being 25*l.* shares. The first deposit of 1*l.* 7*s.* 6*d.* per share on the letters of allotment of the South Stafford shares, purchased by the defendants for the plaintiff, had been paid on the 14th of August 1845; and the second deposit on the 18th and 19th of September in that year. The price, 4*l.* 10*s.*, at which the defendants contracted to buy, did not include the deposit or any part thereof. The prices quoted in the Liverpool share list of the 19th of September were 4*l.* 10*s.* and 4*l.* 15*s.* In settling with the vendors for the shares, after the scrip had issued, the

defendants paid them 2*l.* 10*s.* in addition to the above sum of 4*l.* 10*s.* per share. On the 26th of September the defendants received instructions from the plaintiff to sell eighty South Staffords; and they sold them on that day, at 7*l.* per share, and sent the following advice note:—

Sold for John Dails, Goole,—

80 South Stafford Railway shares, at 7 <i>l.</i>	£560
Commission on ditto, 2 <i>s.</i>	10
	<u>£550</u>

For account day, October 15th, E.E.

Liverpool, September 26, 1845.

On the 2nd of October the defendants forwarded to the plaintiff an account of transactions between them up to the 30th of September. [This account was set out in the case, and in it the plaintiff was debited with the 360*l.* for the purchase of the South Staffords, and it shewed a balance of 141*l.* 2*s.* in the defendants' favour. That account contained the purchase only and not the sale of the eighty South Staffords (the sale being for a subsequent account) and the price charged was 4*l.* 10*s.* per share.] On the 13th of October the defendants forwarded to the plaintiff an account of transactions between them up to that date. [That account was also set out in the case. It commenced with debiting the plaintiff with the 141*l.* 2*s.*, the balance of the former account, and it credited him with the 560*l.*, in respect of the sale of the eighty South Staffords, and left a balance of 941*l.* in the plaintiff's favour. In that account the selling price (7*l.*) charged for the South Staffords included the deposit of 2*l.* 10*s.*] On the 31st of October the defendants forwarded the plaintiff the following account of transactions between them up to that date:—

John Dails, Esq., Goole, in account current with Lloyd & Price, Liverpool.

1845					
Oct. 17	Cash . . . . .	£855 7 8	Oct. 13	Balance of accounts rendered	£ 941 16 6
" 13	Commission of Goole and Doncaster . 2 <i>s.</i> 6 <i>d.</i>	5 0 0		40 Goole and Doncasters . 7 ½	305 0 0
	Balance . . . . .	386 8 10			<u>£1,246 16 6</u>
		<u>£1,246 16 6</u>			

October 27, Balance . 386 8 10

The plaintiff had not been charged in account at all with anything beyond the  
NEW SERIES, XVII.—Q.B.

4*l.* 10*s.* per share for the South Staffordshire shares. The plaintiff, in buying and  
2 K

selling the South Staffordshire shares, acted as broker for other parties; and he rendered advice notes to them, and settled by payment with them, upon the footing of the advice notes sent to him by the defendants, treating the purchase price charged in these notes as the full price of the shares. The settlement by payment was before the defendants made any claim upon the plaintiff in respect of the deposit upon the shares. The Liverpool share lists contained no entry in the column for money paid on account of South Staffordshires until the 26th of September, when the 2*l*. 10*s*. per share was entered for the first time as paid. The omission by the defendants to make any reference in the accounts before mentioned to the deposit paid by them on the Tean and Dove shares and on the South Staffordshires, in addition to the price, was occasioned by mistake. On the 18th of November the plaintiff addressed a letter to the defendants, stating the balance on the account current to be 605*l*. 14*s*. 10*d*., and requesting payment. On receipt of this letter, the defendants examined their books, and then first discovered their mistake with regard to the deposits; and, on the 19th, they addressed to the plaintiff the following letter:—

Liverpool, Nov. 19, 1845.

Mr. John Dails, Gools.

Dear Sir,—We are in the receipt of yours of yesterday, annexing a statement of your account, which is not complete: according to your statement we stand debtors for 605*l*. 14*s*. 10*d*.; but on September 19th we paid deposit on eighty South Staffordshires, amounting to 200*l*.; and in August 30th we purchased for you thirty Tean and Doves, at 2*l*. 8*s*. 6*d*. premium, but never charged you with the deposit of 1*l*. 3*s*. 8*d*. per share, amounting to 41*l*. 5*s*., making 241*l*. 5*s*.: which leaves a balance of 364*l*. 9*s*. 10*d*., according to our statement, which is correct. We inclose sundries, as at foot, for 364*l*. 9*s*. 10*d*., to square this account, &c. Yours, &c.

[The rest of the letter contained nothing material.]

On the 20th of November the plaintiff wrote to the defendants:—

Dear Sirs,—I have yours of yesterday's date, accompanying cash, &c., value together

364*l*. 9*s*., which amount is passed to your credit. The claim you make for South Staffords and Tean and Doves shall be laid before the parties concerned, two of whom are from home at present; but I really cannot allow you thus summarily to make the deductions from our present settlement for other transactions. I do therefore hope that you will see the justice of immediately remitting the balance of 241*l*. 5*s*. still remaining due to me, and waiting which, I am, &c. John Dails.

This was followed by a letter from the defendants to the plaintiff of the 21st of November, stating that the deposit paid was only what was paid when the shares were taken up; the purchase having been made by them prior to the scrip being issued, and the deposit consequently not being in the lists, and adding, "this your client will see on reference to the list, and will not hesitate to settle with you."

This was followed by a letter from the plaintiff, giving the names of the purchasers of the South Staffords and Tean and Doves, and making a demand of payment of the 241*l*. 5*s*.

The question for the opinion of the Court was, whether the defendants could avail themselves in this action in any form of the deposits on the Tean and Dove and South Staffordshire shares, amounting together to the sum of 241*l*., paid by them to the persons from whom they bought those shares, in addition to the price charged by them in their advice notes, and in the accounts sent to the plaintiff. If they could avail themselves of that sum, then the plaintiff had been fully paid his demand; and a verdict would be entered for the defendants on the second and third issues: if they could not avail themselves, then the verdict would be entered for the plaintiff on all the issues, for the sum of 241*l*. 5*s*.

This case was argued (May 2) by—

*Baines*, for the plaintiff.—A loss has been occasioned by the negligence of the defendants, and it would be most unfair that they should throw this loss on the plaintiff. No fraud is imputed to either party; but the plaintiff has settled with his principals on the footing of accounts rendered to him by the defendants: and if the defendants have

made payments in their own wrong, they must bear the loss—*Skyring v. Greenwood* (1), *Marriott v. Hampton* (2), *Bramston v. Robins* (3), *Shaw v. Dartnall* (4). The plaintiff has been misled by the accounts as well as the letters of the defendants, and he cannot be placed in the same position as at first—*Thomas v. Hawkes* (5), *Cox v. Prentice* (6), *Heane v. Rogers* (7), *Pickard v. Sears* (8), *Gregg v. Wells* (9).

*Cooling*, contra.—The facts are not very fully stated, but if they are to be understood as brokers would understand them, and as the parties, no doubt, therefore, understood them, the defendants are entitled to set off the 241*l.* 5*s.* First, with respect to the Tean and Doves. The price charged did not include the deposit. The use of the word "premium" does not strengthen the case against the defendants, as the parties dealt according to the custom and mode of dealing at Liverpool; and price which does not include deposit is premium; and delivery on the account day would be a delivery within a reasonable time—*Fletcher v. Marshall* (10). The plaintiff got the shares for less than the defendants paid for them, and the mistake being discovered the amount should be refunded—*Sutton v. Tatham* (11), *Bayliffe v. Butterworth* (12). It might have been better, no doubt, to have inserted the word "premium" in the advice note as well as in the sold note; but the plaintiff, who was a broker, is not to be supposed to have been misled. If he was misled in fact, it should have been stated in the case. Suppose the defendants had sued the plaintiff for this sum, the plaintiff would have had to admit the debt, and shew by special plea matter to

discharge himself—*Willoughby v. Backhouse* (13). The case of *Marriott v. Hampton*, and the class of cases in which it has been held that money paid by a party with full knowledge of all the circumstances, cannot be recovered back, do not apply, as this was a payment properly made, as is not disputed, but which the defendants omitted to charge: they are not conclusively bound by the accounts first sent in, if they set the mistake right as soon as it is discovered.

*Baines*, in reply.

*Cur. adv. vult.*

LORD DENMAN, C.J. subsequently (June 7) delivered the judgment of the Court.—The only question in this case was, whether the defendants were entitled to set off a sum of 200*l.* paid by them for deposits on eighty shares in the South Stafford Railway, purchased by them for the plaintiff, and a further sum of 41*l.* 5*s.* paid by the defendants for deposits on thirty shares in the Tean and Dove Railway, purchased by them for the plaintiff.

Upon looking at the accounts between the parties, as stated in the case, it seems to us to be clear, that the defendants are entitled to set off the 200*l.* paid by them for deposits upon the eighty shares in the South Staffordshire Railway, as the plaintiff has actually had the full benefit of that payment allowed to him in account, though the defendants have, by mistake, omitted to charge him with it on the debit side of the account.

In the account sent by the defendants to the plaintiff, of the 2nd of October 1845, they charge him with 360*l.* as the purchase-money for the eighty South Stafford shares, at 4*l.* 10*s.* a share, omitting to charge him with 2*l.* 10*s.* per share more, which they had paid for deposit; but in the subsequent account of the 13th of October 1845, they give him credit for 560*l.*, as the produce of the same shares which they sold for the plaintiff at 7*l.* a share, which included the 2*l.* 10*s.* per share paid by them for deposit, beyond the premium of 4*l.* 10*s.* per share. There is, therefore, no reasonable ground for contending that the defendants are not entitled to set off that 200*l.*

(13) 2 B. & C. 821; s. c. 2 Law J. Rep. K.B. 174.

(1) 4 B. & C. 281.

(2) 2 Smith's Leading Cases, 241; 7 Term Rep. 209.

(3) 4 Bing. 11.

(4) 6 B. & C. 56; s. c. 5 Law J. Rep. K.B. 35.

(5) 8 Mee. & Wels. 140; s. c. 10 Law J. Rep. (n.s.) Exch. 240.

(6) 3 Man. & Selw. 344.

(7) 9 B. & C. 577; s. c. 7 Law J. Rep. K.B. 285.

(8) 6 Ad. & El. 469.

(9) 10 *Ibid.* 90; s. c. 8 Law J. Rep. (n.s.) Q.B. 193.

(10) 15 Mee. & Wels. 755.

(11) 10 Ad. & El. 27; s. c. 8 Law J. Rep. (n.s.) Q.B. 210.

(12) 17 Law J. Rep. (n.s.) Exch. 78.

The right to set off the 41*l.* 5*s.* on account of the Tean and Dove shares is not quite so clear. Those shares were purchased by the defendants for the plaintiff, on the 30th of August 1845, at 2*l.* 8*s.* 6*d.* per share; and the bought note was sent to the plaintiff with that sum as the price. The 2*l.* 8*s.* 6*d.* was only the premium per share, no deposit being then paid, as the scrip was not issued. The shares were bought for the plaintiff for the account day, which was the 15th of September, and by the custom of share-brokers, if the deposit was paid before the account day, it was added to the price. The plaintiff was a share-broker, but dealt with the defendants as a principal, and the fact of his being himself a broker is no otherwise important than as shewing he would be cognizant of the course of dealing in the share market, with respect to the payment of deposits upon shares. As the scrip of the Tean and Dove shares had not come out on the 30th of August, when the purchase was made, it must have been clear to the plaintiff that the deposit had not been paid at that time, and consequently was not included in the price of 2*l.* 8*s.* 6*d.* per share. In the ordinary course of business the payment made by the defendants on account of the deposits would not appear as a charge against the plaintiff until the 19th of September, when the first account was rendered: it is not, however, charged to the plaintiff in that account, nor in any other, owing to a mistake; and the question is, whether the defendants are concluded by that omission from charging the plaintiff with the payment of the deposits, as an item of set-off, because he has himself sold to other persons at the price paid for premium only, and has at that rate been paid and settled with by these persons.

The precise nature of the dealing between the plaintiff and his principals does not appear upon the case, nor is it stated that the scrip was ever transferred by the plaintiff—for all that appears it may have been a mere time bargain, and the scrip may still be in the hands of the plaintiff. If the scrip was actually transferred by the plaintiff, he must have known, or ought to have known, that the price he paid was premium merely, and could not have included any sum paid for deposit. In either view of the case, we

think that the defendants are entitled to set off the amount, which by the course of business they were bound to pay, in order to procure the scrip, beyond the premium, and that the omission to debit the plaintiff with such payment in their account does not take away their right. They dealt with the plaintiff as the principal in the transaction, and are not concluded by having by mistake omitted to charge him with a payment of which he has had the benefit by the actual possession of the scrip, which could only have been obtained by the payment in question. The case of *Sutton v. Tatham*, as well as the other cases cited in the argument, are consistent with the views we take of the case; and our judgment, therefore, is in favour of the defendants.

*Judgment for the defendants.*

1848. { THE QUEEN v. THE ARCH-  
Jan. 25, 26; BISHOP OF CANTERBURY,  
Feb. 1. in the matter of DR.  
HAMPDEN.\*

*Ecclesiastical Law—Bishop, Confirmation of—25 Hen. 8. c. 20.*

*Under the 25 Hen. 8. c. 20. s. 5, after an election of a bishop by the dean and chapter of a cathedral church by virtue of a congé d'élire and letters missive, the person so elected is to be reputed and taken by the name of the lord elected of the see, and the King is thereupon to issue letters patent to the archbishop commanding him to confirm the said election, and to invest and consecrate him, and if he fail to do so for twenty days he is to incur the penalties of a præmunire:—Held, by Lord Denman, C.J. and Erle, J., that the archbishop acting merely ministerially is bound to confirm the bishop elect, and that he has no authority to hear any opposition advanced against the person so elected; per Patteson, J. and Coleridge, J., that confirmation is a judicial act, which the archbishop is to conduct according to the principles of the canon law, and that parties opposing are entitled to appear in his court and enter their objections.*

*Held also, per Patteson, J. and Coleridge,*

\* Decided in Hilary term.

*1., that the opposers not having been allowed to appear and be heard, there was a declining of jurisdiction by the archbishop, for which a mandamus would lie.*

Sir F. Kelly had obtained a rule calling upon the Archbishop of Canterbury, and his vicar-general, to shew cause why a mandamus should not issue, commanding them or one of them at a court to be therefore duly holden in the cause or business or matter of the confirmation of the election of the Rev. Renn Dickson Hampden, D.D., to the bishoprick of Hereford, to permit and admit to appear in due form of law the Rev. Richard Webster Huntley, clerk, M.A. in the University of Oxford, vicar of Albury, in the county of Salop and diocese of Hereford, the Rev. John Jebb, clerk, M.A. of Trinity College, Dublin, rector of Peterstow, in the county and diocese of Hereford aforesaid, and the Rev. W. F. Powell, clerk, M.A. of the University of Cambridge, perpetual curate of Cirencester, in the county of Gloucester, to oppose the confirmation of the said election of the said Dr. R. D. Hampden, and to hear and determine upon such opposition, and upon the articles, matters, and process thereof.

The rule was obtained on the affidavits of the Rev. W. F. Powell, and of R. E. A. Townsend, one of the proctors entitled to practise in the ecclesiastical courts, by which it appeared that Dr. Hampden was, on the 28th of December 1847, elected by the Dean and Chapter of the cathedral church of Hereford, to the office or dignity of Bishop of the said diocese of Hereford, the same being thenbefore vacant, and thereupon Her Majesty issued her royal letters patent, bearing date the 5th of January 1848, directed to the Archbishop of Canterbury, as follows:—

“Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, &c. To the most reverend father in God, our right trusty and right entirely beloved councillor, William, by divine providence Archbishop of Canterbury, &c., and to all other bishops herein concerned, greeting. Whereas the episcopal see of Hereford being lately vacant by the translation of the right reverend father in God, Doctor Thomas Musgrave, late bishop thereof, to the archiepiscopal see of York, upon the

humble petition of the Dean and Chapter of our cathedral church of Hereford, we did, by our letters patent, grant them our leave and licence to choose to themselves another bishop and pastor of the said see, and the said Dean and Chapter, by virtue of our said licence and leave, have chosen for themselves and the said church our trusty and well-beloved Renn Dickson Hampden, doctor in divinity, to be their bishop and pastor, as by their letters, sealed with their common seal directed to us thereupon, does more fully appear. We, accepting of such election, have given our royal assent thereto, and this we signify unto you by these presents, requiring and strictly commanding you, by the faith and allegiance by which you stand bound to us, to confirm the said election, and to consecrate the said Renn Dickson Hampden, so as aforesaid chosen to be bishop of the said see, and to do, perform, and execute with diligence, favour, and effect, all the singular other things which belong to your pastoral office, according to the laws and statutes of England in this behalf made and provided. In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster, this 6th day of January, in the eleventh year of our reign. By writ of Privy Seal.”

That the said W. F. Powell and the Rev. R. W. Huntley, and the said Rev. J. Jebb, being of opinion and verily believing that good and valid objections existed to the confirmation of the said election, resolved to oppose the said confirmation, and accordingly instructed and gave their several proxies in due form of law to the said R. E. A. Townsend and his partner, to appear on their behalf, and oppose the said confirmation; that in obedience to the said letters patent, and according to the usual course of proceeding in such cases, the said archbishop, by his vicar-general, assisted by the Right Hon. Stephen Lushington, L.L.D. and Sir J. Dodson, L.L.D. &c., as assessors for the purpose of proceeding with the matter of the said confirmation, proceeded in the said matter, as after mentioned, on the 11th of January 1848. The diocese of Hereford is within the province of Canterbury, and the Court of the vicar-general for the confirmation of bishops elected within that province has immemorially been held



at the church of St. Mary-le-Bow, in the city of London. A citation or mandate against all and singular opposers, calling upon them to appear and render their objections at the said court on the 11th of January 1848, had been published in the said church on the 8th of January 1848, and a copy affixed to the door of the said church, according to the law and practice of the said court. The vicar-general and the assessors being assembled at Doctors' Commons, the proctor for the Dean and Chapter of Hereford exhibited a proxy under the hands and seals of the said Dean and Chapter, and presented to the said Dr. R. D. Hampden a certificate of his being howsoever elected bishop and pastor of the said cathedral church of Hereford, and prayed him to give his consent to the said election; and therefore Dr. Hampden read the schedule of consent and signed the same, and the vicar-general then adjourned the business to the church of St. Mary-le-Bow.

After prayers had been read in the church, the business of the confirmation of the election of Dr. Hampden was commenced by the presentation to the vicar-general of the letters patent, which were read: whereupon R. U, the chapter clerk of the Dean and Chapter of Hereford, prayed the vicar-general to take upon himself the duty of the said confirmation, and to decree that the same be proceeded in according to the form of the said letters patent and exigency of the law; and the vicar-general having assented thereto, Dr. Hampden was presented to the vicar-general by the said R. U, who declared that he judicially produced Dr. Hampden as Bishop-elect of Hereford, and stated that as proctor for the Dean and Chapter he exhibited an original mandate, together with the certificate thereupon indorsed touching the execution of the said mandate, against all and singular opposers; and prayed that such opposers might be publicly called. The vicar-general thereupon directed the apparitor-general of the said court to make proclamation as usual in such cases, which he did in open court in the words following: "Oyez, oyez, oyez, all manner of persons who shall or will object to the confirmation of the Rev. Renn Dickson Hampden, Doctor of Divinity, to be bishop and pastor of the cathedral church of Hereford, let them

come forward and make their objections in due form of law, and they shall be heard."

Immediately after such proclamation was made, and before any other proceedings were taken, the deponent, R. E. A. Townsend, addressed the vicar-general, and stated that he appeared as proctor for the Rev. R. W. Huntley, &c., the Rev. J. Jebb, &c., and the Rev. W. F. Powell, &c., and exhibited proxies under their hands and seals, and declared that he opposed the confirmation of the election of the said Dr. Hampden to the office or dignity of Bishop of Hereford. The vicar-general then inquired of Mr. Townsend what were his objections; and while Mr. Townsend was in the act of producing his objections, which were in writing, in the form of a libel or plea, and duly signed by advocates as is usual in such cases, the vicar-general said to him, "We are acting here under a mandate from the Crown issued pursuant to the provisions of the statute of 25 Hen. 8. c. 20, and we conceive ourselves bound to confirm without suffering any opposition." Mr. Townsend then said, "Right Worshipful, I bring in a libel," whereupon the said Dr. Lushington, one of the assessors, said, "No, you will not; you were not permitted to appear, and you know perfectly well, as an ecclesiastical practitioner, that you are not able to bring in a libel until you are permitted to appear;" and the vicar-general then wholly refused to permit Mr. Townsend to appear as proctor for the said opposing parties or any of them, or to exhibit his proxies, or to present or bring in any libel or plea or objections against the confirmation of the said election, or to do any act whatever in opposition to the confirmation, although the proxies and libel were in due form of law, according to the usage and practice of the said court, and although he then duly and at the proper time, according to law, offered and proposed to appear as proctor for the said opposing parties in the matter of the said opposition, and to exhibit his said libel.

Certain advocates, who had been instructed to appear on behalf of the said opposing parties, then appeared accordingly and required to be heard, whereupon the vicar-general inquired of one of them (Dr. Addams) whether he wished to be heard upon the question whether counsel had a

right to be heard or not, and Dr. Addams having replied that he did, the vicar-general said, "We confine you to that;" and Dr. Lushington also said, "Distinctly understand to what you are confined, namely, the question whether, considering the statute of Henry the 8th, which has been referred to, you have a right notwithstanding that statute to be heard at all." The advocates were then heard upon the question, whether they were entitled to appear and be heard, and when they had concluded, the counsel on behalf of Dr. Hampden and of the Dean and Chapter rose to reply; but the Court stopped him, and decided that they could not bear any objections to the confirmation of the said election, and that they were precluded by the said statute from allowing any such objections to be entertained, the vicar-general delivering his judgment to the effect following, "that he was of opinion that the Court was bound to proceed to the confirmation of the election of Dr. Hampden to the bishoprick of Hereford under the provisions of the statute 25 Hen. 8, which clearly extended to the present case, and by which, if he should commit or suffer any let or hindrance to such confirmation, he should become liable to the penalties of *præmunire*; that the act itself prescribed no mode of proceeding in the performance of the duty enjoined, nor referred to any, and that the said Court was bound by the statute law of the realm, which afforded it no alternative but that of confirming the election, which was certified to have been made by the Dean and Chapter of Hereford, or subject themselves to the penalties of *præmunire*. The assessors also delivered their opinions that the opposers, their proctor or counsel, could not be allowed to appear or be heard by reason of the statute 25 Hen. 8.

After this judgment had been given, the vicar-general directed the confirmation to be proceeded with, according to the usual forms; whereupon the proctor of the dean and chapter openly said in the Court: "I accuse the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and on pain of such their contumacy pray that they and every of them be precluded from the means of further opposing against the said election, the manner thereof, or the person elected in that

behalf, and also that it may be decreed to be proceeded to further acts in this business of confirmation, the absence or contumacy of the persons so cited, intimated, publicly called, and not appearing in anywise notwithstanding, and I porrect a schedule which I pray to be read."

The proctor then handed a paper to the vicar-general, who then read and signed it. The proctor then said, "In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, I give this summary petition in writing which I pray to be admitted, and that it be decreed to be proceeded summarily and plainly, and that a term be assigned to me to prove the same immediately." The vicar-general replied: "We do admit this your summary petition, so far as the same may be by law admitted, and do decree that it may be proceeded summarily and plainly, and we do assign you a term to prove this your summary petition immediately;" whereupon the proctor said, "In pain of the contumacy of all and singular persons cited, intimated, and publicly called and not appearing, and in support of proof of the matters contained in my said summary petition, I exhibit a certificate touching and concerning the election of the aforesaid Rev. R. D. Hampden, D.D. to be bishop and pastor of the said cathedral church of Hereford, made by the said dean and chapter of the said church, and issued under their common seal. I likewise exhibit a public instrument of the consent of the said Dr. R. D. Hampden to the said election, and Her Majesty's letters patent before read. And I allege that all and singular the matters set forth in the said exhibits respectively were and are true, and so had and done as therein contained; and I pray all of them to be admitted, and that a term may be assigned me to hear sentence instantly."

The vicar-general then said, "In pain of the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called and not appearing, we do admit these public instruments, and do assign to hear sentence instantly." The proctor then said, "I pray all and singular the said opposers to be again publicly called." The vicar-general then said, "Let the opposers be again publicly called," and the apparitor-general then made proclamation (in the same terms

as before). After this proclamation the proctor said, "I accuse the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called, and not appearing, and I pray them to be pronounced contumacious, and in pain of such contumacy that it be decreed to be proceeded to the pronouncing your definitive sentence, and I porrect a schedule which I pray to be read."

The proceedings then terminated by Dr. Hampden taking the oaths usual and required in such cases, and the vicar-general signed, promulgated, and gave the following sentence in writing:—"In the name of God. Amen.—We, S. B. Burnaby, Doctor of Laws, vicar-general and official principal lawfully constituted of the most Reverend Father in God, William, by divine Providence Lord Archbishop of Canterbury, &c., being hereunto sufficiently and lawfully authorized, and having heard, seen, understood, and discussed the merits and circumstances of a certain business of confirmation of an election made and celebrated of the Rev. R. D. Hampden, D.D., elected bishop and pastor of the cathedral church of Hereford, which is controverted, and remains undetermined before us in judgment, and having considered the whole process had and done in the business of such confirmation, and having observed all and singular the matters and things that by law in this behalf ought to be observed, we have thought fit, and do thus think fit, to proceed to the giving our definitive sentence or final decree in this business, in manner following:—Whereas, by the acts enacted, deduced, alleged, propounded, exhibited, and proved before us, relating to such confirmation, we have amply found, and do find, that the said election was rightly and lawfully made and celebrated by the Dean and Chapter of the said cathedral church of Hereford, of the said reverend the bishop elect, a man both prudent and discreet, deservedly laudable for his life and conversation, of a free condition, born in lawful wedlock, of due age, and an ordained priest, and that there neither was nor is anything in the ecclesiastical laws that ought to obstruct or hinder his being confirmed by our authority bishop of the said see: therefore we, S. B. Burnaby, L.L.D., the Judge aforesaid, having weighed and considered the premises, and with the

assistance of the learned in the law, do, by the authority wherewith we are invested, confirm the aforesaid election made and celebrated of the person of the said Rev. R. D. Hampden, D.D. to the bishoprick of Hereford. And we do, so far as in our power and by law we may, supply all defects in the said election, if any there happen to be. And we do commit unto the said bishop elected and confirmed the care, government, and administration of the spirituals of the said bishoprick of Hereford, and we do pronounce, decree, and order, by this our definitive sentence or final decree, which we make and publish in these presents, that the said bishop so elected or confirmed, or his lawful proctor for him, shall be inducted into the real, actual, and corporal possession of the said bishoprick, and of all its rights, dignities, honours, privileges, and appurtenances whatsoever, and be installed and enthroned by the Archdeacon of Canterbury or his deputy, according to the laudable and approved manner and custom of the said cathedral church, not being contrary to the laws and statutes of this realm." The vicar-general then decreed that a public instrument and letters testimonial be made out concerning the premises.

The affidavits further stated, that the opposition intended to be made to the confirmation of Dr. Hampden was founded on two books published by him, the avowed object of the first of which was to illustrate the injurious effects of dogmatism in theology: and that in both books, in illustration of the effect of dogmatism in theology, it was known, or justly suspected, that he had spoken in derogation of many things in the Book of Common Prayer, and had maintained doctrines repugnant to the Thirty-nine Articles of the Church of England, especially those concerning faith and doctrine. That expressly by reason of these two books, Dr. Hampden (then Regius Professor of Divinity in Oxford,) in 1836 incurred the censure of the University, which censure (he not having explained or retracted those parts of his teaching), was affirmed in 1842. That articles alleging such unsoundness of doctrine of Dr. Hampden had been prepared and signed by civilians, ready to be given in had the parties been permitted to appear, and which the deponents were advised and believed, con-

tained sufficient grounds of opposition to the confirmation of Dr. Hampden.

*Sir J. Jervis (Attorney General), Sir D. Dundas (Solicitor General), M. D. Hill, Dr. Bayford, and Waddington* shewed cause against the rule.—They argued that confirmation was a ministerial and not a judicial act, and that the archbishop was bound to confirm the bishop elected by the dean and chapter under the *congé d'élire* and letters missive issued by the Crown; that the express object of the 25 Hen. 8. c. 20. was to vest in the Sovereign the absolute power of nominating the bishops; and that it expressly subjected the archbishop to a *præmunire* if he neglected to confirm within twenty days; that no instance had occurred since the statute in which opposers had been held entitled to be heard against the confirmation of a bishop elect; that the 1 Edw. 6. c. 2. declaring these proceedings to be mere forms, is an exposition of the meaning of the 25 Hen. 8. c. 20; that if there is no confirmation the election is still to stand good to all intents and purposes. But that, even admitting this to be a judicial act, the proper remedy was by an appeal from the archbishop's court, and not by *mandamus*; that the vicar-general had no contentious jurisdiction, and therefore could not enter into this question.

*Sir F. Kelly, Dr. Addams, A. J. Stephens, Peacock and Badeley* argued in support of the rule.—They contended, that, under the common law, prior to the 25 Hen. 8. c. 20, parties had a right to come in and oppose the confirmation of a bishop, and that this right was not taken away by that statute; that the Crown never claimed more than the temporal right of appointing, not the spiritual power of making a bishop; that this act was a judicial act, appertaining to the archbishop as a spiritual Judge, and not merely ministerial; that consecration and confirmation were, by the statute, placed on the same footing; that consecration was clearly a high judicial act, investing the Bishop with the functions of a spiritual Judge; that the 25 Hen. 8. c. 20. only subjects the archbishop to a *præmunire*, in case he refuses to confirm, without some valid reason; that if the Archbishop refused to confirm and consecrate, no power is given to the Crown to perform those acts. As to the right to issue a *mandamus*, they argued that it lay to

compel an inferior Court to enter upon an inquiry, though it would not prescribe the particular judgment to be given by a Court of peculiar jurisdiction; that in this case there could be no appeal, as there might have been if the appearance of the opposers had been allowed, and the articles propounded by them rejected; that it was no answer that the vicar-general had no contentious jurisdiction, for immediately the matter became contentious, it would go to the court of audience, and be decided by the archbishop there (1).

*The Attorney General* claimed a right to be heard in reply, stating that he appeared on behalf of the Crown, for the purpose of defending the prerogative.—He contended

(1) The following (amongst other) authorities were referred to in the argument as to the right of opposing the confirmation:—

- Burns's Eccl. Law, vol. 1. p. 205, art. 14.
- Gibson's Codex, vol. 1. p. 110. tit. 6. sect. 8; vol. 2. Appendix of Forms, p. 1328.
- Evans v. Ascuith, Palm. 472; a.c. Sir W. Jones, 158.
- Lancelotti Institutiones Juris Canonici, lib. i, p. 38.
- Ferraris Bibliotheca Canonica Juridica.
- Lyndwode Provincialis, p. 218.
- Ayliffe Parergon Juris, p. 245.
- Collier's Ecclesiastical History, vol. 2. p. 745.
- Vindiciæ Ecclesiæ Anglicanæ, by Francis Mason, p. 433, Cantab. 1743.
- Godwin de Præsulibus Angliæ, Life of Bishop Montague.
- Oughton Prolegomena, vol. 1. cap. 3.
- 3 Salk. 71, 'Bishop.'
- Cawdrey's case, 5 Rep. 7.
- Godolphin's Repertorium, p. 26.
- Watson's Clergyman's Law, p. 215.
- Potter on Church Government, 5th edit. p. 405.

As to a *mandamus* lying,—

- The Bishop of St. David's v. Lucy, 1 Ld. Raym. 541.
- The King v. the Justices of Middlesex, 4 B. & Ald. 298.
- The Queen v. the Justices of the West Riding of Yorkshire, 10 Ad. & El. 685.
- The Queen v. the Justices of Carnarvonshire, 2 Q.B. 325; a.c. 11 Law J. Rep. (n.s.) M.C. 3.
- The King v. the Justices of Kent, 14 East, 395.
- The Queen v. Gort, 1 Jebb & Symes, 388.
- The Queen v. the Justices of Denbighshire, 9 Dowl. P.C. 509; a.c. 10 Law J. Rep. (n.s.) M.C. 79.
- The King v. the Mayor of Fowey, 2 B. & C. 584.
- The King v. Barker, 3 Burr. 1265.
- The King v. the Bishop of Lincoln, 2 Term Rep. 338, n.
- The King v. the Bishop of Ely, 5 Term Rep. 475.
- The King v. Everet, Ca. temp. Hardw., 249.

that his certificate *ore tenus*, that the Crown was immediately interested, gave him that right, and referred to *Rowe v. Brenton* (2), and the practice in revenue cases in the Court of Exchequer.

*Sir F. Kelly* having been heard against the right claimed,—

The COURT declined to admit the absolute right of the Attorney General to a reply, considering that they had a general controul over the proceedings, and a power to prescribe the course they would follow in each particular case; but they also decided that from the importance of the present argument it would be convenient to allow the Attorney General to reply, which he accordingly did.

*Cur. adv. vult.*

At the sittings, after the same term, the learned Judges, being divided in opinion, delivered their judgments *seriatim*.

ERLE, J.—This was an application for a mandamus from this Court, to be directed to the Archbishop of Canterbury, or his vicar-general, commanding them or one of them, at a court to be therefore duly holden in the business of the confirmation of the election of Dr. Hampden, as Bishop of Hereford, to permit and admit certain parties to appear in due form of law to oppose the confirmation of the said election, and to hear and determine upon such opposition, and upon the articles, matters and proofs thereof.

The ground of opposition is stated to be the unsoundness of certain theological opinions entertained by the bishop elect. In support of this application, it is stated that the archbishop, when confirming the election in obedience to the statute, is bound to try judicially the validity of the election, and that persons have a right to come forward and object, and that the archbishop is to deliver his judgment thereon. They contend, further, that this right may be enforced by the writ of mandamus. To this it is answered, that the statute of Henry the Eighth is in contradiction of the right claimed. The question then depends upon the construction of that statute, 25 Hen. 8. c. 20, which is intituled, 'An act for the non-payment of the First-fruits to the Bishop of Rome.' Under this

(2) 3 Man. & Ryl. 133; s.c. 5 Law J. Rep. K.B. 137.

act, it appears that the power of nominating bishops is given to the king, and that the archbishop has no authority to judge whether the king has properly exercised that power. On the contrary, the archbishop is made liable to the penalties of *præmunire* if he shall not, within twenty days, confirm, invest, and consecrate the bishop, whose election or nomination has been signified to him by the king's letters patent. In the argument on this case it was not contended that the archbishop was empowered to sit and judge of the king's nomination. When the bishop has been elected by the dean and chapter, the king is to signify that election by his letters patent, and to require the archbishop to confirm it. This brings us to the question, whether or not the word "confirm" is to be taken as meaning that the archbishop is to try the qualification of the person elected. According to the general rule, the words of the statute are to be construed in the ordinary sense in all its parts. From this it follows, that the command to confirm does not involve any authority to judge of the fitness of the person elected. It is provided by the 5th section, that the election by the dean and chapter "shall be good and effectual to all intents;" and the command to confirm follows immediately upon this, and is in harmony with it. But an election cannot be good and effectual to all intents, if it is to be voidable by the archbishop. It then says that, upon being elected by the dean and chapter, the person so elected "shall be reputed and taken by the name of the lord elected of the said dignity and office," which is incompatible with his being liable to be declared disqualified by the archbishop. He is then to take the oath of fealty to the king, who is thereupon to issue his letters patent to the archbishop, "commanding him to confirm the said election, and to invest and consecrate him," within twenty days. This is inconsistent with its being the duty of the archbishop to invite and receive objections, and to decide whether or not they are well founded. I am of opinion that the statute does not impose the duty or give the right alleged to the archbishop. It is said, that the word "confirm," in reference to bishops, has a technical sense in the canon law, and includes an examination into the qualifications of

the persons elected; that this power was exercised throughout the whole christian world down to the time of Henry the Eighth, and that the legislature intended the word to be taken in that sense. In support of this view, various passages were cited from the canon law, and the form of citing opposers at confirmations, and the advantage of giving this power to the archbishop and people, were much relied on. But these grounds are untenable. In the first place, the reception of evidence of extrinsic facts, with a view to alter the received meaning of known words, is not to be permitted; it would be doing violence to the statute, if not illegal. But, in the next place, it does not appear to me that the alleged practice has been proved. The preamble of the 25 Hen. 8. begins with a recital of the 23 Hen. 8, from which it appears that nominations and presentations of bishops by the king to the pope were often delayed, and that bishops, in case of such delay, were in future to be consecrated and invested by any two bishops whom the king should appoint for that purpose, "in like manner as divers archbishops and bishops have been heretofore in ancient time, by sundry the king's most royal progenitors, made, consecrated, and invested within this realm." This preamble speaks of the consecration and investment, but not of the confirmation of bishops. It asserts the former practice of the kings of England, agreeably with the opinion that bishopricks were donative under the Saxon and some of the Norman kings; afterwards, by the charter of King John, the election was in the dean and chapter, subject to the approbation of the Crown, but the archbishop confirmed the election, which power was usurped by the Pope, and continued, except when the see of Rome was powerless, down to the statute of Henry the Eighth. It is also necessary to ask, what foundation in fact is there for the assertion, that the legislature referred to that part of the canon law which has been cited? That law was pertinent to contested elections, by large numbers, but not to a nomination by the king. Besides, the foreign canon law has no binding effect in England; and there is a statute of Henry the Eighth which recites that a commission of thirty-two persons had been appointed to revise the

canon law, and it enacted that, until they should have completed their task, such canons only should be in force as were not contrariant to the laws and customs of the realm. It is impossible, then, that the parliament, which so regarded the canon law, should use the word "confirm" in this statute, not in its common sense, but in a sense limited by the canon law. The proclamation made at the time of the confirmation was next pressed upon us as favourable to the suggested construction. But this proceeding can be of no avail against the statute. By the statute, the election of a bishop is rendered a mere form, and so is the confirmation; for it declares every such election to be good and effectual to all intents. We here see, indeed, the form and vestiges of rights which have ceased, forms which have been preserved but with a view to colour the changes which have been introduced. If these had not been preserved as mere forms, the right of opposing would have been asserted in some instance since the date of the statute. But no such instance has been produced. There has been no examination of opposers. An attempt was made in the case of Bishop Montague, which was evaded without any decision. If the evidence of the existence of the practice fails, so does the opinion of writers of authority that the right existed. The opinions of all the text writers, from Lord Coke downwards, are of positive force against it. The importance of this right was urged upon us, as tending to confirm the stability of the Established Church. But if there are advantages on the one side, so there are evils also, and a practised mind will be able to balance the weight of the arguments. This question, however, is unsuitable to the office of a Judge, whose duty is only to declare what the law is. Another point urged was, that the sole purpose of the legislature was to put an end to the interference of the see of Rome with the English church. But I think the intention of the statute, as expressed, was to prohibit the interference of the see of Rome, and at the same time to lay down the manner of consecrating the bishops of the church so separated from the see of Rome. Effect must be given to every part of the statute, and I think the statute not only destroys the Pope's usurpation,

but declares the rights of the king, and was intended to put an end to all contests between the Crown and the ecclesiastical authorities. I am of opinion that the supposed right does not exist; and, therefore, that the rule must be discharged.

COLERIDGE, J.—I regret that I am called upon to deliver my opinion on this rule at so short an interval, after an argument of such great learning and ability, and the more so, as I am compelled to differ from my Lord and my Brother Erle. The question, narrow as it may be simply propounded, has been argued upon grounds at once so large, various, and wide, and mounting up to such remote antiquity, that it is scarcely possible to have any strong confidence in deciding upon them. It is, however, consolatory to me to know that any error in my judgment will not be fatal. I am not insensible to the fact, that some public inconvenience may be attached to the agitation of a question such as the one now before us, though I believe it has been somewhat exaggerated. But the inconvenience is not all on one side, and I am unwilling to take any course which might do a final injustice. Regarding the question merely as one of law, I rest my judgment on this narrow ground, that the applicants have laid such grounds before the Court as entitle them to a mandamus, in order that it may be demurred to, or met by a return. My opinion is, that this was an inferior court with a question before it for decision, with parties lawfully summoned to appear, and having sufficient interest in the matter to entitle them to be heard. If this be true, it is within the province of this Court to compel the inferior court to allow those parties to appear, and to hear their allegations. It is no answer to say, that the court is an ecclesiastical court; for the ecclesiastical courts are not withdrawn from the controul of writs of mandamus or prohibition. We cannot, indeed, divert the course of their proceeding, nor review their decisions by way of appeal. But we compel them to address themselves to the discharge of their duty, and restrain them when they shew that they are about to exceed their jurisdiction. This stands upon the plainest principle. The case of *The King v. St. Peter's, Thetford* (3), is often cited on the

(3) 5 Term Rep. 364.

other side; but the Court there said, that the question of church-rates was a matter of ecclesiastical jurisdiction, and there was no ground laid for the interference of this Court; but here the objection is, that the Court has heard one side, and refused to hear the other. I found my opinion on that expressed by Holroyd, J., in the case of *The King v. the Justices of Carnarvonshire* (4), though without that authority I should have felt no difficulty upon this point, for this case is to be decided by principle rather than by precedent. It was said, that the party might appeal from the decision of the Court below, but there can be no appeal, for there has been no decision; the parties have not been heard. Now, though this Court will not interfere with the rules of the court below, it will interfere so far as to enable the parties to state their case. It was said that the parties had not sufficient interest to entitle them to be heard. But I think they have. They are all involved in the main question. If the confirmation was all a shadow, no one could have any interest; but, on the other supposition, two of them, as incumbents in the diocese, have a deep interest in the faith and doctrines of their bishop. We have determined that the mere interest which a man has, as an inhabitant of a borough, is sufficient to enable him to become a relator in a *quo warranto* on the election of a mayor or member of a town council. I come now to the statute of Henry the Eighth; and here our object is to ascertain, not what Henry the Eighth intended, but what was intended by the legislature. It is not *quid voluit Rex*, but *quid dixit Parliamentum*, into which lawyers are to inquire. The 5th section of the statute enacts, that the King shall signify the election of the bishop elect to the archbishop of the province, and require him to confirm the election; and the question is, what is the import of the word "confirm"? It is said, on one side, that the duty and function of the archbishop was merely ministerial. On the other hand, it is contended that confirmation was a solemn judicial act, and that the archbishop was to perform that act according to the accustomed forms. It is obvious, that those who take this view take upon them-

(4) 4 B. & Ald. 86.

selves a large burthen of proof. It is necessary for the applicants to examine the whole of the statute, and into what was, in point of fact, done at the time of and since its passing. But it must be borne in mind that usage cannot contradict it, nor can disuse render it obsolete. The examination of the statute may be ranged under four heads of inquiry, three of which relate to matters of fact, and the fourth to the construction of the statute. Without entering into them at length, my opinion is, that upon each and all such a case is made out that we ought to let this writ go, and by the practice of this court we do not require, before granting this writ, absolute certainty either in fact or law; but if the matter of fact be made probable, we leave it to a jury to decide the fact, and we allow the matters of law to remain on the record, in order that our decision may be reviewed by a higher tribunal. If it were a question of title which was to go to a jury, we should not require absolute certainty, especially when that title was to be traced down, as here, from remote ages, through contested claims and foreign usurpation. If we refuse the rule, we prevent inquiry; we say there is nothing to inquire into, or that the matter is unimportant. Whereas, if we grant it, all we do is to say that enough has been done to shew that it is a case which deserves further inquiry.

Now, the case on the part of the applicants is, that there were four great general councils held, whose authority is recognised in matters of doctrine by the statute of Elizabeth; and that of these four councils, two, viz., those of Nice and Chalcedon, say that no bishop can be confirmed *præter voluntatem metropolitani*. Both of these councils were called by imperial authority, and after the temporal rulers had asserted their power in the church; and yet it was by them declared that the confirmation by the metropolitan was necessary to complete the election. This fact is established by a large body of evidence prior to the rise of the canon law. It is not contended that confirmation by the archbishop was not required by the canon law; but it is contended that this law was not admitted into England. The canon law obtained its binding authority in this country by custom, and was subject to the statute law. But,

as a general rule, our ecclesiastical courts governed themselves by the canon law, which was the law of that catholic church of which this country was a part. In *Lyndwode* and *John de Athon* we have the expositors of our national canon law. The provision in the 19 Hen. 8, towards the end, refers to the preamble of the act, which does not speak of the canon law, but of the provincial constitutions which had been made in this country, among which are the constitutions of Othobon, referred to in *Gibson*. It is clear that what had been decreed by councils had been adopted by the canon law, and it is necessary to shew that that law had not been adopted in this country. By that law confirmation was a judicial proceeding, in which the process of the election and the person of the elected, his life, morals, and learning, &c. were examined, and the result was not unfrequently unfavourable to the person elected. I do not remember an instance which goes to shew that the *persona electi* meant merely the identity of the party. The practice of provisions and the appellate jurisdiction of Rome interfered with the power of the metropolitan; but after making all deductions on this account, it is proved, I think, that the power of confirmation was in the metropolitan. In *Warton's Anglia Sacra*, which is not a modern work, but a collection of ancient and contemporary writings, there are numerous instances of the exercise of this power from the year 1277, in the reign of Edward I. down to the year 1416, the third of Henry V.—[Here the learned Judge referred to several cases of the kind which had been cited by Mr. Badeley, in the argument.]—We come now to the statute of Henry the Eighth, and we have to see how it has dealt with confirmation. One object of the statute was to put on a clear foundation the right of the Crown to the appointment of bishops, the exercise of that right having been interfered with by provisions. That right was founded on the right of patronage; bishopricks were donative because the King had founded them. The second object was to prevent all interference of Rome in the making and confirmation of bishops. For the first object it was not thought necessary to alter the original mode of election, but that chain was preserved which bound our church with the great christian



communion. But it was preserved in form only, for the power of election was virtually taken away by the letters missive. If the dean and chapter proceeded according to the letters missive, there would be nothing new, and confirmation would go on as usual. There is not a word in the statute to derogate from the power of the metropolitan, but it was rather increased by the removal of the interference of the Pope. Here, then, are two parties, the dean and chapter and the archbishop. If the former refuse to elect, a provision is made by which the king may nominate a bishop; but if the archbishop refuse to confirm, there is no provision in the statute by which the confirmation may be performed by any other.—[The learned Judge here read and commented upon the third and fourth sections of the statute.]—The silence of the act on the subject of qualification arises from the fact that it was passed *alio intuitu*. When a bishop is nominated by the Crown, the archbishop is required, by the fifth section, with all speed and celerity to invest and consecrate the patentee, and to give and use to him pall and all other benedictions, ceremonies, and things necessary for the same. And when the bishop has been elected by the dean and chapter, and that election has been signified to the archbishop, he is required to confirm the said election, and to invest and consecrate the person so elected; but it is not said that he is to do so "with all speed and celerity." Great reliance has been placed on the words that the election of the bishop by the dean and chapter shall "stand good and effectual to all intents," and that the bishop so elected "shall be reputed and taken by the name of lord elected of the said dignity." These expressions have, no doubt, great weight; but the question turns on the meaning of the word "confirm." The archbishop is to confirm and consecrate, but no direction is given him as to how he is to confirm. When the statute was passed, the functions of the archbishop as to confirmation were the same as before the act. If his duties were ministerial before, so are they now. If before the statute he was bound to examine at confirmation, so is he now, for it would require very strong words to deprive him of that right. If the construction which has been contended for against the rule be

correct, the archbishop would be bound to confirm any one who might be elected, whether he were a heretic, infidel, bad liver, and disqualified by age or want of orders. I think it was said, in the course of the argument, that if consecration could not be separated from confirmation great difficulty would be felt. But I think they cannot be separated. Reading the office for consecration, either as it stands now, or as it stood in the time of Henry the Eighth, it is impossible to suppose that the archbishop acts merely ministerially. The 7th section of the statute 25 Hen. 8. contains penal clauses, and provides for three classes of offences. The first is, where the electors refuse to elect; the second, where the archbishop refuses to confirm, invest, and consecrate; and the third, where any persons admit, maintain, or allow anything contrary to the due execution of the act. In the first two cases a time is fixed. Confirmation may in general be expected to be finished within twenty days, and twenty days would be sufficient to ascertain whether the confirmation was wilfully delayed. But if the statute enjoined the archbishop to do a judicial act, and he prosecuted it without delay, that would be an answer to an indictment. The statute, though severe in the measure of its penalties, is not so in reference to the scale of punishments in the age in which it passed; for the same penalties, even in the last century, were awarded to those who were mixed up with the frauds connected with the South Sea bubbles. But I cannot believe that a statute which, though with a rough hand, freed us from the vexatious interference of Rome, at the same time intended that we should wear a yoke upon our necks, and that our archbishops should be liable to these penalties if in the discharge of a most solemn duty they refused to confirm the election of a bishop who might be disqualified for that sacred office. It has been said, that in Ireland and the colonies the Crown exercises this power of nomination without confirmation; but it is obvious that the revival in Ireland of the statute of Edward the Sixth, which had rendered confirmation unnecessary, and its non-revival in this country, shew that we have the same forms as existed before the Reformation and from early ages. The archbishop is not the only person concerned, for the bishop

elect has also an interest, of which the canon law takes notice, otherwise he could not have appealed to the Court of Rome. The forms established by usage become binding, and all lawyers know that it is by forms that rights become substantially protected. For more than three hundred years these forms have taken a judicial shape in open court; and, according to that course of proceeding, the archbishop is bound now to proceed. It has been urged that there has been a total absence of the exercise of this right since the Reformation; but that has not been made out in a satisfactory manner. Considering all the circumstances which are to be taken into account, it seems to me that this rule ought to be made absolute.

PATTERSON, J.—I do not propose to enter into an explanation of the canon law, or the general canons of the christian church on the subject of confirmation. They, however, establish satisfactorily that in all christian countries, in England and wherever bishops were elected, whether by the people, the clergy and people, by the clergy, by chapters, or by convents, such election required to be confirmed, in order to be perfect; and that confirmation was an act of ecclesiastical supremacy, and was a judicial and not a ministerial act, that it required examination into the process of the election, and the qualification of the person elected, and cannot properly be said to be a part of the election. Confirmation was obviously necessary in popular elections; and when elections were confined to smaller bodies, there was still danger that improper persons might be introduced into the office of bishops. All christian people were therefore interested, and therefore all persons were cited generally, and in some cases specially, to come and state their objections against the persons elected. Such citation was practised in this country before the passing of the statute of Henry the Eighth, and has continued in use up to this time. Whether it was introduced from the canon law, and whether the canon law was adopted, in whole or in part, I will not now inquire. It is sufficient for the construction of the statute of Henry the Eighth, that before and at the time of the passing of that act the election of bishops required to be confirmed by a superior, whether pope or metropolitan; and that all persons were cited to come forward

and make their objections. Several instances of archbishops refusing to confirm were cited from *Warton's Anglia Sacra*, in which the objections were made not to the identity, but to the qualifications of the party elected, and in which the elections were annulled. They were all previous to the statute of Henry the Eighth. The elections were real and free elections, upon the receipt of the *congé d'élire* from the Crown, which did not state who was to be elected. It is said that the Crown recommended, but there was no power in the Crown to compel the election of any particular person; nor was there any legislative enactment on the subject, so that the power of confirmation did not trench upon the authority of the Crown. The authorities from the Year Books cited in *Evans v. Ascuthe* shew that confirmation was a necessary act, and that confirmation might be refused and the election made void. It is established by the authorities, that when the 25 Hen. 8. was passed, confirmation was a judicial act: what then are the provisions of that statute? The 23 Hen. 8. provided, that if any person elected to any see should be delayed or should be denied confirmation by the Bishop of Rome, any such person was to be consecrated in England by the archbishop of the province. But nothing is there said of the manner and form of carrying the confirmation into effect, nor of the election of bishops. Then follows the 25 Hen. 8. c. 20, which, in the 3rd section enacts [the learned Judge read this section]. Then the 4th section enacts, "that the king may grant his licence, under the Great Seal, to the dean and chapter to proceed to the election of a bishop, with a letter missive containing the name of the person, *whom they shall elect and choose*; and that the dean and chapter *shall choose the person so named, and none other*." Here is an entirely new matter, for though there was a letter missive before by recommendation, it was a mere request, and the chapter could not be compelled to obey." The effect of the words "and none other" is to destroy the freedom of election altogether. The repealed statute of Edward the Sixth describes these elections to be "in very deed no elections, but only by a writ of *congé d'élire* have colours, shadows, pretences of elections, serving nevertheless

upon this subject, and the delay which may be interposed, but that is not a sufficient reason for refusing the writ. I have not alluded to the nature of the objections to be urged; for, in my opinion, the mistake has been in refusing to admit the parties to appear and state their objections, whatever they might be. Upon these objections, the archbishop or his vicar-general is to determine, and this Court will not interfere with his decision. Upon the whole, I think this rule should be made absolute.

LORD DENMAN, C.J.—This is an application for a mandamus to the Archbishop of Canterbury, to hear certain parties in opposition to the confirmation of the bishop elect of the diocese of Hereford; and their affidavits state, in substance, that a citation had been issued, requiring opponents of the confirmation of the bishop elect to appear with any objections they might have to urge; that they had accordingly appeared with their objections in due form, and that their counsel had not been permitted to do more than to argue in favour of their right to be heard. The affidavit then states that the vicar-general then proceeded with the confirmation, and declared that no opponents had appeared, and that opponents were contumacious for not appearing. It is also further stated, that the objections tendered were founded on doctrines contained in certain books written by the bishop elect, which, it is alleged, are repugnant to the articles of religion; and the applicants contend that the confirmation which followed was, by reason of that refusal, null and void. Various arguments have been used to shew that a writ of mandamus will not lie in the present case. I have no doubt that in this case the mandamus sought for ought not to issue; and even if I were at all in doubt on the subject, I should think it better not to issue the writ than to run the risk of abridging the clear and established prerogative of the Crown, in a matter of such vital importance to the best interests of the people more than to those of the Crown itself. There certainly has been established a *prima facie* case of wrong, where, after citation issued for persons to appear in opposition, and after proclamation to the same effect, persons so appearing were prohibited from stating the grounds of their opposition. This proceeding is an

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elect, whose doctrines have been approved on his ordination to the offices of deacon and priest, and who has been nominated by the Crown, and elected by the dean and chapter, is to be placed by the favour of his sovereign; and the charge is to be made blacker, if possible, by the use of the full and comprehensive word "heresy." While upon this topic, I feel it necessary to repeat what has often been stated in former judgments, that the canon law forms no part of the common law of this realm, unless practice can be shewn to the contrary. And I am of opinion, that the burden of proof on such a point rests on the parties opposing; but into this I need not go, for I am convinced that the practice alleged in the present case never has existed authoritatively in this country, and for proof of that I rely, not upon affidavits, but upon the arguments of the appellants themselves; for I am satisfied that if ever such a case could have occurred, it would not only have been cited in this court, but would have been notorious to all the world. But there is not a trace of such a case; all records, historical and legal, prove a perfect blank with respect to it. It was argued that perhaps such a case never had occurred, because an appeal to that Court might never before have been necessary. What! during all the centuries Christianity has existed, has there not been one person, some of whose opinions may have been alleged to be heretical, elevated to the rank of bishop? Has there been none elevated with "spiritual pride," none with "jealousies," none against whom some person or another might not have alleged some sort of "immoralities"? And even if this were so, were there no persons during all that period capable of making a false charge, or of drawing a false inference? But, suppose opposers admitted, what would happen? "Come forth," says the proclamation, "and offer your opposition in the case of this person about to be made a bishop." The answer is, from one: "I knew this man at college twenty years ago, and I can tell you of some irregularities in his life." Another would say, "This person is justly suspected by one of having performed the service whilst in a state of inebriety." A third might charge him with "vanity." Another might throw a slur upon the chastity of his mother, or attack his conduct respecting his

son. All that the Pharisee blessed himself in being free from, these people might falsely allege against the bishop. He might know all the allegations to be false and infamous. The archbishop might think the accusers utterly unworthy of belief, or know the charges to be false; but, nevertheless, the inquiry must proceed, and though they should be disproved, and the confirmation take place, still the fatal calumny must remain. But how much is the case strengthened when the charge is the unfathomable charge of heresy, supported by extracts from books, probably little understood, and by reported conversations, probably imaginary, and, if real, difficult to be correctly repeated. Thus, the life of a bishop might be frittered away whilst proceedings are pending against him, and his see might be left without any occupant, to the detriment of the church and of the people. The evidence that this opposition took place in ancient times is very small, and it is proved to have been a mere matter of form during the last three centuries. And why should it not have been formal, when it is well known that nothing could have resulted from any attempt to make it otherwise? Why not give the ecclesiastical authorities credit for surrendering so invidious a power, or rather for refusing to adopt it? Any attempt to carry such a scheme into effect must have shewn its utter impracticability. But let us consider what mighty edifice is sought to be raised upon this word "confirm." We are told the archbishop holds a court, but that this Court has ever done what is now required is not pretended. The right of appointment of a bishop by the Crown without the interference of the archbishop has, in fact, never been doubted: that any opposer to the confirmation was entitled to appear was never even surmised. The records of the Court are silent on the subject. There has been, in fact, only one exception to the rule of the non-appearance of opposers, and that exception was in the case of Bishop Montague, when the vicar-general, Dr. Rives, refused to hear an opposer, guarding himself, however, by stating that he did so because the opposition was not in writing. Of this Dr. Rives we know little, and that little not much to his credit; but it is very clear to me that if he did give such a judgment he was wrong; for in the canon law

nothing is said about the opposition being in writing, and indeed it might proceed from a party who is not able to write. If such were the law there would be plausible reasons for admitting the opposition. Dicta have been cited from the case of *Evans v. Ascuthe*, in which the Dean of York having been promoted to the bishoprick of Bristol, and in the interval between his election and confirmation having performed acts as dean, and granted leases in conjunction with the chapter, it had been mooted whether his election was valid. In the course of that proceeding the opposition cooled very much. Judge Whitelocke, it was true, alluded to the possibility of the ceremony not being completed; but he never dropped a hint in favour of the opposer's right to be heard. A useful pamphlet has been cited in this court, containing a collection of opinions upon the subject of the prerogative, in the form of a dialogue and statement. The question discussed is, whether the sovereign has the power of the keys the same as the pope, and can confer ecclesiastical orders. It takes the form of a dialogue between a Roman Catholic and a Church-of-England man. The former maintains the converse proposition; and the subject then branches off to the creation of bishops. The Church-of-England champion maintains that freedom of election in respect to bishopricks is consistent with the recommendation of the sovereign to the vacant see; that it does not exclude it. The Roman Catholic then suggests the appointment of an uncanonical or immoral person, to which the Church-of-England-man replies, that the kings of this country are wont to proceed in such matters carefully and piously; which is the reason why the Church of England is in such a flourishing condition. The Roman Catholic then urges that the sovereign is but a man, and, as such, subject to human weakness; to which his antagonist answers, that in such case the electors would no doubt represent the case to the king, beseeching His Majesty to take care whom he recommends to them: and he adds, the princes of England are so famous for their piety and condescension, that he has no doubt the sovereign would nominate another person. It appears from the pamphlet, that Charles the Second having taken into his serious consideration how much it would conduce to the

honour of God so to do, resolved that no secretary of state should thenceforward move His Majesty to appoint to any bishoprick in the church without a certificate of the competency of the candidate signed by the Archbishop of Canterbury and the Bishop of London. The same thing was done by William the Third; but in neither of those instances was the right of interference with the appointment of the Crown in any way recognized, nor any allusion made to the rejection of the individual nominated for election. The case of Bishop Gibson, which had been before mentioned, was a remarkable authority. He was assailed by one of the most learned Judges who ever sat in this court, Sir Michael Forster, as one who desired to create an ecclesiastical hierarchy, and to erect the church into an *imperium in imperio*. This charge it was that induced him to write that celebrated treatise which still remains a perfect storehouse of ecclesiastical law; but in no one page of which does he assert the existence of any power on the part of the archbishop to defeat by such an inquiry as that of confirmation, the right of nomination by the Crown. Certainly, some questionable applications have been made in regard to the subject. There are no less than four of these reported. In the case of Bishop Hoadley, for instance, that prelate gave his opponents free opportunities of making opposition to his confirmation, knowing that something was alleged against him. Archbishop Wake remonstrated successfully with the sovereign against the promotion of Dr. Samuel Clarke, and other sovereigns have consulted archbishops before promoting to the office of bishop. But not a word has been uttered, not a fact has been cited to shew that any archbishop has ever instituted or could institute any inquiry. Every one has heard in this case of the celebrated protest by thirteen or fourteen bishops to that prelate. The arguments they urged were arguments of great weight and power, but though they warned the minister of "scandal" arising from the nomination, not once did they allude to rejection of the prelate for confirmation on the ground of heresy. One of the objectors wished not to be exposed to the perils of a *præmunire*; but there was no assertion of the danger and disgrace so likely to arise from any opposition



on the part of those who had procured the condemnation of the bishop by the convocation of the University of Oxford. It was said, indeed, that by not allowing the Court to inquire, the archbishop would be converted into a mere "machine." That word "machine" suggests to me the idea that the writ of this court may possibly be used as a machine with some sort of galvanic operation upon powers hitherto supposed to be extinct, which would thereby make some convulsive motions for the space of twenty days, and then relapse into the most profound repose. But that idea implies that the forms in which vitality is to be generated had a real existence. I do not believe that to have been the case. The duty of the archbishop in the matter appears to me to be clear and entirely apart from the functions of a Judge. It is, in my opinion, more analogous to the duty of a returning officer at elections. His confirmation is necessary. If his inquiries lead him to the opinion that the appointment would be injurious, he can remonstrate. He can advise the Crown not to issue a *congé d'élire*. He may ask to be removed from the painful operation of performing, or ordering to be performed, the duty of consecration after the election has been made. Even then he may resort to the presence of the sovereign, and pray to have the *congé d'élire* and the letters missive superseded. But even at the worst, if the Crown persists in nominating the particular person to be bishop, and if he is quite clear that the *congé d'élire* ought to be set aside, he may act as his conscience would doubtless dictate, and as some of the Judges of this court have acted, and resign the office which the Crown had given him. The present archbishop, I have no doubt, would do so after hearing the objections that are made to Dr. Hampden, if he did not consider that he would not be justified in such a course of proceeding. I ask whether it has been the opinion of any person, until this unfortunate controversy occurred, which has so influenced the public mind, that the archbishop had a veto on the appointment of the Crown to a vacant bishoprick? And when I hear the Court solemnly entreated not to call upon the archbishop to invoke the Almighty in prayer, and perform as a sacred ceremony that which is in reality a

mockery, a shadow, and at best a useless form, I confess that I hardly know how to treat such an observation. Are the dean and chapter to be treated as nothing? Do they conduct their proceedings without prayer and solemn ceremony? And if they are required, notwithstanding, to proceed to the election, without the power of refusing to elect the nominee of the Crown, why should this argument be referred only to the confirmation, and not to the election? It may be an ill-considered act of parliament, and one, perhaps, that ought to be repealed; but why should there be any objection made to the solemn ceremony of the confirmation and not of the election, which is conducted with equal solemnity, and both of which are in conformity with the same act of parliament, I cannot understand. Having stated my reasons for the opinions which I deliberately, firmly, and conscientiously entertain—that what has been contended for in support of the rule never was at any time the law of England, I must say that I think the Court is bound to refuse the writ of mandamus. At the same time, I may state that I have had the greatest possible hesitation in coming to this conclusion; and the more especially as I feel that this is a refusal of an inquiry which in a railway or any ordinary case would at once be granted. My opinion is so strong against making such a rule absolute, and so entirely unchanged by what I have heard this day, notwithstanding I feel the greatest disposition to shew the highest respect for the sentiments of my learned Brethren who differ from me, that I cannot possibly say that this writ ought to go. I think, if it went, it would be good for nothing, for the return which would be made to it would be a sufficient answer. But I am also bound to consider the consequences which would arise from the issuing such a writ, viz. the frightful state of theological animosity which it would create and perpetuate for a period of, perhaps, two years, and the sanction it would give, upon the avoidance of every see, to the adoption of a similar course, where the archbishop would be called upon to summon all mankind in every case as objectors to the appointment by the Crown, and to keep open a Court, which, in fact, might never be closed. It must also be

borne in mind that the Court has a discretion in the issuing of a mandamus, supposing even it thought that the proceeding complained of was of a judicial character, and that the archbishop might be compelled to hear the objectors; and in the exercise of this discretion, without regard to the legal right, I feel bound to refuse the writ. I must also acknowledge that some deference is due to the exalted person who is the defendant in this case, as well as to Dr. Hampden himself, whilst more regard is to be paid to the safety of the church and the peace of the state, which I verily believe would be perilled by the encouragement of the smallest doubt as to the true meaning and intention of the act of Henry the Eighth. I repeat, that I have the greatest respect for the opinions of my learned Brethren. I think, however, this is a question which ought to have been discussed. I must say, in reference to my Brother Coleridge's admirable argument, that it only confirms me as to the danger of exposing the clear construction of acts of parliament to those who bring down their forgotten books, and wipe off in this court the cobwebs from decretals and canons of which we, as Judges, know nothing. For these reasons, and thinking myself bound by the act of parliament and the practice which has prevailed, I think the rule must be discharged.

The Court being equally divided in opinion, the mandamus was not issued, and the rule nisi was accordingly

*Discharged.*

1848. }  
June 3. } THE QUEEN v. ST. PANCRAS.

*Poor-Law—Removal—Examinations—Rate Book—Extracts.*

*In an order for the removal of a widow, the pauper's examination set out a renting of a house by her late husband, and that he was assessed to and paid the poor-rates of the appellant parish for the said house for one whole year, and she produced the receipts for the rates, copies of which were exhibited and sent to the appellants. The vestry clerk of the appellant parish was examined, and produced the rate-books for the year in question before*

*the removing Justices, but no extracts from them were sent by the respondents with the copies of the examinations:—Held (dubitante Coleridge, J.), that it was to be presumed that the removing Justices had inspected and decided on the accuracy of the rate-book, and that this being a document belonging to the appellant parish extracts from it need not be sent with the examinations.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 123.]

1848. }  
June 5. } RYAN v. SAMS.

*Principal and Agent—Continuing Authority—Baron and Feme—Liability.*

*The liability of a defendant who has cohabited with a female not his wife, and has allowed goods to be supplied at her residence on his credit, continues until the parties supplying the goods have been informed of the termination of such connexion.*

Debt for goods sold and delivered, for work and labour, and on an account stated.

Pleas—First, except as to 9l. 2s., parcel, &c., never indebted; issue thereon. Secondly, payment into court of 9l. 2s., which the plaintiff took out of court.

At the trial, before Erle, J., at the Sittings after last term in Middlesex, it appeared that the plaintiff, a looking-glass and picture-frame maker, had, on different occasions, between the 2nd of July 1846 and the 20th of May 1847, furnished goods to a lady named Stanley, with whom the defendant had resided for two or three years prior to March 1846, but from whom he had separated on the 9th of November of that year. It appeared also that in 1843, the defendant and Mrs. Stanley were living in Upper Marylebone Lane, as man and wife. In that year goods were ordered of the plaintiff, and paid for by the defendant. They subsequently removed together to other residences, where goods were supplied to her, and the bills sent in to the defendant half-yearly, and paid by him up to December 1846. About the 8th of that month Mrs. Stanley removed to a house in Upper Seymour Street, and it was for arti-

cles supplied at that house that the defendant now contended he was not liable. The plaintiff was aware, throughout his dealing with the defendant, that Mrs. Stanley was not the defendant's wife, but there was no proof that he had received any direct intimation that the parties were separated, before supplying any of the articles charged in the bill of particulars. The jury found a verdict for the plaintiff for 48*l.* 3*s.* 3*d.*, with liberty to move to enter a nonsuit.

*Humfrey* (with whom was *Hugh Hill*) now moved accordingly. — *Munro v. De Chemant* (1) is a very strong authority in favour of the defendant. It is there put by Lord Ellenborough that a man is not liable on the contracts of a woman with whom he has previously cohabited after the cohabitation has ceased, unless she is proved to be really his wife. If this were not so, it would be difficult to say how long the agency of a woman, under such circumstances, is to be presumed to continue.

[*LORD DENMAN, C.J.*—It will be presumed to continue so long as the person giving credit on the faith of the connexion is uninformed of the separation.]

The evidence here shews that the plaintiff knew that the defendant was not married to the lady. The liability in such cases arises either from the implied relation of principal and agent, or from the relation of husband and wife supposed to exist between the parties. Here there was no evidence for the jury of either.

*LORD DENMAN, C.J.*—In the case cited, the liability of the defendant was rested upon the fact of the goods supplied being necessities for which he was bound to pay, and that he could not deny that the woman was his wife, after having held her out as such. Here no such question arises; but it is merely whether the plaintiff sold her these goods on the faith of her still having authority to pledge the defendant's credit. These orders were given continuously, and those prior to the separation had all the authority of *Sams*. The rule must be refused.

*PATTESON, J.*—There certainly was evidence for the jury in this case. The defendant and Mrs. Stanley had lived in different

places together. It is true the former had never passed the female off to the plaintiff as his wife, but he clearly authorized him to supply goods to her on his credit. No intimation of the separation was given to the plaintiff, and therefore the defendant's liability still continued.

*COLERIDGE, J.*—I am of the same opinion. The case from *Campbell* was founded only on the marital liability of the defendant. This, on the other hand, is purely a question of agency. The mere change of place of abode was not sufficient to inform the plaintiff of the alteration of the position of the parties, for there had been at least three changes of residence before, and during all these the authority had continued. The plaintiff therefore had a right to suppose he was still supplying her on the defendant's credit.

*ERLE, J.*—It appeared to me, at the trial, that the defendant had so acted as to induce the plaintiff to suppose that Mrs. Stanley had a continuing authority, and therefore the action will lie.

*Rule refused.*

BAIL COURT. { THE QUEEN v. THE JUSTICES  
1848. { OF CUMBERLAND, AND THE  
June 12, 16. { QUEEN v. THE JUSTICES OF  
LANCASHIRE.

*Costs—Mandamus—Unsuccessful Opposition.*

*The general rule that an unsuccessful party must pay the costs, is applicable to cases where the party, who has obtained an erroneous decision in his favour at the Quarter Sessions, unsuccessfully opposes the issuing a writ of mandamus to correct such decision. This Court, however, may, in the exercise of its general jurisdiction, make an exception under particular circumstances.*

*Semble — that if no opposition were offered to the application for the mandamus, costs would not be incurred.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 133.]

(1) 4 Campb. 215.

1848. }  
 June 22; } COUSENS v. HARRIS AND  
 July 12. } ANOTHER.

*Land Tax, Redemption of*—42 Geo. 3. c. 116.—*Tenant for Life—Reversioner—Repayment of Consideration.*

*Where tenant for life has redeemed the land tax under 42 Geo. 3. c. 116, the reversioner may on coming into possession compel the representatives of such tenant for life to accept the consideration paid for such redemption, together with the arrears of interest, so as to render the land no longer chargeable with the yearly payment of interest.*

*Therefore, where the defendants in replevin avowed as devisees of a tenant for life in respect of the yearly sum payable as interest on the redemption money, and the plaintiff pleaded in bar that he held a moiety of the remainder in fee as tenant in common, and being desirous of freeing the lands from that charge, had, before the distress, tendered to the defendants the redemption money and interest which they had refused,—Held, that the plea in bar was good.*

Replevin. Avowry, that before, &c., to wit, on &c., H. G. M. was seised for life of certain messuages, &c. in the parish of C, in the county of Kent, of which the close in which, &c. was parcel; that the said messuages, &c. were assessed for the said parish of C, for the year ending the 25th of March 1816, at the rate and assessment of 20l.; that before, &c. and after the passing of the statute 42 Geo. 3. c. 116, to wit, on the 28th of September, A.D. 1816, the said H. G. M. contracted with A. and B, two of the Commissioners acting under that statute, for the redemption of the 20l. land tax, and by the said contract the consideration for such redemption was declared to be so much money to be paid to the receiver general or his deputy for the county of Kent, as would be sufficient for the redemption of 3l. 6s. 8d., part of the said land tax, on or before the 25th of March 1817 (and so on yearly), the last portion being payable on or before the 26th of March 1822, according to the price of stock, &c.; that such contract was duly certified according to the form prescribed by the act of parliament; that before the said time when, &c., and during the lifetime of the said H.

G. M. the whole of the payments amounting to 525l. 5s. 0½d. had been duly made according to the terms of the contract, and that the contract was duly registered, whereby and by reason of the premises the land tax became and was redeemed by the said H. G. M. and the messuages, &c., including the close in which, &c. were wholly freed and exonerated from the said land tax, and chargeable for the benefit of the said H. G. M., his executors, &c., with the amount of the money paid as the consideration for its redemption, and with the payment of a yearly sum by way of interest thereon, equal in amount to the said land tax so redeemed as aforesaid; that H. G. M. died in 1829, having devised the yearly sum to his three daughters as tenants in common. The avowry then traced the yearly sum to the defendants by devise and assignment.

Plea in bar—That C. H. M. being seised in fee of the messuages, &c. died in 1804, having first devised to H. G. M. for life, remainder to the two daughters of C. H. M. as tenants in common; that on the death of H. G. M. in 1829, the trustees under the marriage settlement of one of the daughters became seised in fee of one moiety, and the other daughter of the other moiety, and thereupon demised to the plaintiff from year to year; that the trustees had always been ready to pay the redemption money in full, whereof the defendants had always had notice, and afterwards and before the said time when &c., the trustees for the purpose of freeing and discharging the said messuages from all charges in respect of the redemption money and interest, without the privity of the other daughter tendered the amount of the redemption money and interest to the defendants.

General demurrer and joinder.

The defendants' marginal point was, that the tender pleaded is bad in law, first, because the devisees or the representatives of a tenant for life, who redeemed the land tax under the 42 Geo. 3, cannot be compelled to accept a sum of money in satisfaction and discharge of the yearly sum payable by way of interest, with which the land became under the act charged for the benefit of the estate of such tenant for life. Secondly, that the trustees were seised of a moiety only of the lands charged, and could

not compel the devisees or representatives of the tenant for life who had redeemed, to accept a sum of money in discharge of the yearly sum, without the privity or consent of the other tenant in common.

This case was argued (June 22,) by—

*Hoggins*, in support of the demurrer.—The statute 42 Geo. 3. c. 116. gives no power to the reversioner to compel the representatives of the tenant for life who has redeemed, and who has charged the land with an annuity in respect of the redemption money, under section 123 (1), to take back the redemption money, and so to free the lands of that charge. The argument derived from the absence of any provision to enable the reversioner to pay off is fortified by the circumstance that the previous Land Tax Act, 38 Geo. 3. c. 60. s. 18, has a provision that the reversioner next in succession, on coming into possession, and so on *toties quoties*, shall be entitled to an assignment of the contract, on paying the original contractor the consideration for his purchase. Neither is it equitable that the reversioner should at any time, taking advantage of the low price of stock, insist on redeeming at any period of time, after the annuity charged has passed through various hands, and become the subject of family settlement. Secondly, it would be also most unfair if the owners of one moiety should be able to redeem without the consent or even the knowledge of the owners of the other.

*Bramwell*, *contra*.—It is true that the statute 42 Geo. 3. c. 116. contains no express provision enabling the reversioner to redeem as against the tenant for life or his representatives; but that the act contemplated the existence of such a right may be inferred from various clauses. The title of the act is material: it is entitled "An act

(1) Which provides, that where any person or persons having any estate or interest (other than an estate of inheritance) in any manors, lands, &c., shall redeem the land tax charged thereon, by or out of his or their own absolute property, such manors, lands, &c., shall be and become chargeable for the benefit of such persons, his or their executors, administrators, &c., with the amount of the 34. per cent. annuities which shall have been transferred or with the amount of the monies paid as the consideration for the redemption of such land tax, as the case may be, and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land tax redeemed.

for consolidating the provisions of the several acts passed for the redemption and sale of the land tax into one act; and for making further provision for the redemption and sale thereof, and for removing doubts respecting the rights of persons claiming to vote, &c., in respect of messuages, lands, &c., which shall have been redeemed or purchased." The act accordingly contains two sets of provisions, one for the redemption, the other for the sale of the land tax. The redemption clause is section 10, which empowers all persons having any interest to redeem. Section 18. gives them a preference till a certain time. Section 19. gives a preference to parties in possession. There are then clauses, providing for the mode of payment, and giving the form of contract; and section 38. provides for the exoneration from the tax of the lands so redeemed. Section 40. lets in persons who had partially proceeded under former acts. The redemption being complete, and the tax, therefore, got rid of, the act contains various other provisions for something quite different from redemption. Sections 151, 152, 153. provide for the purchase and sale of the land tax. Section 154. provides that the purchaser, his heirs, &c. shall be seised of a fee-farm rent equal to the tax, and have a power of distress. There is then a third set of clauses providing for limited interests. The effect of the enactment was to create a debt, and it would be a great hardship if it could not be paid off. Suppose land liable to a charge of 20*l.* a year, under the act, is let on building leases, and becomes worth 10,000*l.* a year, is the whole of the land to remain for ever liable to distress? Section 155. uses the term "interest": what does that apply to?

[*PATTERSON, J.*—I see no provision enabling the owner of the land to pay off a fee farm rent. I suppose you would deal with it as something in the nature of a mortgage.]

Yes; and the case of *Ex parte Northwick* (2) will apply.

[*ERLE, J.*—That case only seems to decide that the mortgagee might accept the money, and that the charge is an incumbrance.]

If it is an incumbrance, the reversioner might pay it off. If it could be shewn that

the reversioner was liable to be sued for it, it would surely follow as a consequence that he might pay it. In *Hopkins v. the Mayor of Swansea* (3) it was held, that whenever a debt is created by statute, an action will lie for it, though no right of action is created by express words; the enactment, that the lands are to be "chargeable," creates a statute debt.

[PATTESON, J.—There would be an injustice in saddling a person with a debt he never contracted or received consideration for.]

With respect to the statute 37 Geo. 3. c. 60, any argument to be derived from that act is in the plaintiff's favour. That act provides, by section 17, that by a contract for redemption the lands shall be wholly freed and exonerated from the land tax, unless the contractor should declare an option of being put on the footing of a purchaser. Section 18. applies to cases in which the option has been exercised, but in no case under that act is the land charged with the tax as a fee farm rent. As to the second point, it is perfectly clear that if this is a debt with which two parties are chargeable, either of the two may pay it.

*Hoggins*, in reply.

*Cur. adv. vult.*

LORD DENMAN, C.J. subsequently (July 12) delivered the judgment of the Court (4).—In replevin the defendants avowed for the interest upon a sum paid for the redemption of the land tax, by a former tenant for life, under whom they claimed. The plaintiff pleaded that he held a moiety of the remainder in fee, and being desirous of freeing the lands from this charge, had before the distress tendered to the defendants the principal sum paid for such redemption, together with all the interest that was due, and they had refused the same. By the demurrer thereto, the question raised is, whether the person in remainder who has come to the possession of land, can compel the assignees of the tenant of a previous particular estate who has redeemed the land tax charged on such lands out of his own property to receive at any time the principal money paid as the consideration for such

redemption, together with all arrears of interest, and so to free the land from the charge and payment of the interest. If he can, the plea is valid, because it shews a tender of the principal and interest before the distress; and though the present plaintiff is only tenant in common of a moiety, still if the right exists for a remainder-man in severalty, it appears to us that it would exist for each tenant in common, who might take the estate in remainder. The point depends upon the effect of the 42 Geo. 3. c. 116. s. 123, which in case of redemption of the land tax by a tenant of an estate not of inheritance, enacts, that the lands shall be and become chargeable for the benefit of such tenant, his executors, administrators and assigns, with the amount of the monies paid as the consideration for the redemption, and with the payment of a yearly sum by way of interest thereon, equal in amount to the land tax redeemed. The plaintiff contends that the land is hereby made subject to the payment of a debt and interest, which the holder of the land may at any time discharge. The defendant contends that the land is made subject to a perpetual annuity or rent-charge equal to the amount of the interest. It appears to us, that the plaintiff's is the true construction. If we confine our attention to this section, the expression, that "the land shall be chargeable with the principal sum for the benefit of the tenant and his executors," indicates the existence of a debt, and would have no effect if the enactment made the payment of interest an annuity without power of redemption, and gave neither party any right in respect of the principal; also the expression that "interest should be due" implies a debt, and is not the language for creating an annuity. If we regard the other parts of the statute, the presumption in favour of this construction is increased. The legislature has provided for charging the land tax redeemed either in perpetuity or for a time, and has used throughout the act appropriate language for a continuing annual charge, where such was the intention.

By section 88, when bishops redeem with monies raised under the statute, the land tax redeemed is made a perpetual charge to be added to the accustomed yearly rent; so by section 89, in case of redemption of the land tax on the lands comprised therein, it is added to the rent of existing leases.

(3) 4 Mee. & Wels. 621; s. c. 8 Law J. Rep. s. c. Exch. 121.

(4) Lord Denman, C.J., Patteson, J., Coleridge, J. and Erle, J.

But the 154th section affords the most important contrast, which provides for the sale of the land tax to a purchaser unconnected with the estate; it provides that such purchaser and his heirs shall be entitled to demand, and shall be deemed to be in the actual seisin of a yearly rent, as a fee farm rent, equal to the land tax redeemed, to be issuing and payable out of the lands which were liable. It is not easy to suppose that the legislature intended to produce the same result by two enactments, which are so very different in their words. The precautions required by the statute before a stranger is allowed to fix an annual payment irredeemable on the lands, make it probable that the enactment in question was intended to create a debt payable at any time.

The statute regards those who are interested in the estate, whether jointly or successively, as one owner, and gives to any one of them a preference over strangers to redeem, and prevents the sale to a stranger till notice has been given to them and they have refused to redeem, it being considered that the fixing a perpetual rent-charge on the estate might be a great inconvenience to the owners. But in the case where the ownership is to pass to several in succession, and the preference to redeem is given to the holder of the particular estate who happens to be in possession, it would be an unreasonable sacrifice of those in remainder to him if he was allowed the choice of investing his money, so as to fix a perpetual incumbrance on those who are to succeed, they probably being of the same family, or taking under the same grantor, and so not wholly to be disregarded by the tenant of the particular estate, and they being in many instances either under the disabilities of coverture or infancy, and so incapable of default, or holding contingent interests only, and so not entitled to interfere. If the tenant of the particular estate makes the necessary advance, it is just to him that his advance with interest should be secured to him, and it is just to those in remainder that they so indemnify him should be allowed to free their estate. The construction we adopt attains these objects. It is confirmatory that the clause relating to redemption by one coparcener, section 124, is worded in the same way. They may well be considered to be of one family, and the advance by one to be a loan to the

others, secured on their estates, which they might pay off with interest, this being an indemnity to the coparcener that made the advance; and such redemption is distinguishable from the more hostile description where a stranger has the fee farm rent above mentioned, in case of total default of all interested in the estate. This statute is *pari materid* with, and in a degree in furtherance of, the 38 Geo. 3. c. 60, and a reference to that statute makes the construction clear. That statute also gave a preference to those who were interested, and enabled a tenant not of the inheritance to redeem, and gave such tenant an option either to declare his wish to be considered on the footing of a purchaser not being interested or not, and if he so declares, he is to have all the rights of such purchaser, section 17; and by section 37, he and his executors, administrators and assigns, are to hold the land tax so redeemed as an annuity issuing out of the lands, subject to a power of redemption about to be mentioned. And by section 18, where such option shall have been declared by such tenant, viz. to have a continuing annuity, it shall be lawful for those in remainder at any time after the remainder has vested in possession to demand from the proprietor of such annuity (that is, the land tax) an assignment of his interest therein, on transferring to him the same amount of 3*l*. per cent. stock as was transferred by the original contractor for redemption, and such proprietor is to make an immediate assignment, and persons under disability are capacitated to assign. These are the provisions for the alternative of such tenant electing to have a continuing annuity. The legislature pointedly negatives his right to effect this against the will of those in remainder, and enables them at any moment after possession to clear the land of the annuity, by transferring the same amount of stock. The provisions for the other alternative, when such tenant does not so declare his option, are now to be considered. In that case, by section 37, the lands shall be and become chargeable for the benefit of such person, his executors, administrators, and assigns, with the amount of the 3*l*. per cents. which shall have been transferred as the consideration for the redemption, and with the payment of such yearly sum of money by way of interest thereon as shall

be equal to the land tax redeemed. It is almost certain that the legislature must by these words have intended to create a debt in the nature of a mortgage, which the mortgagor, upon coming to the possession, might at any time pay off by returning the principal stock, and paying up the interest; for it would be inconsistent to provide that the annuity might be redeemable at any moment if the tenant for life declared his option to have it permanent; but if he declared no such option, it should be permanent, and those in remainder should have no power of redemption, so that permanence should be taken away where the option to have it should be declared, and should be granted where such option is not declared. These being the provisions in respect of options by such tenants in the 38 Geo. 3, by the 42 Geo. 3. certain alterations are made: the power of declaring the option is no longer to exist; a power to dispose of the cases, where the option has been already declared under the former act, is provided by section 40; and by section 23, if the land tax does not exceed 25*l.*, the consideration for redemption may be money instead of stock. Then by section 123. the provision is made for charging the land with the debt in case of redemption by tenant of a particular estate. The provision is literally the same as that in 38 Geo. 3. for such charge, where such tenant had not declared his option; in that case we have seen the words created a debt, which those in remainder might at any moment pay off, and as the 38 Geo. 3. is for many purposes recognized and continued by the present act, it is almost certain that the legislature, by re-enacting this clause in terms, intended it should have its former effect. These being the reasons for the construction that the debt and interest might be paid off, it remains to consider the grounds adduced for holding that a permanent charge was created. It was said that there were no words expressly compelling the creditor to receive the debt, but express provision is not to be expected; generally speaking, no compulsion is necessary for the receipt of a debt. It was said that there was no provision for compelling a debtor to pay at any time. There is not; but the legislature may have well considered that the lands were an ample security; that the interest

was a compensation; and that if the principal was wanted, this charge as a mortgage might be assigned, and so the consideration raised. It was said that there was hardship in giving those in remainder the option to pay off at any moment, because they might choose to pay off when the 3*l.* per cents. were low, and so gain an advantage; but this ground is founded on misconception. By the 38 Geo. 3. the consideration was to be 3*l.* per cent. stock, and the payment was to be by transfer of stock only. By the 42 Geo. 3, where the land tax does not exceed 25*l.* the consideration may be money. In the present case the land tax was 20*l.*, and the consideration was money as alleged in the pleadings; and therefore those who seek to pay off the debt have to repay the same amount of money which was originally paid for the redemption, and the price of stock has no bearing. Even if this inconvenience had existed it would have been no argument, for the 38 Geo. 3. s. 18. expressly provided for redemption at any moment by transferring an equal amount of stock. If inconvenience is to be considered at all, it affords a strong argument in favour of the construction we have adopted; for thereby an indemnity is secured for the tenant who advances the money, and a provision to free from incumbrance is secured to the successors; but by the other construction the tenant of the particular estate might injure the inheritance by a perpetual incumbrance affecting every part of it, and without a power of apportioning the charge which would be requisite, and which is expressly provided where a permanent rent-charge is intended by section 155. It follows that our judgment is for the plaintiff.

*Judgment for the plaintiff.*

1848. } THE QUEEN v. THE INHABIT-  
June 24; } ANTS OF HALIFAX.  
July 12. } (HALIFAX AND ALNWICK.)

*Poor Law—Order of Removal—Examinations—Removability under 9 & 10 Vict. c.66.—Five Years' Residence—Interruption of Residence—Removal under former Order.*

*It is not an objection to an order of removal that the place at which it is made is not stated in it.*



Nor is it an objection that it does not appear on the face of the order or on the examinations, that the pauper did not become chargeable in respect of relief made necessary by sickness or accident.

A pauper, after residing thirteen years in H, was, by an order which was unappealed against, on the 1st of March 1845, removed to A, where she remained, receiving relief out of the workhouse there until the 19th of March, when, on being promised 7s. 6d. a week by the guardians of A, she returned to H, where her friends lived, and where she had always been desirous of returning. On her return to H, she took possession of a house which she had rented before her removal to A, and of which she had kept the key, and in which she had left her furniture whilst she remained at A. The guardians of A, discontinuing the promised allowance, she again became chargeable to H, on the 4th of November 1846, and another order was made for her removal to A:—Held, that she was properly removable notwithstanding the 9 & 10 Vict. c. 66, as the first removal to A. entirely put an end to the residence at Halifax.

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 158.]

1848. } WHARTON AND ANOTHER v.  
July 1, 12. } NAYLOR AND ANOTHER.

Sheriff—Landlord and Tenant—Fi. Fa.  
—Distress—Payment of One Year's Rent  
—Pleading—Departure.

Where the sheriff seizes goods in execution, and assigns to the execution creditor, having notice that a year's rent is due to the landlord, though he may be liable to an action at the suit of the landlord, yet such landlord cannot distrain for his year's rent while the goods are in the possession of the sheriff or his assignee.

Trespass qu. cl. fr. of plaintiff. Plea, entry to seize growing crops under a distress for rent. Replication, a previous seizure under a fi. fa., at the suit of the plaintiff against the tenant of the locus in quo, and an assignment to the plaintiff by the sheriff under it. Rejoinder, that the seizure was made after notice to the sheriff and to the

plaintiff that a year's rent was due to the landlord, and that neither the plaintiff nor the sheriff paid such year's rent, wherefore the landlord (the defendant) distrained:—Held, that the rejoinder was bad.

Held, also, that the replication was good, and was no departure from the declaration, which stated the closes to be the closes of the plaintiff, for although the replication shewed a tenant from whom the rent was due at the time of the execution, yet such possession was consistent with the possession of the plaintiff at the time of the trespass.

Trespass for breaking and entering, on &c., and on divers other days, four closes of the plaintiff, and reaping, mowing, and cutting the wheat and oats of the plaintiff.

Second count, *asportavit* of wheat, oats, and straw.

Fourth plea to the first count, that before &c., one John Lind, from thence until &c., held the closes in which &c. in the first count mentioned, together with other premises, as tenant thereof to the defendants, under a certain demise, &c., and that 40l., being a half-year's rent, was at the said time when, &c., in arrear, wherefore the defendants, on the first day when, &c., did enter, &c., in order to distrain, and did then distrain for the said rent, and afterwards, on the day last aforesaid, and when the said wheat and oats were ripe, did gather and cut the said wheat and oats for the purpose and in order that the defendants might carry, lay up, and impound the said wheat and oats, as such distress as aforesaid, on the most proper, fit, and convenient part of the said premises so held, &c., according to the form of the statute, &c. Sixth plea, as to the first count, that the rent was in arrear, [as in the former plea,] and that the goods in the second count mentioned were on the premises so held by John Lind, and liable to be distrained, and the defendants then seized and distrained them.

Replication to the fourth plea, that before the said times when, &c. in the said first count mentioned, the plaintiffs recovered a judgment in the Court of Queen's Bench against John Lind for 377l. 8s. 5d. debt, and 9l. 19s. costs, and that the plaintiffs sued out a writ of *fi. fa.* to levy the above sums, which writ was delivered to the sheriff, who, by virtue thereof, seized

the wheat and oats in the first count mentioned, the same being the growing crops of the said John Lind, and being of great value, &c., and therefore within a reasonable time afterwards, and before the said times when, &c., and before the defendants entered and distrained, as in the said fourth plea mentioned, and whilst the said writ remained in full force, to wit, on &c., the sheriff duly bargained, sold, and assigned the said wheat and oats so seized and taken in execution, and so being the growing crops of the said John Lind as aforesaid, to the now plaintiffs, for 38*l.* 10*s.*, and the now plaintiffs thereupon became and were possessed of the said wheat and oats then being growing crops until the said times when, &c.; and that before a reasonable time had elapsed for the cutting and gathering the said wheat and oats by the plaintiffs, and whilst the same were growing, to wit, on &c., the defendants entered and distrained and afterwards cut and gathered the same, as in the fourth plea mentioned. Verification.

Similar replication to the sixth plea.

Rejoinder to the replication to the fourth plea, that the said rent so due and in arrear, as in the said fourth plea mentioned, became so due and in arrear long before the said time when the plaintiffs sued and prosecuted out of the said court the said writ in the said replication mentioned, and long before the day of the teste of the same writ, and long before the said time when the said writ was delivered to the said sheriff, as in the said replication alleged, and also long before the said time when the said sheriff seized and took in execution the said wheat and oats, as in the said replication mentioned, in manner and form, &c., to wit, on &c., and of all which premises the plaintiffs and also the said sheriff, before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs, as in the said replication mentioned, to wit, on &c., had notice; and that the said last-mentioned wheat and oats, at the said time when the same wheat and oats were seized and taken in execution, were certain wheat and oats which were in and upon the said closes in which, &c. in the said first count and fourth plea respectively mentioned, whereof the plaintiffs and also the said sheriff, then and before the said time when the said sheriff bargained, sold,

and assigned the said wheat and oats to the plaintiffs, as in the said replication mentioned, to wit, on &c., had notice; and that the said rent so due and in arrear to the defendants as aforesaid, from the time when the same rent became so due and payable as aforesaid, until and at the said time when the said wheat and oats were so seized and taken in execution as aforesaid, and also until and at the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as aforesaid, was and continued to be due and payable from and by the said John Lind, and in arrear and unsatisfied to the defendants as the landlords of the said closes in which, &c., whereof the plaintiffs and also the said sheriff before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as aforesaid, to wit, on &c., had notice; and that the said rent so due and in arrear as aforesaid at the said time when the said wheat and oats were so seized and in execution as aforesaid, and also at the time when the said sheriff bargained and sold the said wheat and oats to the plaintiffs, did not amount to more than one year's rent of the said closes and premises in the said fourth plea mentioned, and then amounted to and was a certain sum of money, to wit, the sum of 40*l.*, being the amount of the said rent for the said half-year, of all which premises the plaintiffs and also the said sheriff before the said time when the said sheriff bargained and sold the said wheat and oats to the plaintiffs as aforesaid, to wit, on &c., had notice, and the defendants then and before the said time when the said sheriff bargained, sold, and assigned the said wheat and oats to the plaintiffs as aforesaid, required the said sheriff, to wit, on &c. to pay to the defendants the said rent so due and in arrear to them as aforesaid, before the said wheat and oats, or any part thereof, should be sold and removed from or out of the said closes and premises, of which the plaintiffs and also the said sheriff then had notice; and that the said wheat and oats were so seized and taken in execution as aforesaid long after the 1st of May 1710, and that the plaintiffs did not, nor did the said sheriff or any other person, at any time before the said time when the said sheriff bargained, sold, and assigned

the said wheat and oats to the plaintiffs, or at any time before the said time when, &c. in the said first count mentioned, pay to the defendants, so being such landlords as aforesaid, or to their bailiff, the said rent so due and in arrear as aforesaid, or any part thereof; wherefore the defendants, on the said day when, &c. did enter into and upon the said closes in which, &c., for the purpose and in order to seize, take, and distrain the said wheat and oats as and for a distress for the said rent so due and in arrear as aforesaid, and afterwards cut and gathered the same as in the fourth plea mentioned, as the defendants lawfully might for the causes hereinbefore and in the said fourth plea mentioned, and of all which premises the plaintiffs then had notice, which are the same supposed trespasses in the said first count mentioned, and which are in the said fourth plea above justified. Verification.

Similar rejoinder to the replication to the sixth plea.

Demurrers to each rejoinder, assigning for causes that the rejoinder confessed the facts stated in the replication, and did not avoid them; and that it ought to have shewn a seizure for the rent anterior to the seizure and sale by the sheriff; and that the landlord could not legally distrain the crops which had been legally seized by the sheriff, and sold to the plaintiffs, before a reasonable time for the plaintiffs to gather and remove them; and that the rejoinder should have shewn that the crops were removed from the premises by the sheriff or the execution creditor, without paying the landlord a year's rent.

This case was argued (July 1) by—

*W. H. Watson*, in support of the demurrer (1).—The rejoinder raises a ques-

(1) The defendants' points were, amongst others that the crops were not, at the time of the distress, in the custody of the law, or otherwise protested against the distress. That the replication was a departure from the declaration, as the first count alleged the closes to be the closes of the plaintiffs; but the replication admitted, that at the times when, &c. they were the closes of John Lind. That the sheriff having, after notice of the rent being due, proceeded to a sale under the execution, his bill of sale to the plaintiffs was void at all events, as against the defendants; and the plaintiffs could not, by their own unlawful act in proceeding with their execution, defeat the defendants' claim or remedy for their rent. That both counts of the declaration and both the replications were bad and insufficient.

tion which has never been expressly decided; namely, whether, where growing crops have been seized in execution, and assigned to a purchaser, the landlord can distrain if the rent is not paid before removal. Before the statute 8 Ann. c. 14. goods in the custody of the law could not be distrained, and they must of course be held as much entitled to protection in the hands of the vendee as in the hands of the sheriff. It is true that that statute makes the goods seized in execution liable to the payment of a year's rent; but the seizure in execution stands good, and the sheriff is liable to an action if he removes the goods without paying a year's rent; but the landlord cannot enter and distrain. In *Peacock v. Pervis* (2), the year's rent had been paid; but that case is important as shewing the rights of the vendee. *Smallman v. Pollard* (3) may be relied on on the other side. The remarks made by several of the Judges, as reported in that case, were not necessary for the decision of the question raised in it, and are not supported by any authority. Perhaps if the goods were left on the premises an unreasonable time after the seizure and sale under the execution, they might be liable to be distrained—*Cocker v. Musgrove* (4). Secondly, there is no departure, as this assignment gives the vendee an interest in the land until the crops are reaped; besides, the goods were in the custody of the law.

*Hindmarsh*, contra.—It is true that rent becoming due after the levy cannot be distrained for—*Peacock v. Pervis*; but here the plaintiff and the sheriff had notice, before the levy, that the rent was due. The sale, therefore, was void. The sheriff's hands were tied by the notice; and his legal custody did not exist after the notice—*Blades v. Arundale* (5) and *Wintle v. Freeman* (6). Lastly, as to the departure. If the goods were in the custody of the law the plaintiff had not the possession.

*Watson*, in reply.—The landlord is not in a worse situation by the goods remaining on the premises, as he could not, had he distrained, have removed them before they

(2) 2 Brod. & Bing. 362.

(3) 6 Man. & Gr. 1001; s.c. 13 Law J. Rep. (n.s.) C.P. 116.

(4) 15 Law J. Rep. (n.s.) Q.B. 365.

(5) 1 Man. & Selw. 711.

(6) 11 Ad. & El. 539; s.c. 10 Law J. Rep. (n.s.) Q.B. 161.

were ripe and fit to reap—11 Geo. 2. c. 19. s. 8.

*Cur. adv. vult.*

LORD DENMAN, C.J. subsequently (July 19) delivered the judgment of the Court (7).—The declaration in this case contains two counts in trespass. The first for breaking and entering the closes of the plaintiffs and cutting down growing crops of corn. The second upon a *cepit et asportavit*. The defendants plead to the first count, and justify under a distress for rent due for the closes from one John Lind. They also plead a similar plea to the second count. The plaintiffs reply separately to each plea, shewing a judgment at the suit of the plaintiffs against John Lind, and a writ of *fiery facias* under which the sheriff seized the growing crops in question and sold them to the plaintiffs, and that before a reasonable time had elapsed for cutting and gathering them the defendants distrained and seized thereon. The defendants rejoin that the rent for which the distress was made became due long before the judgment; that the sheriff and the plaintiffs had due notice of it; that it continued in arrear and did not exceed one year's rent; that they required the sheriff before he sold to the plaintiffs to pay the rent, of which also the plaintiffs had notice, and that it was not paid. The plaintiffs demurred.

On the argument, it was contended for the defendants, that as regards the first count the replication was a departure, inasmuch as the count alleges the closes to be the closes of the plaintiffs, whereas the replication shews them to have been the closes of John Lind. We think that there is nothing in this point. The plea, being in confession and avoidance, admits the possession of the plaintiffs at the time when the trespass complained of was committed, and there is nothing in the replication inconsistent with that fact, for it only admits the rent to be due from J. Lind, and that he was in possession when the sheriff entered under the *fiery facias* long antecedent to the trespass complained of: both of which circumstances are quite consistent with the possession of the plaintiffs at the time of that trespass. The principal question in the case

is, whether the growing crops so seized by the sheriff and sold to the plaintiffs could be distrained for antecedent rent of which the sheriff and the plaintiffs had notice, and which they neglected to pay. That goods which are in the custody of the law cannot be distrained for rent is clear: the point therefore is, whether these crops are to be considered to have been in such custody when the defendants seized them. If the rent had been paid, it is plain that they would have been in such custody, though in the hands of a vendee under the sheriff, and not of the sheriff himself—*Peacock v. Purvis*. In that case it is true that rent distrained for accrued after the seizure under the *fiery facias*, but still it establishes the principle that the crops in the hands of the sheriff's vendee are as much *in custodia legis* as if in the hands of the sheriff, until they are in such a state as to be capable of removal. We have then to consider what is the effect of the statute 8 Anne, c. 14. s. 1, whether goods seized by the sheriff under a writ of *fiery facias* are prevented by the operation of that statute from being *in custodia legis*, so far as regards the landlord's right of distress for one year's rent then due. The statute says, that no goods shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off such premises by virtue of such execution, pay to the landlord of the premises rent not exceeding one year.

The words cannot be taken literally. The true construction is given in *Riseley v. Ryle* (8) by Parke, B. The meaning is, that the sheriff shall not remove the goods unless a year's rent be first paid. The seizure is lawful *prima facie*; but if the goods be removed without payment of the rent, after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord, and subjects the sheriff to an action on the case at his suit. The goods, however, in the mean time until they are removed are *in custodia legis*. A bill of sale of the goods is not a removal, as was established in the case of *Smallman v. Pollard*. If indeed the sheriff receives the proceeds under such bill of sale, either from a

(7) Lord Denman, C.J., Patteson, J., Coleridge, J. and Erie, J.

NEW SERIES, XVII.—Q.B.

(8) 10 Mees. & Wels. 101; a.c. 11 Law J. Rep. (N.S.) Exch. 385.

stranger vendee absolutely, or from the execution creditor constructively, he being an officer of the court will be compelled on motion to pay over a year's rent to the landlord—*West v. Hedges* (9), *Henchett v. Kimpson* (10); but such bill of sale and receipt will not amount to a removal so as to subject him to an action. In the case of growing crops possibly the sheriff may sell either for a sum of money to be paid immediately, or for a larger sum to be paid on reaping and removal of the crops; and in the latter case he could not be called upon by the landlord by motion to pay his rent until the time came for removal of the crops. The landlord is in no way injured by this, for if there had been no execution and he had distrained the crops for his rent under 11 Geo. 2. c. 14. s. 8, he could not sell them till they were reaped, and must therefore wait for his money till that time. There seems, therefore, to be no reason why he should be held to be authorized by the statute of Anne to do that which at common law he could not do, namely, to distrain goods in *custodiâ legis*, but rather that that act intended to give him protection through the liability of the sheriff in lieu of his right of distress which is taken away by the seizure under a *fiery facias*. This appears to be the reasonable construction of the statute of Anne in regard to goods of any kind seized by the sheriff; and it is more strongly so in regard to growing crops which, although liable to be taken in execution by the common law, were not liable to be distrained for rent until the statute 11 Geo. 2.

It is true that in the case of *Smallman v. Pollard* there are dicta of the learned Judges, especially of Mr. Justice Maule, intimating their opinion, that by the statute of Anne the landlord's right to distrain is preserved; but those dicta are entirely beside the point on which the case was determined, which was simply that the declaration against the sheriff alleged a removal of the goods (which allegation Mr. Justice Cresswell considered to be necessary), and the fact of removal was not established by proof of a bill of sale, the goods remaining on the premises. With all possible respect towards the learned Judges whose dicta are there stated, we cannot agree with them in opinion. We think that the crops

in question, having been lawfully seized by the sheriff (for not having been removed at the time of the trespass complained of, the seizure of them had not been rendered unlawful), were in *custodiâ legis* though in the hands of the plaintiffs, the vendees, under a bill of sale from the sheriff, and could not by law be distrained for any rent. We think that the statute of Anne does not preserve any right in the landlord so to distrain, but gives him his remedy against the sheriff in lieu of such right, and that our judgment must be for the plaintiffs.

*Judgment for the plaintiffs.*

1848. }  
June 6, 13. } PIKE v. STEPHENS.

*Bankruptcy—Execution—Notice of prior Act of Bankruptcy—Service on Clerk of Attorney—2 & 3 Vict. c. 29.*

*Notice of a prior act of bankruptcy given to a clerk of an attorney, who had issued a writ of execution, at the office and in the absence of his master, such clerk not being shewn to have had personally the conduct of the suit in which execution issued, will not operate to defeat the execution under the proviso in the 2 & 3 Vict. c. 29. s. 1, until communicated by the clerk to his master.*

This was an action on the case against the defendant as sheriff of Berks, for neglecting to levy under a writ of *fi. fa.* delivered to him against certain persons named Toms and Matthews, at the suit of the plaintiff, until after the lapse of a reasonable time in that behalf, and until after the plaintiff had received notice of a prior act of bankruptcy committed by Toms and Matthews, whereby he was deprived of the benefits of his execution.

Pleas (*inter alia*) not guilty, and that a reasonable time had not elapsed before the receipt by the plaintiff of the notice of the act of bankruptcy. Issue thereon.

At the trial, before Coleridge, J., at the Gloucestershire Summer Assizes, 1847, it appeared, that the writ in question was lodged with the town agents of the sheriff of Berks on the 2nd of December 1846, and that a warrant was forwarded by them by post the same night to the bailiff at Newbury, the place of business of Toms and Matthews

(9) *Barnes*, 211.

(10) 2 *Wils.* 140.

being at Hungerford, which is distant nine miles from Newbury. The sheriff of Berks never had a bound bailiff at Hungerford. It appeared that the post arrived at Newbury about nine o'clock in the morning, and the plaintiff called as a witness a boy who was a clerk in the office of Mr. Astley, an attorney at Hungerford, who was in partnership with Matthews, who stated that the bailiff called at their office as early as a quarter before ten on the morning of December the 3rd. It also appeared, that on the same morning a docket was struck against Toms and Matthews, and a verbal notice that they had committed acts of bankruptcy given a few minutes after ten o'clock at the office of Mr. Hooker, the plaintiff's attorney, to a clerk who had issued the writ of execution in the cause. Mr. Hooker had not then arrived at his office, but the clerk undertook to communicate the notice to him, which he accordingly did on his arrival about a quarter before eleven; a written notice to the same effect was also served on Mr. Hooker himself soon after eleven. The defendant gave evidence shewing that Macgraw (the bailiff) did not quit Newbury until ten o'clock on that morning, and that he had borrowed a horse for the purpose of going over to Hungerford, there being no public conveyance before the afternoon, and that he reached that place about half-past eleven, and levied about half-past twelve or one. The counsel for the defendant contended, that the verbal notice given to the clerk of the plaintiff's attorney at his office was a valid notice from the time when it was given to defeat the execution under the 2 & 3 Vict. c. 29. s. 1, and that taking all the evidence together there was no such unreasonable delay in the execution of the writ as ought to make the sheriff liable to this action.

The learned Judge thought the notice of the act of bankruptcy could only operate from the time when it was communicated to Hooker, by his clerk, and told the jury that although a levy at one o'clock would have been early enough under ordinary circumstances, yet if they thought Macgraw was in Hungerford as early as ten o'clock, and had neglected to levy before a quarter to eleven, the time when notice of the act of bankruptcy was communicated to Hooker, he had been guilty of unreasonable delay.

The jury under this ruling gave a verdict for the plaintiff.

In the ensuing term,—

*H. S. Keating* obtained a rule nisi for a new trial on the ground of misdirection as to the notice, and also on affidavits, against which—

*Talfourd, Serj.* and *Gray* shewed cause. —It is not denied that the principle laid down by Coleridge, J. in *Rothwell v. Timbrell* (1), that notice to the attorney in the cause is notice to the client, is correct. But the notice given, as here, to a mere clerk in the attorney's office, not clothed with any authority to act on behalf of the client, is of no avail to defeat the execution. The words in the 2 & 3 Vict. c. 29. s. 1. are "provided the persons at whose suit the execution was issued had not notice of a prior act of bankruptcy," and notice there must clearly mean knowledge by some person who is authorized by the party issuing the execution to act upon that knowledge, as much judgment and discretion may be required to determine what ought to be done on the receipt of such a notice as the present. In *Ramsey v. Eaton* (2) the Court held, that notice to the sheriff's officer was insufficient, as he was not the agent of the execution creditor. That is the principle upon which the few decisions on this point have proceeded. It may be argued that this was a managing clerk, and had some greater authority to act for his master than is ordinarily the case with clerks in attorneys' offices, but that does not appear from the evidence. No doubt he acted officially in issuing the writ, but that was only under his master's direction. There is nothing to shew that he was treated otherwise than as a mere conduit pipe to convey the information to his master, and he could not have been in a condition to act upon the notice at the time he received it. If the view taken by the defendant be correct, notice given at an attorney's office to a boy or a laundress there would be sufficient. *Conway v. Nail* (3) was also referred to (4).

(1) 1 Dowl. P.C. (N.S.) 778.

(2) 10 Mee. & Wels. 22; s. c. 11 Law J. Rep. (N.S.) Exch. 333.

(3) 1 Com. B. 643; s. c. 14 Law J. Rep. (N.S.) C.P. 165.

(4) The Court heard the argument as to the misdirection only in the first instance.

*H. S. Keating* and *H. J. Hodgson*, in support of the rule.—This is a notice given in the course of a suit, and stands on the same footing with other similar notices, which are well served upon any clerk at the office of the attorney. In fact, it is the place where the service is made which is the most material consideration, as the Courts consider that an attorney is bound to be present either by himself or some person qualified to receive notices during business hours. *Grant v. Mackenzie* (5) is a very strong authority on that point. There a notice was put through the door of an attorney's office during the regular hours, and it was held on the same principle that it was a good service from the time when it was so put through the door.

[*PATTESON, J.*—That was a notice of taxation given in the progress of the cause, and therefore different from such a notice as this.]

It is submitted that it ought to be regarded in the same light. Neither notice is strictly a step in the cause, but it is immediately connected with, and affects the proceedings in the cause. Suppose the attorney is absent from London, surely service at his office upon a clerk there is more likely to be effective than if made personally on him at a distant place.

[*PATTESON, J.*—Do you then say it is good service whoever it is delivered to?]

It would be a question for the jury, whether the person receiving it had authority. No such question was here left to them.

[*ERLE, J.*—You must go the length of saying it would be good service if it were put through the door or delivered to any person, or at any place referred to by a notice on the attorney's door.]

*Grant v. Mackenzie* and *Lackington v. Elliot* (6) support such a view. As to this being a managing clerk, that is a question which ought to have been left to the jury. It is not necessary that he should be what is called the general managing clerk of the office, it is enough if he appears to have had the conduct of the particular suit, and that it is submitted does appear in the evidence. *Rothwell v. Timbrell* was the first case where notice to the attorney act-

ing in the cause was held to be a notice to affect the client, and that was followed up by *Bird v. Bass* (7).

[*COLERIDGE, J.*—Merely issuing execution, which is all that this clerk appears to have done, is not such an acting in the cause as will render him the immediate agent of the client.]

The notice in such a case as the present is merely technical, and whether given to the attorney or his client it would have been utterly impossible for either of them in London to have taken any step which could have stopped the execution in Berkshire. Its effect is to defeat not to prevent the levy by the sheriff.

*Cur. adv. vult.*

On a subsequent day in this term (June 13) the judgment of the Court (8) on the point of law was delivered by—

*LORD DENMAN, C.J.*—The point which has been argued in this case, and on which we think it right to pronounce our judgment before we go into the remaining questions, arises on the first proviso in the 2 & 3 Vict. c. 29. s. 1. That section enacts "that all contracts, dealings and transactions by and with any bankrupt, really and *bond fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; *provided* the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed." Upon these words the question is, whether a notice in other respects treated as sufficient, but served on a clerk of the plaintiff's attorney issuing the writ of execution, such clerk not being shewn to have had personally

(5) 16 Law J. Rep. (N.S.) Exch. 255.

(6) 8 Sco. N.R. 275; s. c. 13 Law J. Rep. (N.S.) C.P. 153.

(7) 6 Man. & Gr. 143.

(8) Lord Denman, C.J., Patteson, J., Coleridge, J. and Erle, J.

the conduct of the suit, will take the execution out of the protection of the clause. The learned Judge ruled that it would not. In deciding this question, it is important, of course, to consider the object of the proviso, which is in restraint of the previous enactment, and that is clearly this:—whereas dealings with a trader *bond fide* carried on, or executions issued out against his property in ignorance of a prior act of bankruptcy, and prior to the date of the fiat, are to be protected, nothing is to be done to relieve from the ordinary operation of the bankrupt law any transaction entered into or any execution levied with notice of such act. And, in advancement of this, a second proviso further limits the operation of the enacting part of the section, by providing, that even where there is no such notice, still if the payment by the bankrupt be in the way of a fraudulent preference by him, or the execution be founded on a judgment or warrant of attorney, or cognovit, which he has given by way of fraudulent preference, the act shall give no protection. On the receipt of the notice it becomes the duty of the person properly served to stop the transaction or execution as the case may be. This, then, being the object of the proviso, the notice must be understood to be such as will advance it, and therefore in the case of an execution it has been held, rightly we think, in *Rothwell v. Timbrell*, that although the words are the *person or persons at whose suit or on whose account the execution issues*, yet notice to the attorney who conducts the cause for him, when acting in the cause, is sufficient. It is obvious that notice to him will in the majority of such cases be more effectual to stop promptly the further proceedings, than notice to the client himself. And it would be easy to suppose cases where the clerk of the attorney may have been so entirely entrusted with the management of the cause, and the control of the proceedings, that notice to him might be as effectual as to his principal, and equally bind the client. And so in the cases of contracts, dealings and other transactions in business, instances might be put of confidential clerks or managers invested with such authority in the management of their masters' affairs, or so trusted in the particular negotiation, that a notice to them ought to stop at once the further progress of it,

and therefore would bind the principal as a notice to himself. The statute in terms requires, that the person dealing or suing should have notice, not that he should be personally served; and wherever in the transaction or the suit he has put, or allowed to be put, some one else in his place to manage or controul, in good sense and equity a notice to that person must be considered a notice to himself. This being the principle, the question is, whether such a clerk as we have described from the evidence in the cause, falls within it. The counsel for the defendant contended that he did; that any clerk at the office of the attorney—the place where all notices in the cause were to be served—was such clerk; nay, that any other person, at any other place, to whom or at which by notice over his door, the attorney might direct papers, letters, or notices in a cause to be delivered, was such an agent as might receive a notice under the proviso, to bind the client. But there is an obvious distinction between such a notice and those notices and matters which, in the ordinary progress of a cause, must be passing from one attorney to the other. That the cause may proceed with regularity and without delay, the Courts require that the attorney shall always be at his office, or have some competent person there during office hours, for the purpose of receiving them, and as to these, the attorney is regarded not merely as the mere agent of the client, but rather as a substituted principal. What is required upon a notice of this kind to be done or communicated, there ought to be a clerk at the office sufficiently skilled and entrusted to be able to do or communicate, or take the necessary step upon, if the attorney himself be absent; and the client must suffer if his attorney be guilty of any default in not employing such a clerk. But the notice now in question was not a notice in the cause; it was the intervention of a third party, on the result of which would depend the perception or not of the whole fruits of the cause. It cannot be said that the clerk receiving it had authority to stay the issuing or the levying of the execution, nor that his master was bound at all office hours to have a clerk there with such authority in his own absence. This was a matter which would require the whole discretion of the principal to determine whether he would



yield to it, or enforce his writ, and attorneys are not bound in all cases to have in their employment clerks to whom such extensive authority may be safely entrusted. What has been called a managing clerk is by no means a necessary officer in an attorney's establishment; it would be very unjust to require it, and it must not be taken that even such a person would, under all circumstances, be one on whom such a notice could be effectually served. If it be said that the doctrine now laid down may sometimes lead to injustice, and that by the absence of the attorney from his office it may become impossible to serve the notice in time to prevent the execution from taking effect, the answer is that the proviso embraces other cases than that of execution, and must be construed throughout on the same principle; that, even as construed by us, the party seeking to prevent the operation of execution has unavoidably an advantage over him who seeks to invalidate a mercantile transaction, because he has in all cases both the client and attorney, on either of whom he may serve the notice as may be most convenient; but lastly, and chiefly, that the statute is framed in advancement of the policy of modern legislation to restrain the relation to the act of bankruptcy, and that we ought to be careful not to limit that by a notice which is in truth merely nugatory as regards the object with which it is professed to be served. The words compel us to hold that where the notice is served on a proper person before the execution levied, it must have effect, even where from distance it cannot be used to stop it, but we ought not to go beyond that. We think, therefore, that in this case, having regard to the exact circumstances, the ruling of the learned Judge was right, and it is clear that the party serving the notice treated the clerk merely as a channel through which it was to reach the attorney, and never intended to rely on the service on him as in itself good service.

In the ensuing vacation the rule was further argued upon the affidavits, when the Court ordered that it should be discharged.

*Rule discharged.*

[IN THE EXCHEQUER CHAMBER.]

1848.

June 19. } BROOME v. THE QUEEN.

*Indictment—Title of Grand Jurors—Statement of Time.*

*An indictment, the caption of which was in the usual form, commenced "The jurors of our Lady the Queen," and laid the offence as "in the tenth year of our Sovereign Lady Victoria," &c.:—Held, on writ of error, first, that taking the caption and the indictment together, there was no error in the description of the grand jurors; secondly, that the statement of time, if incorrect, was cured by the 7 Geo. 4. c. 64. s. 20.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 152.]

1848.

July 12. } WESTAWAY v. FROST.

*Case—Wrongful Act—Attorney—Damage—Necessary Consequence—Effect of Verdict.*

*Where the declaration alleged that the defendant, an attorney, wrongfully, and without the consent or retainer of the plaintiff, entered an appearance for him in an action brought by D. (a third party) against the plaintiff, and took upon himself to conduct the action, and such proceedings were thereupon had that D. recovered judgment, and issued execution, and the plaintiff was obliged to pay the amount recovered and the costs of the execution, and "by reason of the premises" was injured in his credit and character,—Held ill, after verdict, as not shewing any damage resulting from any act of the defendant.*

*Case.* The declaration stated, that before and at the time of the committing, &c., he, the defendant, was and still is an attorney of the Court of Queen's Bench, at Westminster, and whereas also before, &c. a certain writ of summons had been duly issued out of her Majesty's Court of Exchequer, in a certain action against the plaintiff, at the suit of one Adolphus Dyer, which said writ, at the time of the committing, &c., still was and continued to be in full force, but no further proceedings, beyond the

issuing of the said writ, had then been had in the same action, nor would the plaintiff have defended the same, nor had the defendant then been nor was he then or at any time thereafter retained or employed by the plaintiff to defend the said action; all which said premises he, the defendant, before and at the time, &c., well knew, yet the defendant, heretofore, to wit, on &c., then and there still being such attorney as aforesaid, but contriving, &c., did wrongfully and injuriously, and without the consent, authority, or retainer of the plaintiff, and without any just or reasonable cause in that behalf, enter an appearance for the plaintiff in the said action, and did afterwards, without the consent, authority, or retainer of the plaintiff in that behalf, take upon himself to manage and conduct the defence to the said action, and that such proceedings were thereupon had in the said action, the same being continually and wrongfully defended by the now defendant, without the leave, licence, authority, consent, or retainer of the plaintiff, that afterwards, to wit, on &c., it was considered and adjudged by the said Court of Exchequer, that Adolphus Dyer should recover against the plaintiff a certain large sum of money, to wit, the sum of 83*l.* 9*s.*, and thereupon execution was afterwards, to wit, on &c., issued upon the said judgment against the plaintiff; and the plaintiff, in order to satisfy the said execution, was afterwards, to wit, on &c., forced and obliged to pay to the said Adolphus Dyer, in satisfaction of the said judgment, the money so recovered, and also another large sum of money, to wit, the sum of 9*l.* 8*s.* 6*d.*, being the costs and expenses of and occasioned by the said execution; and the plaintiff, by reason of the premises, was thereby then greatly injured in his credit and character, &c., and put to great loss, costs, and charges, &c., and is otherwise greatly injured, &c., to the plaintiff's damage, &c.

Plea—First, not guilty; second, that the defendant was retained and employed by the plaintiff. Issue thereon.

At the trial, before Wightman, J., at the last Spring Assizes for Devonshire, the plaintiff obtained a verdict for 93*l.* 18*s.* 2*d.*

In Easter term,—

*Montagu Smith* obtained a rule *nisi* for arresting the judgment, on the ground that

the declaration disclosed no cause of action, or shewed that the plaintiff had sustained any damage; and it was quite consistent with the declaration, that the now plaintiff derived great benefit from the proceedings taken by the defendant, though without authority; and that it did not appear what the first action was brought for, or any reason why the now plaintiff might not have protected himself by paying the demand.

*Greenwood* shewed cause.—The declaration is sufficient after verdict. A good cause of action is disclosed, if damage might have resulted from the defendant's undertaking the defence without authority; and it is not necessary by an allegation in the form of *per quod*, or otherwise, to pursue the exact chain of circumstances, to shew how the consequential injury was sustained—*Pryce v. Belcher* (1), *Taylor v. Henniker* (2). The only question is, whether the act of the defendant was a wrongful act. That cannot be disputed. It can never be contended, that one man may defend an action for another without authority, and justify himself on the ground, that on the whole it was the best thing that could be done—*Clifton v. Hooper* (3). If there is a wrongful act, and an allegation of damage, the Court cannot inquire into the amount given by the jury, who, at all events, might have given nominal damages. Suppose the jury had specially found the facts to have been (as they really were) that the defence was skilfully conducted, though unauthorized, and that the plaintiff's credit and character were injured.

[PATTESON, J.—How could his character be damaged by an appearance being entered for him? A judgment might have that effect; but it is not said that the judgment was recovered by reason of the defence. The plaintiff does not say that there was no defence to the action.]

He says that he should not have defended it.

[PATTESON, J.—That does not signify. The plaintiff in the action might have

(1) 3 Com. B. 58; s. c. 16 Law J. Rep. (N.S.) C.P. 264.

(2) 12 Ad. & El. 488; s. c. 9 Law J. Rep. (N.S.) Q.B. 383.

(3) 6 Q.B. Rep. 468; s. c. 14 Law J. Rep. (N.S.) Q.B. 1.

entered an appearance for him. The plaintiff in the present action might have stopped the action for anything that appears. The injury arises from the judgment, and not from the defence.]

The rule as to distinctly shewing that the damage resulted from the wrongful act, would be ground of special demurrer only. In *Marzett v. Williams* (4), which was an action against a banker, for non-payment of a cheque drawn by a customer having assets at the time, it was held that the plaintiff, who could not shew that he had sustained actual damage, was held entitled to nominal damages; and Taunton, J. observes, that "there are many instances where a wrong, by which the right of a party may be injured, is a good cause of action, although no actual damage is sustained."

[PATTESON, J.—That case has no sort of bearing on the present case. The action there was for a breach of duty; this is for an unauthorized interference, which is quite a different thing.]

The non-payment of a cheque might be a benefit to the customer. A refusal to transfer stock is a ground of action—*Com. Dig. 'Action on the Case' (A)*; but that also might be a benefit to the party entitled to the transfer, as the funds might rise. Admitting that the declaration might be bad on special demurrer, it falls within the class of cases in which it has been held that a defective averment is cured by the verdict—*Hitchins v. Stevens* (5), *Hall v. Marshall* (6), *May v. King* (7), *Anonymous* (8), *Roe v. Hersey* (9), *Gostwick v. Mason* (10), *Hedger v. Steavenson* (11), *Lewis v. Gompertz* (12), *Alston v. Buscough* (13), *Wicker v. Norris* (14). In *Spier v. Parker* (15), which may be relied on for the defendant, the facts must be taken to have appeared by

necessary implication. It cannot be contended that the verdict does not help—*Stennel v. Hogg* (16).

*Montague Smith*, in support of the rule, was not called upon.

LORD DENMAN, C.J.—The rule must be made absolute. All the authorities have been brought before us, but I adhere to the opinion I formed when the rule was applied for. It is evident that the declaration means to impute that the plaintiff was injured in his reputation by the appearance being entered for him in the former trial, but that does not appear to have been the necessary effect or result of such appearance being entered, and no reason is shewn.

PATTESON, J.—I really cannot understand the declaration as stating anything amounting to damage. It states the entry of an appearance by the defendant, and that afterwards there was judgment and execution against the now plaintiff, and goes on to say, that "by reason of the premises" (which must mean the execution, if anything) the plaintiff was injured in his character. There is a total failure of averment to shew any injury resulting from the act of the defendant.

*Rule absolute* (17).

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1848. }  
 June 18; } THE QUEEN v. THE INHABITANTS OF SHEFFIELD.  
 July 15. }

*Poor-Law—Order of Removal—Examinations—Caption—Complaint of Overseers.*

*It is not sufficient that the caption of examinations, on which an order of removal is founded, shews that they are taken touching the settlement of the pauper and on the complaint of the overseers. The caption should also shew what such complaint is.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 155.]

(4) 1 B. & Ad. 415; a. c. 9 Law J. Rep. K.B. 42.

(5) Raym. 487.

(6) Cro. Car. 497.

(7) Com. Rep. 116.

(8) 2 Ld. Raym. 1060.

(9) 3 Wils. 275.

(10) 1 Sid. 423.

(11) 2 Mee. & Wels. 799; a. c. 6 Law J. Rep. (N.S.) Exch. 189.

(12) 6 Ibid. 399; a. c. 9 Law J. Rep. (N.S.) Exch. 182.

(13) Carth. 304.

(14) Rep. Temp. Hardw. 116.

(15) 1 Term Rep. 141.

(16) 1 Wms. Saund. 226.

(17) Coleridge, J. and Wightman, J. were on circuit; Erle, J. was at Guildhall.

1848. }  
May 13, 30. } RINGHAM v. CLEMENTS.

*Pleading—Trover—"Not possessed."*

*In trover, evidence that the goods were delivered to the defendant by the plaintiff's wife, with his authority, is available under "not possessed."*

Trover for furniture.

Pleas—Not guilty, and Not possessed.

At the trial, before Patteson, J., at the Summer Assizes for Suffolk, 1847, it appeared that the conversion complained of was the removal of the furniture in question from the plaintiff's house by the defendant, who justified doing so, on the ground that the plaintiff's wife had delivered it to him in payment of a debt due to him from the plaintiff. Subsequently to the removal, but before the action, a written demand to restore the furniture was served on the defendant by the plaintiff, when the former refused to give it up unless his debt was paid. The learned Judge left it to the jury to say, whether the goods were converted by the defendant, saying, that this depended upon whether the plaintiff's wife had authority to deliver the goods, and the defendant took them by her leave; and if they should be of that opinion, the defendant was entitled to the verdict, which the jury accordingly gave. Leave was reserved to the plaintiff to move to enter a verdict for 10*l.* 7*s.*, (the value of the furniture,) if the Court should be of opinion that this defence was inadmissible without a special plea of leave and licence, his Lordship expressing a strong opinion that there could not be a plea of leave and licence in trover. A rule *nisi* having been accordingly obtained,—

*O'Malley* shewed cause (May 13).—This defence was admissible without a plea of leave and licence. In *Stancliffe v. Hardwick* (1), and *Vernon v. Shipton* (2), it was held, that not guilty only denies a conversion in point of fact, and that any defence shewing that there was no wrongful conversion, must be

(1) 2 Cr. M. & B. 1; s. c. 4 Law J. Rep. (N.S.) Exch. 161.

(2) 2 Moo. & Wels. 9; s. c. 6 Law J. Rep. (N.S.) Exch. 25.

specially pleaded. Some doubt was thrown on these decisions in *Wilkinson v. Whalley* (3) and *Whitmore v. Greene* (4). In *Kynaston v. Crouch* (5), the Court of Exchequer intimated that *Stancliffe v. Hardwick* was wrongly decided. In *Higgins v. Thomas* (6) and *Mason v. Farnell* (7), it was held, that the defence of joint tenancy must be pleaded; but in the latter case, the distinction between trover and detinue was adverted to. In trover, "conversion" necessarily implies a *wrongful* dealing with the goods; and cannot, therefore, be confessed and avoided—*Warde v. Blunt* (8), *Bull. N.P.* 48, a, and *Bac. Abr.* 'Trover,' were referred to. In defamation, "not guilty" puts in issue the malicious nature of the words, not merely the fact of uttering them.

*Couch*, in support of the rule.—This evidence was not admissible under "not guilty." Here was an actual, not a mere constructive, conversion, as the goods were taken away; and it is no less a taking away from the plaintiff if done by his leave.

[LORD DENMAN, C.J.—But does not the law mean by "conversion" a wrongful conversion?]

It means an act *prima facie* wrongful, and capable of sustaining an action of trover. *Stancliffe v. Hardwick* has never been expressly overruled. The dicta cited on the other side refer to constructive conversions.

[WIGHTMAN, J.—In trespass, you may admit the act done and justify it; but in trover, the conversion is the gist of the action; and if it be necessarily wrongful, it cannot be justified.]

If the principle applied to trover be correct, it must be equally applicable to other actions on the case—such as for obstructing rights of way or water, where "not guilty" puts in issue the obstruction only, and not the plaintiff's right—*Frankum v. the Earl*

(3) 5 Man. & Gr. 591; s. c. 12 Law J. Rep. (N.S.) C.P. 270.

(4) 13 Moo. & Wels. 104; s. c. 13 Law J. Rep. (N.S.) Exch. 311.

(5) 14 *Ibid.* 266; s. c. 14 Law J. Rep. (N.S.) Exch. 324.

(6) 15 Law J. Rep. (N.S.) Q.B. 261.

(7) 12 Moo. & Wels. 674; s. c. 13 Law J. Rep. (N.S.) Exch. 142.

(8) Cro. Eliz. 146.

of *Falmouth* (9). There the declaration alleged the diversion of the water to be wrongful, but the wrongfulness was not put in issue by not guilty. *Wilkinson v. Whalley, Higgins v. Thomas, and Mason v. Farnell*, all turn on the plea of "not possessed." *Walker v. Mellor* (10) is in point. There, under "never indebted," the fact only of a sale and delivery, but not the plaintiff's title to the goods sold, was held to be in issue. If the dictum of Alderson, B., in *Whitmore v. Green*, that "not guilty" and "not possessed" together make up the old "not guilty," be correct, it will never be necessary for a sheriff to justify specially under a writ, as it is held he must do in *Samuel v. Duke* (11).

[PATTESON, J.—In *Pickard v. Sears* (12), this Court held, that under "not possessed" a sale of goods by leave of the plaintiff might be given in evidence; but there the goods were not in the plaintiff's possession.]

The argument on the other side would tend to the abolition of every special plea in trover, except such as go in discharge of a vested cause of action—for instance, release.

*Cur. adv. vult.*

The judgment was subsequently (May 30) delivered by—

LORD DENMAN, C.J.—This was an action of trover, to which the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed. It appeared at the trial, that the plaintiff was indebted to the defendant, and that the wife of the plaintiff, in his absence, gave the furniture in question to the defendant, in payment of his debt, and that he then took it away. The jury believed that the wife had sufficient authority to do so, and found a verdict for the defendant, the plaintiff having leave to enter a verdict for 10*l.* 7*s.*, if the Court should be of opinion that the defence was not admissible under either of the pleas, but ought to have been specially pleaded, and a rule *nisi* was accordingly granted.

(9) 2 Ad. & El. 452; s. c. 4 Law J. Rep. (N.S.) K.B. 90.

(10) *Ante*, p. 103.

(11) 3 Mee. & Wels. 622; s. c. 7 Law J. Rep. (N.S.) Exch. 177.

(12) 6 Ad. & El. 469.

At the trial, the defence was treated principally as one of leave and licence, and so upon the argument, and the general question has been discussed, whether the word "converted" *ex vi termini*, means "wrongfully converted," so that any evidence which shews that what the defendant did was rightful, must be admissible under the plea of not guilty, as negating "conversion."

Upon consideration, however, we are of opinion, that where the wife with the authority of the plaintiff, (as must be taken to have been found by the jury,) gave the goods to the defendant, the property in them passed to him; and, therefore, his taking them, which was the conversion relied on, was a taking of his own goods, and not the goods of the plaintiff, and so the second issue was properly found for the defendant—*Vernon v. Shipton* and *Pickard v. Sears*. In that case, there was a demand and refusal, but as that is not an actual conversion, but only evidence of one, it seems to follow that any evidence explanatory of the demand and refusal must be receivable under the plea of not guilty, because it goes directly to shew that there is no conversion at all. In the present case, however, that point does not arise, because the original taking was an actual conversion, and no subsequent demand and refusal could constitute a second conversion.

This being a case not of mere leave and licence, but of transfer of the property previous to the taking by the defendant, the verdict was right, and the rule must be discharged.

*Rule discharged.*

BAIL COURT. }  
1848. } JEFFERIES v. BEART.  
June 15. }

*Attorney—Privilege—Inferior Court—*  
10 & 11 Vict. c. lxxi.

*Under the 49th section of the London Small Debts Act (10 & 11 Vict. c. lxxi.), the privilege of attorneys to be sued as defendants in their own court is abolished.*

This was an action of assumpsit against the defendant, who was an attorney, in

which the plaintiff had recovered the sum of 2*l.* 3*s.* 9*d.* The cause was tried before the sheriff of Middlesex, pursuant to a writ of trial duly granted. The defendant subsequently obtained a rule *nisi* to compel the plaintiff to bring in the record, and for leave to enter a suggestion under the City of London Small Debts Act (10 & 11 Vict. c. lxxi.), to deprive the plaintiff of costs. The affidavits on which the rule was obtained stated the facts requisite to shew that the plaintiff and the defendant were living within the jurisdiction, and that a plaint might have been entered under the said act for the cause of action, in respect of which the verdict was obtained.

It appeared upon the affidavits in answer that the defendant was an attorney.

*Bramwell* now shewed cause.—The question is, whether the 49th section of this statute deprives attorneys when defendants of their privilege of being sued in the superior courts. That section is, "That no privilege except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of the Court." It is in the same terms as the general County Court Act, but there are no exceptions afterwards specified. The privilege of an attorney of being sued in the superior court is the privilege of his supposed clients, not his own. It cannot be taken away either by charter or act of parliament, unless they are therein mentioned by express words—*Welles v. Trahern*, per Willes, C.J. (1), *Jolliffe v. Langston* (2).

[WIGHTMAN, J.—What were the words?]

It was on the question of the charter of the University of Oxford.

[WIGHTMAN, J.—They were affirmative words. In *Lewis v. Hance* (3) I understand the full Court decided this question.]

That was not the matter before them, but the privilege of attorneys as plaintiffs.

[He referred also to the cases under the various Courts of Requests Acts.] Further, the 113th section corresponding to the 129th section of the general County Court Act, which deprives the plaintiff of his right to costs, contemplates trials before a Judge

who can certify, which a sheriff cannot—*Jones v. Barnes* (4).

*Ball*, contra.—"No privilege" must mean no privilege.

WIGHTMAN, J.—The plaintiff is not within the exception, as the Judge has not certified. The course to adopt is, when the writ of trial is obtained to make it a term that the Judge shall have power to certify. The words of the section are clear, and there is no privilege.

*Rule absolute.*

[IN THE EXCHEQUER CHAMBER.]

1848.	}	POLLITT v. FORREST AND OTHERS.
Feb. 1;		
May 2.		

*Replevin—Distress—Rent—Penalty—Error—Judgment.*

*Replevin. Avowry, that A. held land as tenant to B. under a demise, subject to certain rents, provisions, conditions and stipulations, inter alia, that H. should not during the continuance of the tenancy sell any hay off the premises, under the penalty of 2*s.* 6*d.* for each yard of the hay so sold, to be recovered by distress as for rent in arrear. Averment of the sale of 800 yards of hay by A, contrary to the said stipulation, by reason whereof a sum of money at 2*s.* 6*d.* per yard became due to B; non-payment thereof; and a distress for the same. Plea, non tenuit. Verdict for the defendant, and judgment under stat. 17 Car. 2. c. 7. The Court of Queen's Bench, on error, affirmed this judgment. On error, brought upon the judgment of the Court of Queen's Bench,—Held, by the Court of Exchequer Chamber, that the sum distrained for not being a rent service, the judgment under the statute 17 Car. 2. c. 7. was erroneous, although after verdict the avowry might have sustained a judgment for the defendant at common law.*

*Held, also, that under these circumstances this Court had no power to give judgment for the defendant pro retorno habendo at common law, but could simply reverse the judgment of the Court below.*

(1) Willes, 240.

(2) 1 *Ld. Raym.* 342.

(3) *Ante*, p. 172.

(4) 2 *Mee. & Wels.* 313; s. c. 6 *Law J. Rep.* (N.S.) *Exch.* 81.

Error from the Queen's Bench.

The Court of Queen's Bench having given judgment, affirming the judgment of the Court of Common Pleas at Lancaster, in favour of the defendants, a writ of error was subsequently brought in this court upon that judgment. The pleadings are fully set out in the report of the case in the court below (1).

*Aitherton* (Feb. 1) argued the case for the plaintiff in error; and

*Cowling* appeared for the defendants.

The arguments of counsel and the cases cited were the same as in the court below.

*Cur. adv. vult.*

PARKE, B. now (May 2,) delivered the judgment of the Court (2).—This case comes before us on a writ of error from the Court of Queen's Bench, affirming a judgment of the Court of Common Pleas at Lancaster, in an action of replevin. The principal question argued before us was as to the sufficiency of the avowry after a verdict for the defendants, on a plea of *non tenuit*. The avowry alleged that the plaintiff, before and at the time when, &c., held the lands of which the *locus in quo* was parcel, as tenant to the avowants, under and by virtue of a certain demise thereof to the plaintiff theretofore made, upon and subject to certain rents, provisions, conditions and stipulations, that is to say, amongst other things, that the plaintiff should not nor would during the continuance of the said tenancy sell any hay produced during such continuance upon the said demised premises, under the penalty of 2s. 6d. for each yard of the said hay so sold as aforesaid, to be recovered by distress as for rent in arrear. There was a plea of *non tenuit*, and the verdict was for the defendants, and judgment thereon not *pro retorno habendo*, but under the stat. of 17 Car. 2. c. 7. On a writ of error, the Court of Queen's Bench affirmed the judgment. On the writ of error to this Court, it was argued that the judgment so affirmed was erroneous; that it could only be supported on the ground that the sum distrained for was a rent service, and that on this record it could not be taken to be such. And we are of that opinion.

(1) 16 Law J. Rep. (N.S.) Q.B. 424.

(2) Consisting of Parke, B., Alderson, B., Rolfe, B., Cresswell, J., Platt, B. and Williams, J.

We must assume that the legal effect of the terms under which the plaintiff held is set out; and, if so, the sum payable is a penal sum, by way of punishment for not spending the produce on the land, to be recovered indeed by distress, in the same way as a distress is made for rent in arrear, but not being itself rent. We have little doubt that if the whole instrument was before us, containing the terms of the holding, it would appear that the parties intended the sum to be paid, as additional or penal rent; but on the record we must assume that the legal effect is set out, and take it to be, as the defendant pleaded it, a penalty. If it is so taken, the defendant had certainly no right to avow in the general form given by the stat. 11 Geo. 2. c. 19, which applies to rents only. A penalty is not a rent, as a *nomine pœnæ* is not a rent within the stat. 32 Hen. 8. c. 37.—*Co. Litt.* 162, b. But after verdict upon the issue whether he held on the condition that he should pay a penalty, we should probably hold that it must be presumed that it was proved at the trial, either that he had granted by an instrument under seal this penalty to be levied by distress, or that, if the plaintiff held by a demise from the defendants themselves, he had given a license to enter and distrain his own goods for it.

Whatever was legally necessary to make the plaintiff hold at the time of the distress, under the penalty so claimed, must be presumed to have been proved. Thus the grant of an advowson or reversion, though not proved to be by deed, is good after a verdict on *non concessit*, for a deed must have been proved; and so a grant of a rent-charge, where it is not said to be by deed, is good after a similar issue—*Lightfoot v. Brightman* (3). We should, probably, hold, therefore, that the avowry was good after the verdict, if we could give the defendants judgment after verdict on this writ of error. But as the judgment has been given, not at common law, but under the 17 Car. 2. c. 7, which applies to distresses for rent only, it remains to consider what course is to be pursued. As the judgment is erroneous in its present shape, it is clear it must be reversed; but is the Court simply to reverse it, or to give judg-

(3) Hutton, 54.

ment for the defendants for a *retorno habendo* at common law? The rule used to be, as laid down by the Court of King's Bench in the case of *Parker v. Harris* (4), "where judgment is given for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment, for the suit is only to be eased and discharged of that judgment; but where the plaintiff brings error, the judgment shall not only be a removal, but the Court shall also give such judgment as the Court below should have given, for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given." And the rule is given in similar terms by Lord Mansfield in *Cuming v. Sibly* (5). But in the case of *Gildart v. Gladstone* (6), the question was considered, and the Court held, that they were bound, *ex officio*, to give a perfect judgment on the whole record, and do all the justice to the plaintiff in error to which he was entitled; and where a verdict had been found, and the Court of Common Pleas had given judgment for the plaintiff, the Court of King's Bench, on a writ of error brought by the defendant, not only reversed the judgment for the plaintiff, but also gave judgment for the defendant for his costs. This case was considered as having established the reasonable rule, that the Court, which has a commission by the writ of error to view and examine the transcript and proceedings, and to cause to be further done thereupon what of right ought to be done, should do complete justice on the whole record to the plaintiff in error, and give the same judgment for him which the Court below ought to have given; and the distinction above adverted to was thought to be done away with—see 2 *Saund.* 101. cc. n. (i) to *Jaques v. Cesar*, sixth edition; the note of the learned annotator, and *Tidd's Prac.* 1179; but it happened in the subsequent case of *The King v. Bourne* (7) that the late Mr. Justice Littledale—a great authority—raised a doubt about the propriety of that decision, though he did not

think it necessary to give any opinion upon it.

The Court of Exchequer Chamber, in the recent case of *Gregory v. the Duke of Brunswick* (8), gave a good deal of consideration to this question, which, however, they thought it unnecessary to decide. There the plaintiff below brought a writ of error, and objected that the judgment for the defendant below, who had succeeded on an issue on some pleas, and was entitled to judgment on the whole record, was erroneous, because the Court had omitted to give the plaintiff judgment for the costs of a demurrer to a plea which had been decided to be bad; and the Court held, that, as the plaintiff asked to have the judgment reversed, and justice done to himself, they ought to give him judgment on the demurrer and his costs, which might exceed the defendant's costs of the cause, but that they could not give that judgment without giving a complete judgment on every part of the record; and the result, therefore, was, that the plaintiff must have that judgment, and the defendant the general judgment. The rule, therefore, laid down by the Court in *Gildart v. Gladstone* was not re-established by the decision in *Gregory v. the Duke of Brunswick*, though it was by no means questioned; and it remains, therefore, to consider, whether it was right. We think it was right. The former cases adverted to in the argument in this case were chiefly reversals of judgment on demurrer prior to the 8 & 9 Will. 3. c. 11. s. 2, which gave the defendant his costs on demurrer; and, therefore, the simple reversal gave all the relief to which the defendant, the plaintiff in error, was entitled. The same reason applied to reversals of judgments for the plaintiff for defective declarations after judgment by default or verdict against the defendant; and though the same position is laid down in general terms in some cases since the 8 & 9 Will. 3. c. 11, it may be attributed to inadvertency in not sufficiently considering the reason of the rule.

It seems just and reasonable, that whether the plaintiff or the defendant brings a writ of error, each should have all the justice

(4) 1 *Salk.* 262.

(5) 4 *Burr.* 2489.

(6) 12 *East*, 668.

(7) 7 *Ad. & El.* 58; s. c. 6 *Law J. Rep.* (N.S.) M.C. 129.

(8) 3 *Com. B.* 481; s. c. 16 *Law J. Rep.* (N.S.) C.P. 35.



donè him by the court of error which the nature of the case admits, and that he should not only have a judgment of reversal, but such a judgment as the plaintiff in error ought to have had in the court below. This is the principle of the decision in the case of *Gildart v. Gladstone*, and we are of opinion that it was right, and is good law. But the question in this case is different; it is not whether the plaintiff in error is entitled to have, besides a judgment of reversal, a further judgment for his damages and costs, for he is clearly entitled to more than the former; but whether the defendant on this writ of error brought by the plaintiff is entitled, after the judgment is reversed, to such judgment as the Court below ought to have pronounced in his favour. This is a very different question. Though it is true, that if a party prays judgment, and then goes on to ask something which the Court cannot by law give, the Court will, nevertheless, give the party the proper judgment, as was held in the case of *Street v. Hopkinson* (9) and *Le Bret v. Papillon* (10), it does not follow that they can give a judgment against his prayer for the opposite party, and we do not find any satisfactory precedents of such a course. In *The King v. Bourn*, which is itself an authority to the contrary, Mr. Justice Patteson remarks on the absence of authorities to the effect that the Court could give the proper judgment for one party on a writ of error at the suit of another; and speaking of an anonymous case, in *Salk*. 401, which states, that if judgment be below for the plaintiff and error is brought, and that judgment is reversed, yet, if the record will warrant it, the Court ought to give a new judgment for the plaintiff, he observes that it does not appear who brought the writ of error. Nor does it in the note of the same anonymous case in *7 Mod.* 3. Both of these are merely loose notes. In *Roll. Abr.* 774, (D 1), however, *Slocomb's case* (11), on the prayer of a plaintiff to reverse a judgment for the defendant in an action of slander, which was not maintainable, the declaration being insufficient, it appearing that the terms of the judgment were "*ideo concessum est*," instead of "*consideratum*," the Court did not merely

reverse, but gave a judgment against the plaintiff *quod nil capiat*, &c. That, however, is a necessary consequence of the reversal in that case, for the Court could not give judgment for the plaintiff. In *Rees v. Morgan* (12), on a writ of error by the plaintiff, in replevin on an erroneous judgment on the 17 Car. 2. c. 7. s. 3, Buller, J. says, "Supposing this judgment shall be reversed on a writ of error, we shall award a judgment *pro retorno habendo*," and, therefore, adjudicates in favour of an application by the defendant in error to amend the record, by inserting such a judgment. Also, in answer to a question put by the House of Lords (4th of May 1793,) to the Judges in *The King v. Amery* (13), "Whether, if on a writ of error, the judgment of the Court below be reversed, the court of error must give the same judgment that the Court below ought to have given," the Judges answered in the affirmative. This, however, was a case in which the relator, the plaintiff below, brought a writ of error, and the Judges may have answered with a view to the particular case. On the other hand, there are many precedents of reversals of judgments, as is observed by the Lord Chief Baron, in the case of *Gregory v. the Duke of Brunswick*, where an *in misericordiam* is entered instead of a *capiatur pro fine*, and *vice versa*; which cannot be reconciled with the supposition that the Court might, on a writ of error by the defendant, have given against the defendant the proper judgment. These defects are cured by the stat. 16 & 17 Car. 2. s. 8, and it is not to be supposed that they were curable without the aid of the statute, by merely entering the proper judgment; and besides the consequence of such a course would be, that a plaintiff in error, who had a perfect right to sue out his writ of error, would pay the costs of it, and yet be defeated in his object. In effect, he would cause an amendment in the judgment at his own expense, instead of that of the opposite party. We think that a court of error cannot give a judgment against the party suing out a writ of error after reversing an erroneous judgment against him, though they may give one in his favour, whether he be plaintiff

(9) Cas. temp. Hardw. 345.

(10) 4 East, 502.

(11) Cro. Car. 442.

(12) 3 Term Rep. 349.

(13) 1 Anst. 178.

or defendant in the court below, on his prayer for judgment to the full extent to which he would have been entitled to it in the court below. For these reasons the judgment of the Court of Queen's Bench must be reversed.

*Judgment reversed.*

BAIL COURT. }

1848. }

June 15. }

M'DOWALL v. BOYD.

*Pleading — Payment and Discharge — Immaterial Issue.*

*An averment that a bill of exchange was given "for and on account of and in payment and discharge" of a debt, is not equivalent to an averment that the bill was given in satisfaction of such debt; and therefore where a plea with such averment further stated that the bill so given was afterwards altered, and shewed that in consequence thereof it became ineffectual, and the plaintiff traversed the fact of alteration, upon which issue the defendant had a verdict, judgment non obstante veredicto was awarded to the plaintiff.*

Debt by the drawer against the acceptor of a bill of exchange for 52*l.* 10*s.*, and upon an account stated.

Pleas, to the first count, that the bill was altered in a material point; and to the account stated, that the acceptance of the bill in the first count was the account stated therein mentioned, with an averment of the identity of the debt.

Replication, a traverse of the alteration, and a new assignment as to the account stated.

Rejoinder, joining issue as to the alteration; and pleas to the new assignment, first, never indebted, and, secondly, as to the said several causes of action by the plaintiffs above newly assigned as to the plea of the defendant by him lastly above pleaded, that after the accruing of the said debt of 52*l.* 10*s.* upon the said account stated above newly assigned, and the causes of action in respect thereof, and before the commencement of this suit, to wit, on the 15th day of June A.D. 1847, the plaintiff made and drew his certain bill of exchange in writing, bearing date, to wit, the day and year last aforesaid, and thereby then required the defendant,

four months after the date thereof, to pay to the order of the plaintiff a certain sum, to wit, the sum of 52*l.* 10*s.* for value received; and the defendant then accepted the last-mentioned bill, and then and before the commencement of this suit, to wit, on the day and year last aforesaid delivered the same to the plaintiff, who then took and received the same of and from the defendant for and on account of and in payment and discharge of the said debt of 52*l.* 10*s.* so accrued upon the said account stated above newly assigned as aforesaid, and the said causes of action in respect thereof. The plea further stated that the last-mentioned bill of exchange, after the same had been fully drawn and dated as lastly above mentioned, and before the commencement of this suit, to wit, on the said 15th day of June A.D. 1847 was accepted by the defendant in the words and in manner following, that is to say, by the defendant writing across the last-mentioned bill the words "Accepted, John Boyd;" that after the said drawing and accepting thereof, and after the same was completely issued and negotiated, to wit, by the defendant as such negotiator as aforesaid, and during the currency thereof, and before the commencement of this suit, to wit, on the 20th day of June 1847, the plaintiff, without the consent of the defendant, altered and changed the last-mentioned bill in a material part, by adding to the defendant's said acceptance of the last-mentioned bill so made and drawn in manner and form as last aforesaid in writing on the said bill the additional words following, to wit, "Payable at the Joint Stock Bank, London," such last-mentioned words falsely purporting to be part and parcel of the acceptance of the last-mentioned bill, and that the said alteration was not made in correction of any mistake originally made in the framing of the last-mentioned bill, or to further the first intentions of the parties thereto, or any of them. Verification.

Replication to the pleas to the new assignment, joining issue upon the first, and to the second the plaintiff replied that he, the plaintiff, did not alter or change the said bill in that plea mentioned in manner and form, &c. Issue thereon.

At the trial a verdict was returned for the defendant, and a rule subsequently obtained by—

*O'Malley* for judgment *non obstante veredicto*, upon the pleas to the new assignment, or for a repleader.

*J. Brown* now shewed cause.—The validity of the plea turns upon the averment, that the bill alleged to be altered was delivered for and on account of, and in payment and discharge of the debt. If it amount only to an averment of the bill being delivered for and on account of, then the issue is immaterial.

[WIGHTMAN, J.—The plaintiff will say it is not an extinguishment or satisfaction of the debt.]

The word “extinguishment” is not used in pleadings; it is merely a legal consequence, and which it is submitted results from the above averment being true. Effect must be given to every part of the plea, and the words “in payment and discharge” are not a mere repetition of “for and on account of.” “Discharge” must mean extinguishment. In *Maillard v. the Duke of Argyle* (1), the Court seemed to think that payment was something more than “for and on account of.” In *Emblin v. Dartnell* (2), the plea averred the delivery of a bill in discharge, and the replication traversed the delivery in discharge and satisfaction, and was held bad as traversing that which was not alleged. That case is in some degree against the defendant, but there Parke, B. said “in discharge” meant “for and on account of,” and something more. It therefore deserves consideration as to what the real meaning of “discharge” is as stated in a plea like this. If it be equivalent to “satisfaction” then the giving of the bill would, under the circumstances, be a good answer to the action. He referred to *Sibree v. Tripp* (3).

*O'Malley*, in support of the rule, was not heard.

WIGHTMAN, J.—It was very properly conceded that if the averment amounted only to a delivery “for and on account of” the debt, the subsequent part of the plea would be immaterial, for it shewed that the bill so given had not been effectual, and the collateral security which would be a good

answer while running, for it would operate as a suspension of the cause of action, would be no answer when it had failed. It is contended, therefore, that the words express not merely a suspension, but a satisfaction of the debt: that is, that the words “in payment and discharge” are equivalent to satisfaction. I cannot attribute this meaning to these words. I always distrust the use of supposed equivalents, and the effect of the two cases referred to is this: in *Maillard v. the Duke of Argyle* “payment” was considered not equivalent to “satisfaction”; and in *Emblin v. Dartnell* “discharge” was decided not to mean “satisfaction;” for if the terms of the plea in that case had been equivalent to satisfaction the replication would have been good. I agree with both cases; and whatever may be the exact meaning of “in payment and discharge,” their legal effect is not equivalent to satisfaction. The plaintiff is therefore entitled to judgment.

*Rule absolute* (4).

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1848. { THE QUEEN v. THE INHABITANTS OF ST. GILES, COLCHESTER.  
June 26.

*Poor Law—Removal, Order of—Examination—Grounds of Appeal—Effect of General Denial of Settlement.*

*The only settlement disclosed by the examinations was the birth settlement of the pauper's late husband:—Held, that, under a ground of appeal which stated generally that “the pauper was not at the time of the order, nor was the late husband at the time of his decease, legally settled” in the appellant parish, the respondents were bound to give evidence of the birth of the pauper's late husband in the appellant parish, though there was no ground of appeal traversing the fact of his being born there, or alleging that he was born elsewhere.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 148.]

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(1) 1 Dowl. & L. P.C. 536.

(2) 12 Mee. & Wels. 830; s. c. 13 Law J. Rep. (N.S.) Exch. 255.

(3) 15 Ibid. 23; s. c. 15 Law J. Rep. (N.S.) Exch. 318.

(4) See *Kemp v. Watt*, 15 Mee. & Wels. 672; that “discharge” only means “for and on account of.”

1848. }  
July 12. } NORMANSELL v. CREPT.

*Contract—Parol Assignment—Delivery  
—Licence.*

*A. being on the eve of insolvency, made a bonâ fide verbal assignment of all his goods to the plaintiff, in trust, for the payment of his debts, and to hold the surplus for relations who had advanced money to him. An order was given by the plaintiff, with A's consent, for sending the goods to an auctioneer's for sale, from time to time, and several portions were accordingly parted with by A, and sold:—Held, that the successive deliveries were made under a mere licence to sell the goods from time to time, and that the property in the whole did not pass to the plaintiff.*

Feigned issue, the question being whether certain goods seized in execution were or were not the property of the plaintiff. It appeared, at the trial, before Lord Denman, C.J., at the sittings after Michaelmas term 1846, that one Walker being in difficulties, and pressed by his creditors, proposed to assign all his property to the plaintiff in trust to pay the trade creditors in full, and to divide the surplus between his relations, who had also advanced money to him. A deed to carry out this arrangement was proposed; but under the advice of counsel, it was abandoned, as it would amount to an act of bankruptcy; and, accordingly, Walker was informed by the attorney acting for the plaintiff, that everything was to be made over to the plaintiff, on the same understanding, but by parol. To this Walker agreed, and sent to the plaintiff a list of his stock and debts; and Mayhew, the plaintiff's attorney, instructed him to send his goods, from time to time, to an auctioneer's, where they were sold under the directions of Mayhew, who received the proceeds of the successive sales; and, subsequently, Mayhew gave Walker directions to send more goods to the auctioneer's. The residue of the goods were seized by the defendant in execution, and being claimed by the plaintiff, the present issue was directed. A verdict was found for the plaintiff. In Hilary term, 1847, a rule nisi was obtained, pursuant to leave reserved at the

trial, to enter a verdict for the defendant, on the ground that there had been no valid transfer of the goods to the plaintiff, against which—

*Petersdorff* shewed cause (1).—The verdict is right. It is unnecessary that there should be any delivery of the property by Walker to the plaintiff contemporaneously with the verbal contract, which being substituted for the contemplated deed, operates in the same way. The division of the property by Mayhew, under the direction of the plaintiff, and by Walker's consent, amounts to an act of ownership by the plaintiff. Again, the power of sale is unlimited, though it is only to be exercised from time to time. At common law a delivery is immaterial, if there be a contract shewing an intention on one side to part with, and on the other to accept the property. *Shep. Touch.* p. 224, *White v. Wilks* (2), and *Tarling v. Baxter* (3), were cited.

*W. H. Watson* and *Lush*, in support of the rule.—There was no transfer of the goods, but only a simple revocable licence to the plaintiff to take and sell the property from time to time, and no possession was taken of any of the goods besides those actually sold—*Wallwyn v. Coutts* (4).

[COLERIDGE, J.—If it was a mere licence to receive the goods, how could any property in them pass at all?]

The execution of the authority to sell perfected the gift *quoad* the part sold—*Mogg v. Baker* (5). No question was put to the jury whether a delivery of part was to operate as a delivery of the whole. Property can only be transferred in one of three ways—by contract, by deed, or by gift and delivery. A gift or grant, without delivery, is inoperative—2 *Black. Com.* 441, *Irons v. Smallpiece* (6). If there be no delivery it is a mere contract, and must be founded on a good consideration.

*Cur. adv. vult.*

(1) In the sittings after Michaelmas term, 1847, before Lord Denman, C.J., Patteson, J., Coleridge, J., and Wightman, J.

(2) 5 Taunt. 176.

(3) 6 B. & C. 360; s. c. 5 Law J. Rep. K.B. 164.

(4) 3 Mer. 707.

(5) 3 Mee. & Wels. 195; s. c. 7 Law J. Rep. (N.S.) Exch. 94.

(6) 2 B. & Ald. 551.

The judgment of the Court was now delivered by—

LORD DENMAN, C.J.—This was a second trial of a feigned issue, whether stock in trade and goods which had belonged to one Walker were the plaintiff's property, under a gift from him as the plaintiff. On the eve of complete insolvency he, under the advice of counsel, made a verbal assignment of all his goods to the plaintiff, in trust for the payment in full of all his trade creditors, and of the surplus to some relations, who had advanced money to him. An order was given for sending them to an auction-room, from time to time, to be sold under the directions of their attorney; and much of the stock in trade was conveyed afterwards in parcels from his warehouse, where it remained, to the auctioneer's, who disposed of it by successive sales. Some portion remained, and was taken in execution. The property of the plaintiff in this surplus was in question. Fraud was imputed, but properly negated by the jury. But the question was, whether the whole stock in trade was, by this transaction, assigned to the plaintiff, as there was no deed, and, it was said, no delivery. One of these was allowed to be essential to the validity of the transfer; but we paused to consider whether there was not evidence of a delivery in the circumstances of the case. We think they did not amount to such evidence. The goods sent to be sold were not delivered in the name of all; and the successive deliveries of them were made under a licence to take and sell them, but did not convey the whole. The licence might have been revoked.

*Rule absolute to enter a verdict for the defendant.*

1848. }  
July 1. } KEMPE v. GIBBON.

*Pleading—Limitations, Statute of—3 & 4 Will. 4. c. 42. s. 5.—Written Acknowledgment.*

*To a plea under the 3 & 4 Will. 4. c. 42. s. 5, that the cause of action on a deed did not accrue within twenty years, a replication, alleging a written acknowledgment of the*

*debt within twenty years, need not set out the writing in its terms.*

Debt on a mortgage deed.

Plea, that the cause of action did not accrue under the said indenture within twenty years.

Replication, that defendant, after the accruing of the said cause of action, and before the commencement of this action, to wit, on &c., by writing, signed by him the defendant, acknowledged the said debt in the declaration mentioned to remain unpaid and due to the plaintiff, and that the present action was commenced within twenty years next after such acknowledgment so made as aforesaid.

Special demurrer, on the ground that the writing mentioned in the replication ought to be set out.

*H. S. Keating*, in support of the demurrer.—This case depends on the 3 & 4 Will. 4. c. 42. ss. 3, 5; the latter of which requires that the written acknowledgment shall be specially replied. It is matter of law whether the writing does or does not amount to an acknowledgment; and, therefore, the terms of the writing ought to be set out on the record. Reliance will be placed by the other side on the cases decided under the Statute of Frauds, to the effect that when a writing is essential it need not be set out. But in *Lowe v. Eldred* (1) the Exchequer threw out a doubt whether such a course was not necessary. That case is, no doubt, opposed to *Wakeman v. Sutton* (2), where *Lysaght v. Walker* (3) is cited and relied upon. But that last case is very different from the present. Here there is no fortifying of the declaration by the replication, but a new and independent matter pointed only to defeat the plea is alleged in the replication.

[COLERIDGE, J.—In *Lysaght v. Walker* it would still be for the Court to say whether the contract contained in the writing is the same as that declared on according to its legal effect.]

The defendant ought to have an opportunity of admitting that the writing is his, but arguing its legal effect: by this replica-

(1) 1 Cr. & M. 239; s. c. 2 Law J. Rep. (N.S.) Exch. 81.

(2) 2 Ad. & El. 78; s. c. 4 Law J. Rep. (N.S.) K.B. 38.

(3) 5 Bligh, N.S. 1.

tion he is bound to go to a jury. The case of debt on a bond conditioned to perform an award is analogous. There to a plea of *nul tiel agard* the plaintiff must reply, setting out the award—2 *Wms. Saund.* 62. c. 5.

[PATTERSON, J.—That is to enable the plaintiff to assign breaches. In cases under the 9 Geo. 4. c. 14. the written acknowledgment or ratification is never set out.]

*Fortescue*, *contra*, was not called upon by the Court to argue.

LORD DENMAN, C.J.—The mode of pleading in cases arising under the 9 Geo. 4. c. 14. rules the present. If the mere question to be raised were, whether the writing amounted in law to an acknowledgment, it would be right to set it out in the pleadings; but the question is a mixed one, consisting partly of the fact that the defendant did intend to acknowledge the existence of the deed. This is for the jury, and therefore may be raised by asserting the acknowledgment generally.

PATTERSON, J.—It is always a mixed question of law and of fact, whether the defendant gave a written acknowledgment of a previous debt or deed. In such cases many questions of fact properly triable by a jury may arise, as, for instance, the question of agency, when the acknowledgment is given by an agent. Therefore this replication is correct in form.

COLERIDGE, J.—I think the general replication is good, for two reasons: first, whenever a party relies on the fact of a writing being made, he may always state its legal effect, together with the surrounding circumstances, leaving the Court to put a legal construction on the document when produced in proof of the pleading; and, secondly, it may often happen, in such cases as this, that a plaintiff relies on more than one acknowledgment in different terms, which he could not do if he were obliged to set out one only *in hæc verba* on the record, whereas if he is allowed to reply generally, he will be able to avail himself of all.

ERLE, J. concurred.

*Keating* prayed leave to amend; but the Court directed that there should be—

*Judgment for the plaintiff.*

1848. }  
July 1, 12. } PALK v. FORCE.

*Pleading—Appraiser—46 Geo. 3. c. 43.*  
*—Statute—Negating Exceptions.*

*To a declaration for work and labour the defendant pleaded that the work, &c. consisted of an appraisement of personal property, which the plaintiff appraised in expectation of reward to be therefore paid by the defendant to him, without being duly licensed according to 46 Geo. 3. c. 43:—Held, that the plea was sufficient, without stating that the plaintiff did the work as an appraiser, as it followed the words of the statute.*

*Held, also, that the plea need not negative that the appraisement was for the purpose of ascertaining legacy duty.*

*There is no difference, in respect of declarations and subsequent pleadings, as to negating exceptions in acts of parliament.*

Assumpsit for work and labour, and on an account stated.

Second plea, that the said work, &c. were and consisted entirely of an appraisement of certain personal property, which personal property the plaintiff theretofore, to wit, on the day and year in the first count mentioned by the said appraisement appraised; that plaintiff, after the passing of an act, &c. (4 & 5 Will. 4. c. 60.) (1), and between the 5th of July 1845 and the 6th of July 1846, to wit, on &c., in Great Britain, appraised the said personal property in expectation of reward, to wit, the money in the first count mentioned, to be therefore paid by the defendant to the plaintiff, without being then licensed in that behalf so to do by a licence, stating the true name and place of abode of the plaintiff, and granted by any two or more of the Commissioners of Stamps and Taxes, or by any person duly authorized by such Commissioners, or any three or more of them, contrary to the form of the statute in such case made and provided; and that the said account, in the last count mentioned, was so stated as there mentioned of and concerning the said sum of money in the first count mentioned, and of no other money whatever.

Demurrer, on the ground that the plea

(1) By which the Boards of Stamps and Taxes were consolidated.

does not allege that the plaintiff, at the time of doing the said work, &c. or at any other time was, or used or exercised the calling or occupation of, an appraiser, or that the plaintiff appraised the said property as such appraiser; and that it does not allege that the plaintiff was an appraiser, or that the appraisement was not an appraisement or valuation of any property made for the purpose of ascertaining the legacy duty payable in respect thereof.

*Tomlinson*, in support of the demurrer (July 1).—This plea is framed under the 46 Geo. 3. c. 43. ss. 5. and 6, and does not shew that the plaintiff was a person requiring to be licensed under section 5. of that act; it only states evidence of his being an appraiser, not that he was in fact an appraiser.

[ERLE, J.—The ultimate fact stated in the plea is, that he appraised.]

The statute makes the fact of appraising *prima facie* evidence that the party is an appraiser, but it is not conclusive of that fact—*Atkinson v. Fell* (2), where Lord Ellenborough, C.J. anticipates this very point. It is essential to see *quo animo* the act of appraisement is done in order to determine whether the party is within the statute.

[LORD DENMAN, C.J. referred to *Forster v. Taylor* (3) and *Cope v. Rowlands* (4).]

[COLERIDGE, J.—Section 6. uses the words “no person,” which is wider than no appraiser, and seems pointed at those not regularly appraisers who act as such.]

[ERLE, J.—Why cannot the plaintiff traverse that he appraised?]

The proper traverse would be, that he did not appraise as such appraiser, so as to exclude a valuation for the private information of the parties—*Jackson v. Stopherd* (5). Secondly, the plea does not negative that the plaintiff appraised the property for the purpose of ascertaining the legacy duty, which is exempted from duty by 55 Geo. 3. c. 184. Sched. ‘Appraisement.’ This plea goes to defeat the action, and therefore

ought to negative the exception. It would be different in a declaration—per Lord Abinger in *Thibault v. Gibson* (6), *Turquand v. Mosedon* (7).

[COLERIDGE, J.—The exception applies only to the stamp on appraisements, not to the appraiser’s licence.]

*J. Karlake*, *contra*.—The plea states enough to be a defence, as it shews that the plaintiff appraised personal property in expectation of reward; and by section 4. of 46 Geo. 3. c. 43. any person so doing is to be “deemed and taken to be an appraiser within the provisions of this act to all intents and purposes.” If the plaintiff denies that he appraised within the meaning of the act, he should traverse the averment in the plea. *Atkinson v. Fell* and *Jackson v. Stopherd* were both cases where the point arose on the evidence under the general issue. Here the plea is framed in strict accordance with the words of the statute. Secondly, the exception need not be negatived. The suggested distinction between a declaration and a subsequent pleading cannot be sustained. The exemption in the case of legacy duty is contained in a subsequent statute, and therefore the plaintiff should reply it if he relies on it; besides, it relates only to the stamp, not to the licences—*Washbourn v. Burrows* (8), *Lee v. Simpson* (9).

*Tomlinson*, in reply.

*Cur. adv. vult.*

The judgment of the Court (10) was subsequently (July 12) delivered by—

LORD DENMAN, C.J.—To a declaration for work and labour, the defendant pleaded that the work done was and consisted entirely of an appraisement of certain personal property, which the plaintiff appraised without a licence, contrary to the act 46 Geo. 3. c. 43. Demurrer on the general ground that he did not appear to have so done the work as an appraiser within the meaning of the statute, as explained in *Atkinson v. Fell*.

(6) 12 Mee. & Wels. 88; s.c. 13 Law J. Rep. (N.S.) Exch. 2.

(7) 7 Ibid. 504; s.c. 10 Law J. Rep. (N.S.) Exch. 196.

(8) 1 Exch. 107; s.c. 16 Law J. Rep. (N.S.) Exch. 266.

(9) 3 Com. B. 871; s.c. 16 Law J. Rep. (N.S.) C.P. 105.

(10) Lord Denman, C.J., Patteson, J., Coleridge, J. and Erle, J.

(2) 5 Mau. & Selw. 240.

(3) 5 B. & Ad. 887; s.c. 3 Law J. Rep. (N.S.) K.B. 137.

(4) 2 Mee. & Wels. 149; s.c. 6 Law J. Rep. (N.S.) Exch. 63.

(5) 2 Cr. & M. 361; s.c. 3 Law J. Rep. (N.S.) Exch. 95.

We think it was properly answered, that the plea was sufficient, as it followed the words of the statute, and that the doctrine of the case cited does not require the defendant to state that the plaintiff appraised as an appraiser; though upon a replication traversing the fact of appraisal, the plaintiff might have been entitled under the authority of that case to a verdict, if his appraising was not in the exercise of that calling. There was also a special demurrer, because the plea did not negative certain exceptions introduced in the statute. Generally, it certainly is not necessary to negative exceptions not contained in the sentence which imposes the penalty, and the negative of which therefore forms no part of the description of the offence. But that rule was said to apply to declarations only, not to subsequent pleadings. This observation, made by counsel *arguendo* in *Thibault v. Gibson*, was adopted by Lord Abinger to distinguish that case from *Turquand v. Mosedon*; where, however, the rule was not mentioned, and in which case the exception was contained in the same section, which was relied on. In *Thibault v. Gibson* it is said by counsel, that a plea requires more strictness than a declaration; and 1 *Wms. Saund.* 276, is cited, by mistake for 277, b, for the proposition that greater strictness is required in a plea than in a declaration. The proposition, though true in some cases, is not applicable here. The exception of an auctioneer is in a subsequent section of 46 Geo. 3. c. 43, and that with respect to legacy duty, in a subsequent act of parliament; and the rule in this respect applies as well to pleas as to declarations.

*Judgment for the defendant.*

1848. }  
 July 12. } PRIAR v. GREY AND OTHERS.

*Covenant — Pleading — Condition Precedent.*

*A lease contained a proviso that on notice being given by the lessee eighteen months before the end of the eighth year, and all arrears of rent being paid, and all covenants and agreements on the part of the lessee having been observed and performed, the lease should determine at the end of the eighth year;*

*"nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained":—Held, that the performance of all the covenants by the lessee was a condition precedent to his right to determine the lease, notwithstanding the concluding clause.*

*To an action by the lessor on the lease where the declaration alleged specific breaches of covenant, the lessee pleaded that he gave eighteen months' notice to determine the lease at the end of the eighth year, and that at the expiration of that year all arrears of rent had been paid, and all and singular the covenants and agreements on the part of the lessee had been observed and performed, and thereupon the lease determined. The plaintiff replied, setting out a specific breach of covenant which had been assigned in the declaration, absque hoc that all and singular the covenants and agreements on the part of the lessee had been observed and performed by him at the end of the eighth year, concluding to the country:—Held, that the plaintiff was at liberty to put the defendant on proof of his averment in the general terms in which it was made, and that the replication concluded properly to the country.*

Covenant by assignee of lessor against lessees under an indenture of lease. The declaration assigned several breaches of covenant by the defendant. The plea set out the indenture upon oyer, the only material part of which was as follows:—"Provided also, that if the said lessees, their executors or administrators shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such their desire shall give to the said J. F. (the lessor), his heirs or assigns, notice in writing eighteen calendar months before the expiration of such eighth year, and thereafter, before the expiration of any such three years (as the case may be), then and in such case, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed, this lease, and



every clause and thing herein contained, shall, at the expiration of the first eighth year, and thenceforward at the expiration of any such third year (whichever in the said notice shall be expressed) cease, determine, and be utterly void to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired. But nevertheless, without prejudice to any clause or remedy which any of the parties hereto, or their respective representatives, may then be entitled to, for breach of any of the covenants or agreements hereinbefore contained." The plea then averred that the breaches of covenant in the declaration mentioned respectively happened after the expiration of the first eight years of the term, and after the lease and every clause and thing therein contained had ceased, determined, and become void, as thereafter mentioned. That after the making of the lease, and eighteen calendar months before the expiration of the first eight years of the term, the defendants being desirous to quit the demised premises at the end of the first eight years of the term, gave notice in writing to the plaintiff of such their desire, and thereby gave the plaintiff notice that they would quit and deliver up possession of the said demised premises on the 12th of May, A.D. 1846, being the end of the first eight years of the said term; that, at the expiration of those eight years all arrears of the said rents so reserved and made payable by the said indenture had been and were paid, and all and singular the covenants and agreements on the part of the defendants had been and were duly observed and performed by the defendants; and thereupon, at the expiration of the said first eighth year of the said term, and which happened before the commencement of this suit, the said lease, and every clause and thing therein contained, ceased, determined, and were utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired, according to the said indenture and the said proviso in that behalf so contained as aforesaid. Verification.

Replication, that after the making of the said indenture, and during the said term thereby granted, and before the expiration of the first eight years of the said term, to

wit, on &c., and on divers other days and times afterwards, and before the expiration of the first eight years of the said term, the defendants wilfully neglected and omitted to draw and pump out of the said colliery and coal mines divers large quantities of water, &c. [reassigning a breach of covenant which had been assigned in the declaration], contrary to the said indenture and the defendants' covenant in that behalf so made as aforesaid; and at the said expiration of the said first eight years of the said term that breach of covenant was still subsisting and continuing; without this, that all and singular the covenants and agreements on the part of the defendants had been and were duly observed and performed by the defendants, at the expiration of the said first eight years of the said term: concluding to the country.

Special demurrer, on the ground that the covenants and agreements on the part of the defendants, in the plea mentioned, are independent of the proviso in the indenture; and of the right and power thereby given to determine the indenture and term by such notice to quit, as in the plea mentioned, and that such covenants and agreements do not in anywise qualify or constitute a condition precedent to the said proviso or stipulation, or to the exercise of the provisions thereof; that the traverse raises an immaterial issue; that the replication is too general and indefinite; that the plaintiff should have stated as a substantial part of the replication, and not by way of inducement only, that some one, and which, of the covenants and agreements on the part of the defendants was broken at the expiration of the first eight years of the term, and should have concluded with a verification, in order that the defendants might have denied or confessed and avoided such breach of covenant; that the general allegation of performance in the plea is not traversable, but the replication ought to have assigned some particular breach of covenant; that the only breach assigned in the replication is assigned in the inducement, so as to make the assignment of it immaterial. Joinder in demurrer.

The case was argued (1) by—

Corrie, for the defendants.—First, this

(1) Before Lord Denman, C.J., Patteson, J., Coleridge, J., and Erle, J.

issue is bad as being multifarious, as it is not allowed by the rules of pleading to raise a general issue whether several distinct covenants have been performed.

[COLERIDGE, J.—Would it not be allowable to state that each covenant *aeriatim* had not been kept?]

No. *Steph. Plead.* p. 387, rule 7. (4th edit.)

[ERLE, J.—How do you say the plaintiff should reply?]

By setting out the particular breach relied on, and concluding with a verification. The only instance of such a general mode of replying is to a plea of *plene administravit*, where the plaintiff relies on bad debts. In 2 *Wms. Sessd.* 410, (4), the rule is laid down. Here, if the plaintiff, in his declaration, assigned as a breach, that the defendants broke all the covenants, that would be bad as tending to a multifarious issue. Secondly, admitting that the replication is good in form, it is no answer to the plea. It never was the intention of the parties under this lease to take away the lessees' power of putting an end to the term on a breach by them of some minute covenant in the lease. *Dawson v. Dyer* (2) is in point. There a covenant by the lessor that the lessee paying the rent and performing the covenants shall quietly enjoy, was held not to be a conditional covenant; and a plea setting up a breach of covenant or non-payment of rent was no bar to an action by the lessee on the covenant for quiet enjoyment. Besides, the subsequent proviso that either party is still to have his remedy for breach of any covenant is insensible, if the performance of the covenants be a condition precedent to the exercise of the right given to the lessee.

*Manisty, contra.*—The performance of the covenants by the lessees is a condition precedent to the lessees' power of determining the lease. The words, "the covenants having been performed," are sufficient to give such a construction, and the subsequent proviso does not alter it. It is argued, that they can have no meaning if such a view be taken, but several cases may be put to which they would apply. Suppose, for instance, the lessee after breach of cove-

nant gives notice to quit, and the lessor, though not bound to do so, chooses to accept the notice, the proviso will preserve his right of suing for the breach of covenant. Again, though the lessee may have performed all his covenants, the lessor may not have done so, and the former may have his action, though he has determined the lease. *Porter v. Shephard* (3) is very like this case. The broad principle applicable to such cases is to see what the parties meant. Secondly, the replication is only as general as the plea which it follows; the plaintiff in fact takes, and does not offer an issue. It is performance of *all* covenants that gives the defendant a right to determine the lease, and therefore the plaintiff has a right to traverse performance of all, in which case a general mode of pleading is allowed. But it is said, if the plaintiff had assigned a specific breach, and concluded to the Court, the defendants might have rejoined a waiver of that breach, but such a rejoinder would be a departure from the plea, which is one of performance, not waiver. The onus is on the defendants to prove performance of all his covenants. The cases of bonds referred to are exceptions to the general rule.

*Corrie*, in reply.

*Cur. ads. vult.*

Judgment was now delivered by—

PATTESON, J.—The principal question in this case arose on the proviso in the lease giving power to the lessees to determine it by notice eighteen calendar months before the end of the eighth year. That proviso contains the words "then and in such case all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed, this lease and every clause and thing therein contained shall, at the expiration of the first eighth year, and thereafter, at the expiration of any such third year (whichever in the said notice shall be expressed) cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired. But, nevertheless, without prejudice to any claim or remedy, which any

(2) 5 B. & Ad. 584.

(3) 6 Term Rep. 666.

of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." The declaration states a notice by the lessees to determine the lease at the end of the eighth year, and avers that at the expiration of those eight years all arrears of rent had been and were paid, and all and singular the covenants and agreements on the part of the lessees had been and were duly observed and performed by them, and thereupon the lease determined. The replication states a specific breach of covenant before the expiration of the eight years (which breach had been already stated in the declaration); without this, that all and singular the covenants and agreements on the part of the lessees had been and were duly observed and performed by them at the expiration of the said first eight years of the said term, and concludes to the country. The case of *Porter v. Shephard* is directly in point to shew that the performance of all the covenants by the lessees is a condition precedent to the determination of the lease. In that case, however, no such words as these "but nevertheless without prejudice," &c. were introduced into the proviso. We are of opinion that their introduction into the present proviso makes no difference in the construction of it. They appear to be introduced for greater caution, as regards the right of the lessor to sue for breaches of covenant which might be unknown to him at the expiration of the eight years, or possibly to meet the case of the lessor acquiescing in the notice given by the lessees, although strictly the condition precedent might not be performed. Besides which, they are applicable to any parties, and preserve the right of the lessees for any breach of covenant committed by the lessor. They are evidently introduced not to qualify, or do away with the condition precedent contained in the previous part of the proviso, but for a wholly collateral purpose. We are, therefore, of opinion that the averment of performance in the plea is a material one, which the plaintiff was entitled to traverse. It is, however, objected that he ought to have concluded his replication to the Court, after averring a specific breach of covenant, and not to have traversed the performance in

the general terms which he has adopted. The traverse appears to have been in the same form in *Porter v. Shephard*, and not to have been objected to on that ground; neither do we think that it could have been objected to with success. This is not like the case of a bond declared on generally for the penalty, with a plea setting out a condition and averring general performance, in which, or any similar case, no doubt, the plaintiff must in his replication shew a specific breach, and conclude to the Court, giving the defendant an opportunity to plead to that breach. Here the declaration alleges specific breaches of covenant, and the defendants seek by their plea to avail themselves of a proviso containing a condition precedent, the performance of which they aver in general terms, and must prove in order to entitle themselves to the benefit of that proviso. The plaintiff, therefore, is at liberty to put them upon proof of that averment, by denying it in the same form in which it is couched. Our judgment must, therefore, be for the plaintiff.

*Judgment for the plaintiff.*

1848. { THE QUEEN v. THE INHABIT-  
June 17. { ANTS OF HARROW-ON-THE  
HILL.

*Poor Law — Pauper — Removeability —*  
9 & 10 Vict. c. 66.—*Residence — Relief.*

*Pauper became chargeable to the parish of H. on the 9th of December 1846, having resided ten years in that parish. During the year 1844 he received relief from R. The 9 & 10 Vict. c. 66. passed on the 26th of August 1846:—Held, that the residence before and after the year 1844 were to be added together, so as to make up the period of five years, the one year of relief (on the supposition that the proviso was retrospective) being only excluded from the computation of the entire time, and not defeating the effect of a previous residence.*

[For the report of the above case, see  
17 Law J. Rep. (N.S.) M.C. p. 148.]

1848. } KEMP C. CLARE AND  
June 26, 27. } ANOTHER.

*Ship and Shipping—Freight—Liability of Consignee—Inferior Court—Jurisdiction—Indebitatus Count.*

*The liability of a consignee or indorsee of a bill of lading to pay freight is a new contract, the consideration for which is the delivery of the goods to him at his request.*

*A declaration in an inferior court containing the common indebitatus count for freight, and which alleges the delivery of the goods, at the request of the defendant, to have been within the jurisdiction of such court, sufficiently shows that the cause of action arose within the jurisdiction; as the words "at the request of the defendant" are to be taken to apply to the delivery of the goods only, and not to the carriage of them, which may have been out of the jurisdiction.*

Error from the Court of Record, Kingston-upon-Hull.

The declaration in the court below contained (amongst others) the common indebitatus count for freight for the carriage of goods from Marseilles to Hull, and stating the delivery of the goods at the request of the defendant to have occurred within the inferior jurisdiction.

The plaintiffs below had a general verdict, and on this error was brought in this court.

*Hugh Hill*, in support of the writ of error (June 26).—The question arises on the validity of the first count in the declaration in the court below. It appears by this count, that the consideration for the promise, or at least part of it, is for the carriage of goods from Marseilles to Hull. Now, to give jurisdiction to the Court below, it being an inferior court, it was necessary that the consideration for the promise should be shewn to have arisen within the jurisdiction—*Peacock v. Bell* (1), *Stannian v. Davis* (2), *Ramsy v. Atkinson* (3). The shipper is the person liable for the carriage—*Domett v. Beckford* (4). By the indorsement of the bill of lading, the property in the goods only is transferred, but not the contract

between the shipowner and the shipper—*Sargent v. Morris* (5), *Thompson v. Domingy* (6). If this be so, can anybody sue for the carriage of the goods but the shipper? The shipowner may indeed sue the consignee for a sum equal to the carriage; but that liability of the consignee arises from his having deprived the shipowner of his lien, and arises on a new contract, which is not a contract for freight. The proper form of count was considered in *Amos v. Temperley* (7), and in the judgment of *Sanders v. Vanzeller* in error (8), where it is said, that special assumpsit is the proper form for the delivery of the goods. "Freight" means something due for the carriage of goods, and is not applicable when the consideration is only abandoning a lien on goods actually carried.

*Cleasby*, contra.—Whichever way the liability arises the Court below had jurisdiction. The count does not say "goods carried for the defendant," but "that he was indebted for freight for the carriage of goods."

[PATTERSON, J.—It does not say for the delivery of goods heretofore carried.]

If a cause of action for freight can arise within the jurisdiction, then the jurisdiction is sufficiently shewn.

[PATTERSON, J.—Do the words "at his request" override the whole count? if so, the carriage of the goods is included in the consideration, and that was out of the jurisdiction.]

The whole cause of action arises from the delivery. The debt is indivisible, and no freight is earned until the goods are completely carried. *Emery v. Bartlett* (9) is in favour of the defendant in error.

[PATTERSON, J.—There the whole consideration for the promise is the account stated.]

If the allegation of the carriage of the goods be struck out, the count will be a good count. A long course of practice is not to be set aside because a difficulty has been suggested.

(5) 3 B. & Ald. 277.

(6) 14 Mea. & Wels. 403; a. c. 14 Law J. Rep. (n.s.) Exch. 320.

(7) 8 Ibid. 798; a. c. 11 Law J. Rep. (n.s.) Exch. 183.

(8) 4 Q.B. 297; a. c. 12 Law J. Rep. (n.s.) Exch. 497.

(9) 2 Lord Raym. 1555.

(1) 1 Wma. Saund. 74, s. n. 1.

(2) 1 Salk. 404.

(3) 1 Lev. 50.

(4) 5 B. & Ad. 521; a. c. 3 Law J. Rep. (n.s.) K.B. 10.

*Hugh Hill*, in reply.—After verdict it is impossible to say what part of the consideration stated occasioned the verdict. It may have been for the carriage of the goods only. The earning the freight is the gist of the action, and that arises from the carrying the goods.

[PATTESON, J.—We must look at the case of *Sanders v. Vanzeller* again before giving our judgment.]

*Cur. adv. vult.*

The judgment of the Court (10) was now (June 27) delivered by—

PATTESON, J.—Upon reading the case of *Sanders v. Vanzeller*, in the 4th *Queen's Bench Reports*, and particularly with reference to the concluding paragraph in the judgment of my Lord Chief Justice Tindal, in the Court of Exchequer Chamber, p. 297, and upon considering the other cases upon this subject, we are of opinion, that the liability of a consignee or indorsee of a bill of lading to pay freight is a new contract, the consideration for which is the delivery of the goods to him at his request; that the words in the declaration, "at the request of the said defendant," are to be applied to the delivery only, and then it sufficiently appears by this declaration that the delivery only was the consideration for the promise of the defendant. That delivery at the request of the defendant is stated to have been within the jurisdiction of the Court below, and we are, therefore, of opinion, that the cause of action and the consideration are well alleged to have been within the jurisdiction of that Court, and that the defendants in error are entitled to our judgment. The judgment of the Court below will therefore be affirmed.

*Judgment affirmed.*

1848. }  
June 27. } HOARE v. SILVERLOCKE.

*Libel—Innuendo, when necessary—Arrest of Judgment.*

*Allegorical terms of a defamatory character of well-known import, such as imputing to a person the qualities of the "frozen*

*snake" in the fable, are libellous, per se, without innuendoes to explain their meaning.*

*To write to the members of a charitable institution calling on them "to reject the unworthy claims of Miss H," and stating that "she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander D," the secretary of the institution, is libellous.*

This was an action for libel. The following are parts of the third and fourth counts in the declaration:—Third count, and also for that the defendant, further contriving to injure the plaintiff, afterwards (to wit) on &c. in a public newspaper, called the *Nautical Standard and Steam Navigation Gazette*, falsely and maliciously composed and published, and caused and procured to be published of and concerning the plaintiff, and of and concerning her said application to the society, another false, scandalous, malicious, defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the plaintiff, and of and concerning her said application to the said society (that is to say), the Royal Naval Benevolent Society:—"We were sorry to perceive, by a report of last Monday's proceedings, at a meeting of the above society, that the case of Miss Hoare (meaning the plaintiff), which we imagined had been entirely dismissed by the unanimous decision of a large body of officers of high rank and distinguished position in the service, at the last quarterly court, had been re-opened, and that, too, by an officer distinguished no less for his illustrious services against the enemy than his noble descent: the gallant Rear Admiral the Earl of Cadogan has happily been a stranger to those scenes which have occurred at the former meetings of this society, when the case of the above misguided woman (meaning the plaintiff) has been brought forward; but if he has escaped the exhibition of such conduct on the part of one or two officers who would, by the display, be certainly very much lowered in his estimation, his lordship has, unfortunately, also missed the hearing of an overwhelming mass of evidence which is a complete justification for the society's decision with respect to the claims of Miss Hoare (meaning the plaintiff), to say nothing

(10) Patteson, J., Coleridge, J. and Erle, J.

of the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, stated that they had realized the fable of the 'frozen snake.' We have no doubt that his lordship's genuine feelings of philanthropy have been enlisted in inducing him to take the course he pursued on Monday. The manner in which his Lordship acquitted himself was highly honourable to him, and demanded, as it obtained, the respect of the Court, inasmuch as his lordship did not make the case of Miss Hoare (meaning the plaintiff) the excuse for a display of bitter vindictive feeling towards the secretary; but let the noble earl go to the society's offices and examine carefully the documents, and make himself acquainted with the whole of the proceedings of the secretary and the society in this matter, and he must come to the conclusion that the case of Miss Hoare (meaning the plaintiff) is a most forlorn hope, and that, unfortunately, many much more worthy objects of the society's benevolence are excluded from participation in it by the limited state of its funds."

Fourth count—And also for that the defendant, further contriving to injure the plaintiff, afterwards, &c. falsely and maliciously composed and published of and concerning the plaintiff, and of and concerning her said application to the said society, a certain other false, scandalous, malicious libel, containing, amongst other things, the false and libellous matter following:—"For one, I am determined to withdraw my subscription should any of our funds be granted to Miss Hoare (meaning the plaintiff); but I hope and trust the good sense of the members at our next meeting will as heretofore prevail, and reject for ever the unworthy claims of Miss Hoare" (meaning the plaintiff). And in another part of the same libel there was the libellous matter following:—

"Who is this woman (meaning the plaintiff), that she (meaning the plaintiff) is to engross almost the whole of the time of the society? She (meaning the plaintiff) is not entitled, as the descendant of a subscriber or in her own right, to relief; and it is avowed by her (meaning the plaintiff's) friends that she (meaning the plaintiff) squandered away the money which she

(meaning the plaintiff) did obtain from the benevolent in printing circulars abusive of Commander Dickson. Really it is time that all this twaddle about humanity, and this display of knight errantry in defence of a slandered and forlorn damsel (meaning the plaintiff) should be laid aside."

At the trial, before Lord Denman, the plaintiff had a general verdict on the third, fourth, and fifth counts of the declaration.

*Talfourd, Serj.* having moved for and obtained a rule to shew cause why the judgment should not be arrested, or a *venire de novo* awarded,—

*Miss Hoare*, the plaintiff, in person, now shewed cause.—No innuendo was necessary to shew that the imputation in the third count is libellous; the meaning of the allusion to "the frozen snake" is evident to all, and requires no explanation. There is no ambiguity, and therefore no innuendo is necessary. The following cases were cited:—*Digby v. Thompson* (1), *O'Brien v. Clement* (2), *J'Anson v. Stuart* (3). As to the case of *Forbes v. King* (4), relied on when this rule was moved, there is nothing defamatory to another to say he is "Man Friday;" that is not a charge of crime. Any writing is libellous that tends to shew that the party libelled is unfit for the society in which he is placed: as to say of a protestant archbishop that he attempts to convert catholic priests by offers of money—*Tuam (Archbishop) v. Robeson* (5). What, then, would make a person more unfit for society than making those acquainted with her realize the fable of "the frozen snake"? The declaration can be supported after verdict, if the words can be made to bear a defamatory meaning—*Gardiner v. Williams* (6). The fourth count is good. Merely to say that the plaintiff squandered away the money which she obtained from the benevolent in printing circulars abusive of Commander Dickson,

(1) 4 B. & Ad. 821; s. c. 2 Law J. Rep. (n.s.) K.B. 140.

(2) 15 Mees. & Wels. 435; s. c. 15 Law J. Rep. (n.s.) Exch. 285.

(3) 1 Term Rep. 748.

(4) 1 Cr. & M. 435; s. c. 2 Law J. Rep. (n.s.) Exch. 109.

(5) 5 Bing. 17; s. c. 6 Law J. Rep. C.P. 199.

(6) 1 Cr. M. & R. 78; s. c. 4 Law J. Rep. (n.s.) Exch. 164.

and calling on the members to reject the unworthy claims of the plaintiff, are such injurious expressions as to be libellous. Then as to the fifth count.

[LORD DENMAN, C.J.—The fifth count is clearly libellous.]

[PATTESON, J.—I believe the Court of Exchequer has held that if one or more of several counts on which general damages have been assessed be bad, the judgment should not be arrested, but a *venire de novo* awarded to assess the damages on the good counts.]

*Corrie*, contra, in support of the rule.—The third count is not libellous. The allusion to the fable of "the frozen snake" at most amounts to a charge of want of gratitude.

[LORD DENMAN, C.J.—Surely something more—stinging those who had served them; but that want of gratitude is a crime is not without authority.]

The real objection, however, to the count is, that the Court cannot take notice of the meaning of the allusion to "the frozen snake"; it is not apparent by merely stating it; it required an innuendo to point its meaning, as in the case of *Forbes v. King*, before referred to.

[LORD DENMAN, C.J.—To say that another was a "Man Friday" imputed no crime; to be a black man may be a great misfortune, but no crime.]

If the Court takes notice of the meaning of this fable, why not of all others? Suppose one in the Chinese language, could the Court take notice of that? where is the line to be drawn? Suppose a fable well known in Germany; known perhaps to some members of the Court and not to others. If it depend on the fact that the fable is universally known, what should be the proof that there is a universal knowledge of it? An innuendo was therefore necessary. As to the fourth count: the charge is that the plaintiff squandered away her own money, which she had a perfect right to do. In *Robinson v. Jermyn* (7) the words were, "the plaintiff, not being a person that the proprietors and annual subscribers think it proper to associate with, is excluded this room;" and the Court held that this was

not a libel. Surely those words are as strong as those charged as libellous in the fourth count. The defendant, however, relies principally on the objection to the third count, as that raises a general question.

LORD DENMAN, C.J.—There is no ground for arresting this judgment. Before we can make this rule absolute, we must be prepared to say that the jury are wrong in finding these words to be libellous, for we need not take judicial knowledge that these words would be libellous on demurrer. The jury say they understand the allusion to "the frozen snake" as all the world understands it: can we say it is not so? It would be trifling with language to say that we do not clearly see what is the meaning of the allusion. The cases referred to do not come up to this case. The last case cited, *Robinson v. Jermyn*, is merely this, that the parties will not keep company with one another. As to the case in which it was attempted to make it libellous to allude to the plaintiff as a "Man Friday," that imputed no crime at all. The "Man Friday," we all know, was a very respectable man, although a black man, and black men have not been denounced as criminals yet. This reference to the plaintiff as "the frozen snake" tends to degrade her in the eyes of the world, and is, therefore, libellous. As to the fourth count, no persons can be charged with circulating abusive circulars but that their characters must suffer.

PATTESON, J.—This is a written statement respecting the application of the plaintiff to the Royal Naval Benevolent Society, and the words in the third count are that there was "an overwhelming mass of evidence which is a complete justification for the society's decision with respect to the claims of Miss Hoare, to say nothing of the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, stated that they had realized the fable of "the frozen snake." Can we say that these words, on the face of them, appear not to be libellous? If we see they are not libellous, then we cannot discharge this rule, but being after verdict, if they are capable of a libellous meaning, then the finding of the jury can be supported. The objection is that they require an innu-

endo; but, taking the context, it appears to me that it may be seen the words are defamatory, and no innuendo is necessary. As to the fourth count, the words are, "I trust the good sense of the members, at our next meeting, will as heretofore prevail, and reject for ever the unworthy claims of Miss Hoare:" and in another part it is said "she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson." It appears by these words manifest that misconduct is thereby imputed; and in my opinion the counts are good.

COLERIDGE, J.—The matter charged as libellous in the third count is this.—[His Lordship read that libel]. It is said that without an innuendo we cannot understand that these words are libellous. If we cannot so understand them then we are different from all the rest of mankind. Supposing that it was said of a person that he was a Judas, would that want an innuendo to explain its meaning? We ought to attribute to the jury and Court the knowledge of such terms, whether they be allegorical, historical, or fabulous. If such terms, whether historical, fabulous, or allegorical, have passed so much into common use as to have obtained a fixed meaning to persons of ordinary knowledge, then we should take notice that such is their meaning. Our language is, in a great measure, made up of allegorical terms. It is a common expression to say of a person that he has a vinegar face or a sour temper; but surely such well-known terms require no explanation. I am of opinion that this rule must, therefore, be discharged.

ERLE, J.—I see no ground to arrest the judgment. The jury say these words are libellous. We are to say whether they are wrong: unless we can say they are wrong, we must discharge the rule. Likening persons to certain animals may bring them into contempt. Why may I not take judicial notice that an allusion to "the frozen snake" has a tendency to lower a person in the eyes of the world? In my opinion it does so, and is therefore libellous. As to the fourth count, there is no doubt.

*Rule discharged.*

1848. }  
June 27. } BIRD AND ANOTHER v. SMITH.

*Pleading—Confession and Avoidance—  
Plea bad as amounting to General Issue—  
De Injurid.*

*A declaration stated, in the first count, that it was agreed between the defendant and the plaintiffs, that the defendant should sell and deliver to the plaintiffs certain iron rails to be made and delivered of certain weights and shapes at a price stated, and the said rails to be inspected and certified as then agreed on, and to be of a certain quality, and that the defendant did make and deliver certain rails as and for the rails of such quality; and alleging as a breach that the rails were not of the said quality. The defendant pleaded that the said rails were, according to the agreement, to be inspected by an agent of the plaintiffs, who was at liberty to approve and accept the same if he should think fit, and that the said rails were inspected and approved and accepted by such agent on the delivery of the same:—Held, bad, in substance, as not answering the breach complained of, and only shewing performance of one of the stipulations of the contract set out in the said count. And, semble, that it was also bad in form, as amounting to the general issue.*

*To the second count, which stated that the defendant promised to deliver rails fit and proper for the purpose of a certain railway, and alleging as a breach that the rails delivered were not fit and proper for such railway, the defendant pleaded a plea similar to the plea to the first count:—Held, that the plea was bad in substance, for the same reason as the plea to the first count; and, also, in form, as amounting to the general issue.*

*Assumpsit.* The first count stated that before the commencement of this suit, to wit, on, &c., it was agreed by and between the said company (the New British Iron Company) and by the plaintiffs, that the said company should, at certain times then agreed upon between the plaintiffs and the said company, sell and deliver to the plaintiffs, who should then buy and receive of the said company, divers, to wit, 982 tons of iron rails to be made and delivered by the said company to



and for the plaintiffs at certain times and in a certain manner, and of certain weights, shapes and dimensions, then agreed upon by and between the plaintiffs and the said company, at the price of 9*l.* 10*s.* for each ton of the said rails at the Staffordshire works of the said company, the payment of such price to be made by the plaintiffs to the said company according to certain terms and subject to certain allowances then agreed upon by and between the plaintiffs and the said company, and the said rails to be inspected and certified as then agreed upon by and between the plaintiffs and the said company, and to be, to wit, at the several times of the sale and delivery thereof by the said company to the plaintiffs in quality equal to any rails made in Staffordshire. And thereupon in consideration of the premises, and that the plaintiffs then promised the said company to observe and perform all things in the said agreement contained on the part of the plaintiffs to be observed and performed, the said company then promised the plaintiffs to observe and perform all things in the said agreement contained on the part of the said company to be observed and performed. And the plaintiffs, in fact, say, that from the time of the making of the said agreement and promises to the time of the commencement of this suit they have been ready and willing to observe and perform, and during that time have observed and performed, all things in the same agreement and promise contained on the part of the plaintiffs to be observed and performed. Yet the plaintiffs further say, that although, after the making of the same agreement and promises, and at the said times in the said agreement in this behalf mentioned, and before the commencement of this suit, to wit, on the day and year aforesaid, and on divers other days and times during the time last aforesaid, the said company did make and sell and deliver to the plaintiffs, divers, to wit, 982 tons of certain iron rails as and for the rails in quality equal to any rails made in Staffordshire, in the said agreement mentioned as aforesaid. Yet during the times aforesaid the said company, disregarding their said promise and agreement in this, that such last-mentioned rails were not at the said times of the sale and delivery thereof to the plaintiffs, and during the time afore-

said, nor at any time, nor did nor would the said company at any time, make, sell, or deliver any rails whatsoever, in quality equal to any rails made in Staffordshire, contrary to the said agreement and promise of the said company so made as aforesaid.

The second count stated, that theretofore, to wit, on &c., in consideration that the plaintiffs, at the request of the said company, then promised the said company to buy of the said company, at certain times and upon certain terms then agreed upon by and between the said company and the plaintiffs, divers, to wit, 982 tons of iron rails of certain sizes, weights and dimensions, and for certain prices then agreed upon by and between the plaintiffs and the company, amounting to a large sum of money, to wit, the sum of 6,000*l.*, for the purpose of a railway in parts beyond the seas, the said company then promised the plaintiffs to make, sell, and deliver at the several times, and upon the terms and in manner aforesaid, the said rails for the purposes of the said railway. And the plaintiffs, in fact, say, that although they, confiding in the said promise of the said company, did afterwards, to wit, on the day and year aforesaid, buy of the said company at the said times and upon the said terms so agreed upon as aforesaid, the said several tons of iron rails of such sizes, weights, and dimensions, and for the said prices and for the said purposes of the said railway which the said company then made, sold, and delivered to the plaintiffs as and for such rails then fit and proper for the said purposes of the said railway; yet the said company, disregarding their said promise in this, to wit, that at the several times of such sale and delivery of the last-mentioned rails the same were not, nor were any or either of them, or any part thereof, fit or proper for the said purposes of the said railway, nor did nor would the said company at any time, make, sell, or deliver any rails fit or proper for the said purposes of the said railway, contrary to the said promise of the said company in that behalf so made as aforesaid, whereby and by means of the premises the plaintiffs have not only lost and been deprived of the use and benefit of the price of the said rails, amounting to a large sum of money, to wit, 6,000*l.* which they

then paid to the said company, and the said company then accepted from the plaintiffs on account of the said price of such rails, but have during the time aforesaid lost and been deprived of great profits, amounting to a large sum of money, to wit, the sum of 5,000*l.*, which they might and otherwise would have gained from certain contracts then made between the plaintiffs and a certain railway company in parts beyond the seas, to wit, the Mecklenburgh Railway Company, for supplying rails of the respective qualities above mentioned for the purposes of the said railway in the said parts beyond the seas, and have by reason of the premises necessarily incurred debts and liabilities to a large amount, to wit, to the amount of 5,000*l.* on the faith of the said agreement and promises of the said New British Iron Company, and of their due performance thereof by making rails of the qualities respectively above mentioned, and have by reason of the premises necessarily paid divers sums of money, and incurred divers liabilities, amounting altogether to a large sum, to wit, the sum of 1,000*l.* in and about the necessary travelling expenses of the plaintiffs and their servants and agents, and in and about the necessary removal and sending of such rails so made and sold and delivered as and for rails of the quality above mentioned, from the works of the said company to the said parts beyond the seas, and by reason of the premises the said railway company have refused to pay the plaintiffs any price for the rails made, sold, and delivered by the said New British Iron Company as and for rails of the respective qualities above mentioned, and the same have become and are of no use or value to the plaintiffs.

Third plea, to the first count, that according to the terms and the true intent and meaning of the said agreement in that count mentioned, the said rails therein referred to and the subject of the said agreement were to be inspected and certified as in the said first count mentioned (that is to say), the same were to be inspected at the works of the said company after the making thereof, and prior to the delivery of the same by the said company to the said plaintiffs, by an agent of the said plaintiffs, to be appointed by them for that purpose, and who was to be at liberty to approve

and accept in performance of the said agreement for the said plaintiffs, if he should think fit, any of the said rails so to be made as aforesaid, and certify to the plaintiffs, to wit, as he should think fit respecting the same. And the defendant further says, that the said rails in the first count alleged to have been made, sold and delivered to the said plaintiffs, were inspected at the works of the said company, to wit, in the county of Stafford, after the making of the same, and before the delivery thereof respectively, to wit, on the respective days of the delivery thereof, in the said first count mentioned in that behalf, and were thereupon then approved and accepted in performance of the said agreement, for the said plaintiffs, by one James Gladstone, an agent of the said plaintiffs, theretofore appointed by them in that behalf, according to and in pursuance of the said agreement. Verification.

Eighth plea, to the second count, that it was part of the terms of the said agreement in that count mentioned, that the said rails therein referred to, and the subject of the said agreement in that count mentioned, should be inspected at the works of the said company after the making thereof and prior to the delivery of the same by the said company to the said plaintiffs, by an agent of the said plaintiffs, to be appointed by them for that purpose, and who was to be at liberty to approve and accept in performance of the said agreement for the said plaintiffs, if he should think fit, any of the rails so to be made as aforesaid. And the defendant further says, that the said rails in the said count alleged to have been made, sold, and delivered to the said plaintiffs, were inspected at the works of the said company, to wit, in the county of Stafford, after the making of the same and before the delivery thereof respectively, to wit, on the respective days of the delivery thereof, in the said second count mentioned, in that behalf, and were thereupon then approved and accepted in performance of the said agreement, for the said plaintiffs, by one James Gladstone, an agent of the said plaintiffs, theretofore appointed by them in that behalf, according to and in pursuance of the said agreement. Verification.

Replication to both pleas *de injurid.*

Special demurrer and joinder.

*Bovill*, in support of the demurrer (June 26).—*De injuriâ* is an improper replication to both pleas [a long argument took place on this point, but is omitted, as no judgment was given on it].

*Bramwell*, contra.—The replications are good. [This argument is omitted for the reason above stated.] The pleas are bad; they amount to this: the warrant as to quality is broken, but the agent certified. That is an excuse, but the pleas are bad, as it is a bad excuse.

*Bovill*, in reply.

*Cur. adv. vult.*

PATTESON, J. now delivered the judgment of the Court (1).—In this case there were demurrers to the replications to the third and eighth pleas; but it is unnecessary to consider the replications as the pleas appear to us to be bad in substance. The part of the contract set out in the first count, as far as relates to the point of our judgment, is, that in consideration that the plaintiffs would buy and receive, the defendant promised to make and deliver certain iron rails to be inspected and certified as agreed upon, and to be in quality equal to any rails made in Staffordshire; and the breach is, that the rails which were made and delivered were not of that quality. The plea alleges that the rails were, by the contract, to be inspected before delivery by an agent of the plaintiffs, to be appointed for that purpose, who was to be at liberty to approve and accept any of the said rails, if he should think fit, and certify to the plaintiffs as he should think fit, and that the rails in question were accordingly so inspected, approved, and accepted, in performance of the agreement, by an agent of the plaintiffs. This plea confesses that the part of the promise relating to the quality was broken, and attempts to avoid that breach by alleging that another part of the promise, relating to the approval and acceptance by an agent, had been performed. Of course a complaint of non-performance of one part of a contract is not avoided by alleging performance of another part: the defendant must therefore contend that the two parts are not separate and distinct, but forming one subject-matter of promise only,

(1) Lord Denman, C.J., Patteson, J., Coleridge, J. and Erle, J.

and that the effect of such promise is, that the approval and acceptance by the agent should establish that the stipulation for quality had been performed, or that in a measure he had been relieved from the performance thereof. The plea, however, meets neither of these views. If the approval and acceptance by the inspector were conclusive evidence, or indeed evidence at all of the performance of the stipulation for quality, the breach should have been traversed or performance pleaded; and in this point of view the present plea pleads evidence merely. If they amount to a release from the stipulation for quality, the plea should have been of a release; but we see no reason for putting this construction on the contract: each stipulation is in its terms distinct, and in its nature, as an absolute warranty for quality, may well be required in addition to a provision for inspection and approval to guard against defects which inspection cannot discover. We are of opinion, therefore, that the plea is bad.

The same judgment applies to the demurrer to the replication to the eighth plea, which is to the second count. That plea is also bad, as amounting to *non assumpsit*, for the second count is silent altogether as to any certificate of approval; and, by the addition of that certificate made in the plea, there is manifestly a statement of a different contract from that stated in the second count; and it is by no means clear that the plea to the first count is not bad for the same reason.

*Judgment for the plaintiffs.*

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1848. } THE QUEEN v. THE INHABIT-  
June 24; } ANTS OF ST. MICHAEL'S, CO-  
July 12. } VENTRY.

*Poor Law—Order of Removal—Examinations—Caption.*

*It is not necessary that each examination should have a distinct caption; it is sufficient to state in the first caption the names of each of the witnesses.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 156.]

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1848. }  
May 31. } HADRICK v. HESLOP AND RAINE.

*Malicious Prosecution—Probable Cause—Belief—Malice—Pleading—Evidence—Witness—Admissibility of Defendant who suffers Judgment by Default.*

In case for a malicious prosecution for perjury against two defendants, one of whom suffered judgment by default, and the other pleaded to issue, the Judge left it to the jury to say whether the defendant believed, or had reasonable and probable cause for believing, that the plaintiff was guilty of perjury, and whether he acted maliciously. The jury found that he did not believe that the plaintiff was guilty of perjury, but that he had acted from improper motives, and with a view to exclude his evidence on a new trial. The Judge thereupon held that there was evidence of malice:—Held, that this ruling was correct.

Held, also, that in such an action the plea of not guilty does not put in issue the termination of the prosecution by the acquittal of the plaintiff.

Held, also, that the defendant, who had suffered judgment by default, was a competent witness for the plaintiff.

Case for a malicious prosecution for perjury. The defendant Raine suffered judgment by default, and the other defendant, Heslop, pleaded not guilty, and the *venire* was in the usual form, to try the issue against Heslop, as well as to assess the damages against Raine.

At the trial, before Wightman, J., at the Durham Summer Assizes, 1847, the plaintiff called Raine as a witness. He was objected to as being incompetent, but the learned Judge admitted the evidence.

It appeared that the perjury was alleged to have been committed by the plaintiff in an action brought by one Hinde against the present defendants, who were partners, and in which the present plaintiff Hadrick was called as a witness for Hinde, the question in dispute being whether certain barley had been sold on the credit of the firm, or on that of one of the defendants only. Witnesses were called for the defendants on that trial.

It appeared that Heslop was not present when Hadrick's evidence was given; but he

had been told by two persons who gave evidence in the present case, that there was no ground for the indictment, whereupon he said that it would have the effect of stopping the plaintiff's mouth, and assisting him in a motion for a new trial, for which a rule was obtained, but subsequently discharged. Heslop did not call witnesses. The Judge asked the jury whether Heslop believed, or had reasonable and probable cause for believing, that the plaintiff's evidence was false, and whether there was malice. The jury answered the first question in the negative; and as to the second they said they thought "malice" a strong word, but found that the defendant acted from improper motives and with a view of suppressing the evidence. The Judge held that this was malice, and the plaintiff had a verdict, with 200*l.* damages.

Bliss, in the ensuing Michaelmas term, moved for a rule *nisi* for a new trial, on the ground of misdirection, and on account of the improper reception of the evidence of Raine, and also on affidavits. He contended, on the first point, that the Judge ought to have decided whether there was reasonable and probable cause independently of the belief of the defendant. *Broad v. Ham* (1) is different: there the belief came into question. *Ravenga v. Mackintosh* (2), *Panton v. Williams* (3).

[WIGHTMAN, J.—I removed all difficulty by asking the jury each question separately.]

The real question is, whether there was any fact which gave reasonable and probable cause for the charge, not whether the defendant believed its truth or not. *Musgrove v. Newell* (4) is strongly in point.

[LORD DENMAN, C.J.—I never understood the decision of the Court of Exchequer in that case. The defendant believed his complaint to be true when he made it, but was afterwards convinced it was untrue, and yet persisted in the charge. Probable cause for a person acting, must mean probable cause in his own mind at the time when he acts.]

(1) 5 Bing. N.C. 722; s.c. 8 Law J. Rep. (N.S.) C.P. 357.

(2) 2 B. & C. 693; s.c. 2 Law J. Rep. K.B. 137.

(3) 2 Q.B. Rep. 193; s.c. 10 Law J. Rep. (N.S.) Exch. 545.

(4) 1 Mee. & Wels. 582; s.c. 5 Law J. Rep. (N.S.) Exch. 227.

Belief may be an ingredient of probable cause, as in *Venafr v. Johnson* (5), *Taylor v. Willans* (6), and *Delegal v. Highley* (7); but it is not necessarily so—*Turner v. Ambler* (8). Secondly, this was a question for the Judge alone: the belief of the defendant, which is a matter for the jury, goes only to prove malice. The definition of "malice" was wrong. Malice in fact ought to be proved. The improper motives actuating the defendant should be in reference to the prosecution, not generally only. In *Johnstone v. Sutton* (9), Lord Mansfield lays down the true definition of "malice." Thirdly, the fact of the acquittal of the plaintiff was put in issue by not guilty, and ought to have been proved; on this he cited *Drummond v. Pigou* (10), *Watkins v. Lee* (11), *Atkinson v. Raleigh* (12). Lastly, Raine was an incompetent witness—*Worral v. Jones* (13), *Pipe v. Steel* (14).

LORD DENMAN, C.J.—It appears quite outrageous to say that where a party clearly believes a charge which he makes against another to be unfounded, that he can be said to have had reasonable and probable cause for making it under any circumstances. *Turner v. Ambler* has been referred to, and a decision of my Brother Maule, in *Broad v. Ham*, is there noticed, where he held that a defendant was liable who, though cognizant of what really was reasonable and probable cause, did not think it reasonable and probable, but acted from malicious motives only and without that belief, and the Court of Common Pleas upheld that ruling. It is, however, rather difficult to distinguish that case from some others. The question is not a general one as to belief, but whether in the particular case the party believed the

existence of reasonable and probable cause. Absence of this belief must be brought to his knowledge; and in almost all cases it is mixed up with proof of malice. In *Turner v. Ambler* it was inferred that there was no want of probable cause; no point was there made as to the defendant's belief. The only question was, whether the facts proved bore him out in making the charge. Here the plaintiff takes upon himself to prove that the defendant did not believe the truth of the charge made by him; if so, that gets rid of the reasonable and probable cause which might have existed in the absence of such proof. It seems to me we cannot entertain any doubt as to the propriety of the ruling. As to the fact of the acquittal being in issue, the case of *Watkins v. Lee* is a direct authority to shew that it is not so, unless specially traversed. On these points therefore the rule will be refused.

COLERIDGE, J.—I am of the same opinion. It is now settled that the question of want of probable cause is for the Judge; but I take it to mean want of probable cause in the individual case, not generally; therefore there must be certain facts found by the jury, before the Judge can decide the question. The present objection is, that the party did not believe in the charge, and made it from improper motives. Surely, then, it was right to ask the jury whether he believed the party who told him, and whether he preferred the indictment solely for the purpose of suppressing the evidence of the plaintiff. As to the malice I think enough was done, and that the correct definition was given by the Judge. Taking it in its ordinary sense, the jury said it implies a serious charge. The Judge told them it did not mean what they imagined; but if the defendant acted from improper motives it amounted to malice in the sense used. I think he was not bound to say more.

WIGHTMAN, J.—It appears that Heslop was not cognizant of the facts on the original trial: he seems to have acted on what other persons told him; and the question is, whether he had probable cause for indicting the plaintiff. He is told by two of the witnesses that there is no ground for doing so. Admitting, or at least not denying, that he believes what they tell him, he says it will stop his mouth, and therefore

(5) 10 Bing. 301; s. c. 3 Law J. Rep. (N.S.) C.P. 51.

(6) 2 B. & Ad. 845; s. c. 1 Law J. Rep. (N.S.) K.B. 17.

(7) 3 Bing. N.C. 950; s. c. 6 Law J. Rep. (N.S.) C.P. 337.

(8) 16 Law J. Rep. (N.S.) Q.B. 158.

(9) 1 Term Rep. 545.

(10) 2 Bing. N.C. 114; s. c. 4 Law J. Rep. (N.S.) C.P. 294.

(11) 5 Mees. & Wels. 270; s. c. 8 Law J. Rep. (N.S.) Exch. 266.

(12) 3 Q.B. Rep. 379; s. c. 11 Law J. Rep. (N.S.) Q.B. 165.

(13) 7 Bing. 395; s. c. 9 Law J. Rep. C.P. 70.

(14) 2 Q.B. Rep. 733.

I will indict him. That is evidence that he did not believe there was any probable cause at all. With respect to the malice, if once it is conceded that there was no probable cause, that in itself amounts to malice; but here it is proved that the defendant acted from improper motives, and therefore that is stronger evidence of malice. As to the acquittal being in issue, I take it, since the New Rules, there would be no doubt about this, if it had not been expressly decided, as it has been, by the Exchequer.

**BALE, J.**—The question left to the jury was, whether the defendant believed the information as to the evidence given by the plaintiff on the former trial, and the jury found that he did. It certainly would be monstrous to say there was no want of reasonable and probable cause. As to the pleading, wherever a material fact is essential to the case, and not denied, it is admitted on the record.

*Rule refused on the ground of misdirection, but rule nisi granted on account of the reception of the evidence.*

In Hilary vacation last, cause against the rule was shewn (15) by—

**Knowles and Granger** (Feb. 11).—The evidence of Raine was properly admitted at the trial. The old rule as to rejecting a party to the record merely on that account has been much qualified; and the only question is, whether the witness has an interest. *Worrall v. Jones* and *Pipe v. Steel* are in point, and this being an action of tort, in which there is no contribution, is a stronger case. The interest of Raine would be against the plaintiff, as there can be but one assessment of damages. *Doe d. Harrop v. Green* (16), *Stevens v. Lynch* (17), *King v. Baker* (18), *Norden v. Williamson* (19), *Ward v. Haydon* (20), *Marsh v. Smith* (21), *Thorpe v. Barber* (22), and *Blackett v. Weir* (23), were cited.

(15) Before Lord Denman, C.J., Patteson, J., Coleridge, J., and Wightman, J.

(16) 4 Esp. 198.

(17) 2 Campb. 332.

(18) 2 Ad. & El. 333; s. c. 4 Law J. Rep. (N.S.) K.B. 41.

(19) 1 Taunt. 378.

(20) 2 Esp. 552.

(21) 1 Car. & Pay. 577.

(22) 17 Law J. Rep. (N.S.) C.P. 113.

(23) 5 B. & C. 385; s. c. 4 Law J. Rep. K.B. 205.

*Bliss and J. Addison*, in support of the rule.—The objection is not that Raine is a party to the record, or that he has some possible interest, but that by fixing Heslop he immediately relieves himself. It is conceded that there would be contribution here. *Chapman v. Graves* (24) is the only case which was decided on the ground of direct interest.

[**PATTESON, J.**—In ejectment, if one defendant assists to fix another, he does not necessarily relieve himself; so here, the plaintiff may or may not issue execution against both defendants.]

Execution *must* issue against both, and *may possibly* be levied against both; and though Raine's goods will be bound from the delivery of the *fi. fa.* to the sheriff, they will be worth more if the charge is divided with those of Heslop—*Samuel v. Duke* (25), 1 *Bac. Abr.* 'Execution,' C, 2, 2 *Inst.* 395. *Bloor v. Davies* (26) is analogous.

[**LORD DENMAN, C.J.**—That case seems to go the length of holding that a creditor could never be a witness for his debtor.]

They cited *Bland v. Ansley* (27), *Baker v. Tyrwhitt* (28), *Doe d. Jones v. Wilde* (29), and *The King v. Prosser* (30). The case of a co-trespasser not sued, is anomalous, and rests on dicta, until a late authority—*Walton v. Shelley* (31), *Blackett v. Weir, Merryweather v. Nixan* (32), *Adamson v. Jarvis* (33), *Hall v. Curzon* (34), *Berkeley v. Dimery* (35), *Morris v. Daubigny* (36), *King v. Hoare* (37), 1 *Phill. Evid.* p. 83, 8th edit., 2 *Stark. Evid.* 581, (q), 2nd edit., 1 *Arch. Prac.* 604.

*Cur. adv. vult.*

(24) 2 Campb. 333, n.

(25) 3 Mee. & Wels. 622; s. c. 7 Law J. Rep. (N.S.) Exch. 177.

(26) 7 *Ibid.* 235; s. c. 10 Law J. Rep. (N.S.) Exch. 222.

(27) 2 New Rep. 331.

(28) 4 Campb. 27.

(29) 5 Taunt. 183.

(30) 4 Term Rep. 17.

(31) 1 *Ibid.* 296.

(32) 8 *Ibid.* 186.

(33) 4 Bing. 66; s. c. 5 Law J. Rep. C.P. 68.

(34) 9 B. & C. 646; s. c. 7 Law J. Rep. K.B. 303.

(35) 10 *Ibid.* 113.

(36) 5 B. Moore, 519.

(37) 13 Mee. & Wels. 494; s. c. 14 Law J. Rep. (N.S.) Exch. 29.

Judgment was now delivered by—

LORD DENMAN, C.J.—This was an action on the case for a malicious prosecution against two defendants, Heslop and Raine. Raine suffered judgment by default, but Heslop pleaded to issue. The *venire* was in the usual form to try the issue against Heslop, and to assess damages against Raine. Raine was called and examined as a witness for the plaintiff, and on this ground a rule *nisi* for a new trial was obtained, and has been fully argued. Formerly, it seems to have been considered that a party to the record as such merely, was incompetent, but that doctrine is now finally overruled—*Worrall v. Jones*; and the true criterion is held to be, whether the proposed witness is or is not interested to obtain a verdict for the party calling him. In cases of contract, a defendant, who has suffered judgment by default is not competent for the other defendant, because he is directly interested to procure a verdict for him, since such verdict would enure to his benefit, notwithstanding the judgment by default. But, for the same reason, he is competent for the plaintiff, his direct and predominating interest being against the plaintiff who calls him, though he has a conflicting interest to fix the other defendant jointly with himself—*Pipe v. Steel*. In cases of tort such as the present, where an assessment of damages against the proposed witness is to take place, as well as the trial of an issue against the other defendant, he is not competent for that defendant, because he is directly interested to reduce the amount of the damages, though a verdict for that defendant would not enure to his benefit. This was expressly decided in *Thorpe v. Barber*. That same ground of incompetency for the other defendant would make him a competent witness for the plaintiff, by parity of reason with the case of *Pipe v. Steel*, and would be conclusive of the case, if no other ground of incompetency from a more predominating interest could be shewn. It is argued that such ground can be shewn, and also that there is direct authority against his competency. First, as to authority. The case cited is that of *Chapman v. Graves*, reported in a note to *Stevens v. Lynch*, as having been decided by Le Blanc, J. In that case, the

learned Judge admitted a joint-trespasser, who was not made defendant, but rejected one who was, and who had suffered judgment by default. The decisions appear to have proceeded not on the question of interest, but on the fact of being or not being party to the record. If the question of interest had been taken into consideration, it should seem that the witness who was not a party to the record had the strongest inducement to fix the defendants, because the plaintiff after obtaining judgment against them could never have sued the witness at all, and so he by the effect of his own evidence might escape altogether, whereas, the utmost benefit that he who was party to the record could obtain, was that of having others made jointly liable with himself. This case, therefore, although it has been often cited, and with apparent approbation, does not seem to us to be a strong authority, if indeed it be any, since the doctrine that competency depends upon interest only has been established. In the case of *Thorpe v. Barber*, Maule, J. is reported to have said that the case of *Worrall v. Jones* has overruled the case of *Chapman v. Graves*, and so it has, if *Chapman v. Graves* is taken to have proceeded on the doctrine that parties to the record are as such merely not competent, but not otherwise. It should also be observed, that the plaintiff in *Chapman v. Graves* obtained the verdict upon other evidence. In the last treatise on evidence Mr. Pitt Taylor has expressed his doubt whether this case can be supported. Secondly, as to the interest of the witness. No doubt he has an interest to fix the other defendant, because it may be that the plaintiff, having recovered against both, will take his execution against the other defendant, and not against the witness, and in general (subject to some exceptions which are not shewn to apply here) there is no contribution between defendants in actions of tort. On the other side it was said that such an interest is contingent, and too remote and uncertain to be regarded, as it was considered to be in the case of *Doe d. Hurrop v. Green*, decided by Lord Ellenborough. In order to meet this view of the case, the learned counsel for the defendant Heslop cited numerous authorities to shew, first, that if the plaintiff succeeded against Heslop, his execution must be jointly against both Heslop and Raine.

This is so, no doubt, but it is equally clear that under a writ of *feri facias* against both, he might levy on the goods of one only. Secondly, that no execution could be taken out against the lands of Raine, though the judgment at once becomes a charge on them, until all the goods of Heslop as well as Raine should have been exhausted. The principal authority for this position seems to be in 2 *Inst.* 395: "If the chattels be sufficient to pay the debt, and so may appear to the sheriff, whereby he may satisfy the debt, then he ought not to extend the land for the residue," and it being clear that the execution, of whatever nature it be, must be joint, the position may be correct. So, if the plaintiff sues out a *feri facias* and executes it by levying part, he may not be able to sue out an *elegit* for the residue, until there has been a return of *nulla bona* as to both defendants; but there is nothing in the Statute of Westminster 2nd, which gives the *elegit*, to prevent him from suing out an *elegit* against both and taking the goods of one to satisfy his debt, though, if he take the lands, he must take the lands of all. So that the argument at last comes to this, that the witness has a direct interest to obtain the verdict against his co-defendant, and make him liable on account of the possibility that the plaintiff may take his execution against him only, or against the goods and lands of both. We think this too remote and contingent an interest to render the witness incompetent, and if he be held incompetent for this reason, we cannot see on what ground a joint trespasser, not a defendant, can be held competent, as his evidence might wholly discharge himself. Now, Lord Tenterden, in his judgment in *Blackett v. Weir*, says, "In actions of trespass witnesses apparently open to a much stronger objection are constantly admitted. In that action a recovery against one of several co-trespassers, is a bar to an action against the others, and yet scarcely a circuit passes without an instance of a person who has committed a trespass being called to prove that he did it by the command of the defendant. In that case, a verdict for the plaintiff would operate as a discharge to the witness, there being no contribution in actions of tort." The same proposition of law is stated as perfectly clear and well known in *Morris v. Daubigny*. The class of cases which ended in *Bloor v.*

*Davies* might perhaps lead to a contrary inference. The late act will prevent their coming again into operation, but they may be said to have been in a high degree unsatisfactory. Their doctrine would exclude every creditor from being a witness in favour of his debtor, however solvent, in any action whatever. Upon the whole, we are of opinion that the witness was rightly admitted, and that this rule must be discharged.

*Rule discharged.*

1847.	}	HALL v. BAINBRIDGE AND ANOTHER.
Dec. 10.		
1848.		
June 27.		

*Evidence — Presumption — Deed — Delivery.*

*At the trial of a cause it was admitted, that a document "was signed, sealed, and executed as it purports to be." The document, which was produced by the party who was to take a benefit under it, concluded "as witness the hands and seals of" (the parties), and the attestation was to the signing and sealing only:—Held, that it was to be inferred that the document was delivered, and amounted in law to a deed.*

Assumpsit upon an agreement by which the defendants, who were members of the British and American Steam Navigation Company, agreed, *inter alia*, to pay to the plaintiff (the patentee of improvements in steam-engines) 5*l.* per horse-power on all engines constructed by them, in which the principles of the plaintiff's patent should be adopted (1). Breach, non-payment, &c.

Plea (*inter alia*), non assumpsit.

At the trial, before Lord Denman, C.J., at the Sittings in Middlesex, after Hilary term, 1846, it was admitted by both parties that a document embodying the terms of the agreement declared on, "was signed, sealed, and executed" as it purported to be by the plaintiff and one Isaac Solly, a director of the company on their behalf, on the 26th of November 1836. The conclusion of this document was, "as witness the hands and seals of the parties the day and year first above written. Samuel Hall (l.s.), J. Solly

(1) See the declaration at length, 5 Q.B. Rep. 233; and 13 Law J. Rep. (N.S.) Q.B. 6.



(L.S.). Witness to the *sealing and signing* hereof by the said J. Solly. M. Laird."

It was also admitted that another document, not under seal, was signed by the plaintiff and Solly on the 28th of November 1836, which recited part of the former agreement, and granted other patents in consideration of the same gross sum as was to be paid under the first agreement; but it did not in terms embody the first agreement, or refer to the clause for breach of which the present action was brought. A verdict was taken for the plaintiff subject to a special case, which was argued (2) by

*Cowling*, for the plaintiff (Dec. 10.)—It is contended that this agreement is a deed, and that, therefore, the issue on non assumpsit must be found for the defendants. No doubt the document is under seal, but there is no evidence of its ever having been delivered, which is essential to its being a complete deed. The admission that it was signed, sealed and executed as it purports to be does not carry the case any further. It may be a mere licence to use the patent under seal, on which assumpsit will lie, as in *Chanter v. Johnson* (3).

[WIGHTMAN, J.—This is an agreement, not a licence. If a document under seal is handed over by the party sealing, that is a sufficient delivery.]

That depends upon the intention of the party to deliver it as a deed.

[COLERIDGE, J.—There are two requisites: one that the document should be of the proper quality, that is, under seal, the other, that it should be delivered. If it be a deed and it is delivered, it must be delivered as a deed.]

But, assuming the document of the 26th of November to amount to a specialty, that of the 28th of November is under hand only, and will support the action.

[COLERIDGE, J.—A subsequent simple contract cannot do away with the prior agreement under seal if it refers to it for the terms. You cannot do without the first agreement; if you could, your argument might prevail.]

*Peacock*, contra.—The question is, whether the defendant ever entered into such a contract as that declared on, *i. e.* whether he

agreed to pay 5*l.* per horse-power otherwise than by deed. Now the first contract is clearly in form a deed, as there is a covenant in terms, and the ordinary words of attestation. The admission as to the execution is only made to dispense with the attendance of the attesting witness. When an attesting witness appears he never, in fact, proves a delivery, and at the distance of eight or nine years no witness would take upon himself to do so. Signature is not necessary, but only sealing and delivery. The sealing is *primd facie* evidence of delivery, more especially when the deed comes out of the proper custody—1 *Stark. Evid.* p. 372. The proof of the handwriting of the party opposite to the seal is, therefore, *primd facie* proof of delivery by that party. It is argued that it is not to be presumed to have been delivered, as the attestation does not specify that it was; but the ordinary forms of attestation do not use the word "delivered." When a deed is thirty years old an attesting witness need not be called; would it be necessary in that case, with this form of attestation, to prove a delivery? Then, secondly, if the first instrument is a deed it contains the only contract to pay the 5*l.* per horse-power; and if a consideration is set up as contained in the second agreement, to support a promise to pay that sum, then the parol agreement is inconsistent with the deed, and cannot be set up as varying its effect.

*Cowling*, in reply.—It cannot be seriously contended, that a document is a deed merely because it has a seal upon it.

[LORD DENMAN, C.J.—Do you contend that there was here no evidence to go to the jury of the due execution of the deed?]

Yes; Mr. Starkie (as well as Mr Phillips) in his work on Evidence, vol. i. pp. 372, 451, cites *Talbot v. Hodson* (4); but on referring to that case it appears that the attesting clause there stated that the deed was delivered.

[PATTESON, J.—A deed might be signed on one day and delivered on another]

*Cur. adv. vult.*

The judgment of the Court (5) was subsequently (June 27, 1848) delivered by—

PATTESON, J.—The first question in this

(4) 7 Taunt. 251.

(5) Lord Denman, C.J., Patteson, J., Coleridge, J., and Wightman, J.

(2) Other points were argued and decided as to the effect of certain letters to raise a contract, but they do not call for a report.

(3) 14 Mees. & Wels. 408; s.c. 14 Law J. Rep. (N.S.) Exch. 289.

case is, whether any written agreement to the effect stated in the declaration was proved to have been executed by an agent of the defendants, so as to bind them. Two agreements were proved, one dated the 26th of November 1836, under the seals of the plaintiff and Mr. Solly, a director of the British and American Steam Navigation Company, of which the defendants were members and directors, and purporting to be an agreement between the plaintiff and the company; the other not under seal, dated the 28th of November 1836, signed by the plaintiff and the same Mr. Solly. The plaintiff was owner of several patents, and by the first agreement he grants the use of such patents as are mentioned in it to the company upon certain terms, which are those embodied in the declaration. The second agreement recites part of the first, and grants the use of certain other patents of the plaintiff, which had been omitted in the first, in consideration of the same sum of 2,000*l.* agreed to be paid by the first, and varies one of the terms of the first agreement; but it does not in terms embody the first agreement, nor does it expressly refer to the clause, on which this action is founded, as to the payment of the 5*l.* per horse-power in case of the company contracting with any one to use the plaintiff's patents mentioned in the second agreement, but omitted in the first.

Under these circumstances, we do not think that the second agreement can be taken *per se*, or by reference to the first, to be the real contract between the parties. It merely adds the licence to use the additional patents, but it does not even say upon the terms and stipulations contained in the first agreement, nor anything to that effect. We think that the plaintiff must ground his action on the first agreement. Now, if that agreement be a deed, he cannot found on it this action of assumpsit. The plaintiff contends that it is not a deed, because the conclusion of it is only "as witness the hands and seals of the parties," and the attestations are only to the "signing and sealing." Nothing is said anywhere about any "delivery," which is essential to a deed.

The case was tried, so far as this point is involved, on an admission; which was only "that the document was signed, sealed, and executed, as it purports to be." The Court were to draw all inferences of fact

that a jury would be justified in doing. The document was produced by the plaintiff, executed by Mr. Solly. We cannot doubt that if the subscribing witness had been called, and had proved that he saw it signed and sealed by Mr. Solly, the jury, on its production by the plaintiff, would have been justified in inferring, and would have inferred, that it was delivered by Mr. Solly; and we feel ourselves bound to draw that same inference, and to hold that it is a deed, and that this action of assumpsit cannot be maintained: therefore that a verdict must be entered for the defendants on the plea of non assumpserunt.

*Verdict accordingly.*

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1848. }  
June 14. } THE QUEEN v. GILLYARD.

*Conviction—Certiorari—Fraud—Excise Acts—7 & 8 Geo. 4. c. 53.*

*Where a maltster had by collusion, and for the purpose of exonerating himself from penalties under the revenue laws, procured a conviction of one of his servants for the same offence which he had himself committed, and a certificate of two Justices which operated as a discharge of himself, the Court, upon certiorari, quashed the conviction.*

*Though the 7 & 8 Geo. 4. c. 53. takes away a certiorari from the Queen's Bench, it may still issue where a conviction has been obtained by fraud.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 153.]

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1848. }  
June 26. } WILKINS v. WOOD.

*Landlord and Tenant—Custom of the Country.*

*Where a custom of the country is proved to exist, it is to be considered applicable to all tenancies, in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the written terms themselves.*

Debt for work and labour and other common counts.

Pleas—Never indebted, and a set-off for the use and occupation of farm lands,

and for money due and payable from the plaintiff to the defendant, for and in respect of the defendant having before then relinquished and given up to and in favour of the plaintiff, and at his request, and for and in respect of the plaintiff having received the benefit and advantage of certain work done and materials provided and monies expended by the defendant in and about ploughing, harrowing, manuring, sowing, and otherwise cultivating and improving divers lands by him, the defendant, before then harrowed, manured, sown, and otherwise cultivated and improved and given up to the plaintiff; and for money due and owing from the plaintiff to the defendant for divers crops of corn, wheat and turnips, and other crops of the defendant before then bargained and sold by the defendant to the plaintiff, at his request, and by the plaintiff, under and by virtue of such bargain and sale before then accepted, had and received, and taken to his own use.

Replication to the set-off, *nil debet*.

At the trial, before Lord Denman, C.J., at the Sittings after Michaelmas term, 1847, it appeared that the plaintiff was a farmer, and the defendant the owner of the farm called Priestland Farm, Horley, Surrey, which he let to the plaintiff under a written agreement. The plaintiff proved that the defendant was indebted to him for the amount claimed in his particulars of demand; and the defendant then proceeded to shew that the plaintiff was indebted to him as incoming tenant for crops and manure in a sum equal to that proved by the plaintiff. To prove this set-off the defendant relied on the custom of the country, that incoming tenants took the crops and manure at a valuation. The witnesses proved that there was a custom of the country to that extent, but on cross-examination they stated that they were not aware whether this custom applied to lettings which were in writing or under seal.

For the plaintiff it was objected, that the defendant had not proved his set-off, for that he had not shewn that the custom applied to lettings under written agreements, and that as the affirmative was upon the defendant to shew a custom applicable to the particular case, the set-off failed.

For the defendant it was contended, that when a custom of the country was once proved, it must be taken to apply to all

lettings, whether verbal, in writing, or under seal, unless it be proved to be limited to verbal lettings.

The Lord Chief Justice held that the defendant had not made out the custom, and the plaintiff had a verdict.

*Watson* (14th July 1847) moved for a rule to shew cause why a new trial should not be had on the ground of misdirection, citing the following cases—*Wiglesworth v. Dallison* (1), *Hutton v. Warren* (2), *Senior v. Armitage* (3).

[PATTESON, J.—All the cases are collected in *Smith's Leading Cases*, vol. 1, in the notes to *Wiglesworth v. Dallison*.]

LORD DENMAN, C.J.—We will, before we grant a rule, look at the cases.

A rule nisi was subsequently granted, and now—

*Keane* shewed cause, contending that there was ample evidence to shew that the plaintiff had, in fact, paid for the crops, even if the custom were made out; for that a receipt was put in for 150*l*.

[LORD DENMAN, C.J.—Supposing that were so, I gave a decided opinion on an objection formally made, that to prove the custom of the country, it was necessary for the defendant to give evidence that it applied to the case in question, that is, a letting under a written agreement. If a farming custom, when once made out, applies as a matter of law to cases where there are written agreements, as well as to cases of tenancy without written terms, then I was wrong, and there must be a new trial.]

He then contended that the law was as laid down at the trial.

*Keane*, for the defendant, was not called upon to argue.

LORD DENMAN, C.J.—I think I was wrong at the trial. It appears on examination of the decisions that the law is this, that when a custom of the country is once proved, it applies to all takings, whether parol or by lease in writing, unless shewn not to apply by the terms of the writing itself.

PATTESON, J., COLEBRIDGE, J., and ERLE, J. concurred.

*Rule absolute.*

(1) Doug. 190.

(2) 1 *Mee. & Wels.* 466; s. c. 5 *Law J. Rep.* (N.S.) *Exch.* 234.

(3) *Holt*, N.P.C. 197.

[IN THE EXCHEQUER CHAMBER.]

1847. } DE MEDINA v. GROVE AND  
Feb. 5. } OTHERS.

*Pleading—Case—Vexatious Process—Malice and Want of reasonable or probable Cause.*

*In an action for indorsing a writ of ca. sa. and imprisoning the plaintiff thereon for a larger sum than was due on the judgment (part having been paid), and for indorsing a fi. fa. and seizing the plaintiff's goods for a greater sum than was due on a second judgment,—Held, that the declaration in such a case is insufficient, if it do not contain averments of malice and of want of reasonable and probable cause.*

Error from the Court of Queen's Bench.

This was an action for a vexatious arrest, and for vexatiously indorsing a writ of *fi. fa.* (1).

The first count of the declaration alleged that a judgment had been recovered against the plaintiff for 1,060*l.* 10*s.* damages, and had been assigned to the defendant Grove; that the plaintiff paid Grove 1,000*l.* in part satisfaction, and that afterwards Grove and the other two defendants well knowing this, and intending to vex, harass, and annoy the plaintiff, issued a *ca. sa.* on the judgment, and “wrongfully and injuriously” caused it to be indorsed to levy the whole sum of 1,060*l.* 10*s.*, and “wrongfully and injuriously” caused the plaintiff to be imprisoned until she gave a warrant of attorney for the whole amount, with costs. The second count alleged that the defendant Grove entered up judgment against the plaintiff on a warrant of attorney for securing 1,081*l.* 14*s.* 2*d.*; that a large sum had been paid by the plaintiff to Grove in part satisfaction; that the defendants caused a writ of *fi. fa.* to be issued against the plaintiff, and intending to vex, harass, and annoy her, “wrongfully and injuriously” caused the said writ to be indorsed to levy 320*l.*, and the sheriff to seize the plaintiff's goods until she paid 320*l.*, whereas at the time of the seizure and payment much less than 320*l.* was due on the judgment.

At the trial, the plaintiff obtained a verdict against Grove and one of the other

(1) See the report in the Court below, 15 Law J. Rep. (N.S.) Q.B. 284.

defendants. Those defendants having moved in arrest of judgment, the Court of Queen's Bench made the rule absolute for arresting the judgment, on the ground that the declaration was insufficient. Thereupon the plaintiff brought her writ of error.

*Lush*, for the plaintiff in error (2).—The Court below seems to have put this case on the same footing as cases of malicious prosecution. Here the act complained of was in itself wrongful, while in the other cases the act was *prima facie* legal. The case of *Saxon v. Castle* (3) was much relied on; the only material difference between that case and the present being the omission of a *scienter* there, which is inserted in the present case. It is a fallacy to liken this to an action for malicious prosecution. The cases cited in the judgment of the Court below do not bear upon the point. In *Scheibel v. Fairbain* (4) the wrongful act complained of was nonfeasance. It was charged to have been the defendant's duty to countermand execution of a *ca. sa.* after payment, and the Court decided that no such duty existed. There is, indeed, an intimation in that case that the action might have been maintained if malice had been alleged. But it is difficult to see how the motive for a nonfeasance could make any difference, if there was no duty at all. *Scheibel v. Fairbain* was the principal authority on which *Saxon v. Castle* was decided. In *Gibson v. Chaters* (5) the facts precluded the presumption of malice, and there was merely an omission to countermand the writ. *Page v. Wiple* (6) was also cited in the judgment. There it was alleged to have been the duty of the defendant to prevent the plaintiff from being arrested after payment, and the Court decided that there was no such duty cast upon the defendant. All these authorities only shew that where there is no duty incumbent upon a person, an action cannot be maintained for nonfeasance. In *Crozer v. Pilling* (7) an action for maliciously refus-

(2) The Judges present were Wilde, C.J., Parke, B., Maule, J., Rolfe, B., Cresswell, J. and Williams, J.

(3) 6 Ad. & EL 652; s. c. 6 Law J. Rep. (N.S.) K.B. 177.

(4) 1 Bos. & Pul. 388.

(5) 2 Ibid. 129.

(6) 3 East, 314.

(7) 4 B. & C. 26; s. c. 3 Law J. Rep. K.P. 131.

ing to accept money tendered after the execution of a *ca. sa.* and to sign a discharge was sustained, and the Court said that the refusal was *prima facie* evidence of malice. In *Wentworth v. Bullen* (8), Parke, J. said he was satisfied that an action would lie for issuing execution for too much. The case was not decided on that point, but no notice was taken of the omission of an averment of "malice." In *Gough v. Cribb* (9) the declaration was in the form of the present one, for wrongfully and unjustly causing the writ to be indorsed for a larger sum than was due; although several objections were taken, the want of the averment of malice was not alluded to.

[MAULE, J.—The Court below relied not only on the want of an averment of malice, but also on the want of an averment negating probable cause. It is consistent with this declaration that there was probable cause.]

[WILDE, C.J.—Suppose the money had been paid in a dispute with regard to a set-off or appropriation of payments.]

[PARKE, B.—It has always been considered necessary in actions for the abuse of the process of the law to allege want of probable cause as well as malice. Can you plead payment of part to a *scire facies*?]

Perhaps not.

[PARKE, B.—Therefore the only mode of trying whether part has been paid is to issue execution for the whole, and then the other party can apply to the equitable jurisdiction of the Court for the reduction of the amount to be levied.]

Consistently with this declaration, there could have been no dispute about the amount to be levied.

[MAULE, J.—It is quite consistent with the declaration that the parties might have agreed to let the execution go for another debt, or that an unsuccessful application might have been made to the Court of Chancery or to the equitable jurisdiction of this Court. That could not have been if there had been a denial of probable cause. I think there is in this case what amounts to an averment of malice, but not to one of want of reasonable or probable cause.]

The allegation as to reasonable and pro-

bable cause does not occur in the older cases.

[MAULE, J.—You cannot maintain these as modern law.]

In an action for an excessive distress it is not necessary to aver malice or want of probable cause.

[MAULE, J.—That is the act of the party, not of the law. Can you say on what the practice of indorsing writs of execution depends?]

There is no statute and no rule; it is merely an old practice. The case of *Water v. Freeman* (10), which was an action for suing out double execution, distinguishes between actions for the abuse of process and those for malicious arrest.

[MAULE, J.—There is not here any allegation that the defendant had no right to issue execution for the whole sum, or that he knew that he had no right to issue for the whole. There might be circumstances which would entitle a party to issue execution for the whole after a part had been paid, as in the instances already adverted to.]

There is no instance of a case for the abuse of process in which it has been held necessary to negative reasonable or probable cause. In *Grainger v. Hill* (11), where the action was for abusing the process of the law by applying it to extort property, the absence of reasonable and probable cause was not alleged. In *Skinner v. Gnaton* (12) there was no denial of reasonable and probable cause. (See further, *Comm. Dig.* 'Actions on the Case,' *Tortious Proceedings at Law*, (A, 4.)

*Watson and Corrie*, for the defendants, were stopped by the Court.

WILDE, C.J.—I am of opinion that the judgment in this case must be affirmed, and the rest of the Court concur with me in that opinion.

The declaration, in substance, complains of an abuse of the process of the law by having indorsed upon a writ of *capias ad satisfaciendum* a direction to levy a larger sum than was due upon the judgment. It is clear settled law that the declaration in actions of the nature of the present action

(10) Hob. 205, 266.

(11) 4 Bing. N.C. 212; s. c. 7 Law J. Rep. (N.S.) C.P. 85.

(12) 1 Wms. Saund. 228, c.

(8) 9 B. & C. 840; s. c. 9 Law J. Rep. K.B. 33.

(9) 11 Mee. & Wels. 497.

must contain averments negating the existence of reasonable and probable cause for the conduct complained of, and that the defendant acted maliciously. It may be arguable whether this declaration contains a sufficient averment of malice; but it is clear beyond all doubt, that it does not contain an averment negating the existence of reasonable and probable cause; and all the statements in this declaration are consistent with the existence of reasonable and probable cause,—they are consistent with the existence of a dispute between the parties as to the amount really due upon the judgment, which dispute might relate to the amount of the payments which had been made, or as to the authority of the person to receive the payments on behalf of the plaintiff, or as to the appropriation of certain payments, or on numerous other supposable grounds; and the ordinary process of the law to enforce the payment of the amount claimed to be due upon the judgment was a writ of execution indorsed to levy such amount, leaving the now plaintiff to apply to the equitable jurisdiction of the Court before the writ was executed to stay proceedings upon the judgment upon payment of the reduced sum, which, on her part, was insisted to be due, or after execution of the writ to be discharged upon such payment. The Court would not have entertained an application by the now defendant for leave to issue the execution for the amount he claimed; but would have left him to act at his peril; and a suitor may use the process of the law for the purpose of enforcing a demand, without being subject to an action for so doing, in the event of his not being able to maintain his right to the extent which he claimed, unless he does so without reasonable and probable cause and maliciously.

That such is the law where a party sues by mesne process and holds a defendant to bail, and where therefore no *prima facie* right has been established, is admitted; and there is no valid ground for contending that where a party has established a demand by a judgment, he is subject to a greater degree of responsibility in using the ordinary process of the law to enforce such established demand than in the case of a suitor suing by mesne process. The law is clearly otherwise, and to maintain an action for indorsing an execution to levy a larger

amount than in the event the party appears to be entitled to, it is at least equally necessary as in the former case that the declaration should aver malice and the absence of reasonable and probable cause, and no authority has been cited tending to create any reasonable doubt upon the subject. In this case the writ itself was warranted by the judgment; and, as before said, all the allegations in the declaration are consistent with the existence of reasonable and probable cause for the process having been indorsed in the manner complained of. It does not appear under what obligation the indorsement upon a writ of execution is made. I presume it is matter of practice; and if so, the legal liability in respect of such an indorsement cannot be greater than that which attaches upon a party for holding a defendant to bail upon mesne process for an excessive amount. This Court is, therefore, of opinion that the judgment must be affirmed, by reason of the absence in this declaration of the averment negating reasonable and probable cause for making the indorsement of which complaint is made.

*Judgment affirmed.*

1848. }  
June 10; } GILES AND OTHERS v. GROVES.  
July 12. }

*Pleading—Case—Claim of Franchise—Easement—Distributive Issue—Reg. Gen. Hil. T. 4 Will. 4. title Trespass, r. 6.*

*Reg. Gen. Hil. T. 4 Will. 4. tit. 'Trespass,' rule 6. applies to actions on the case as well as trespass, and to declarations as well as pleas.*

*And therefore where in an action on the case for disturbance of ferry, the plaintiff alleged in his declaration that he was possessed of an ancient ferry for passengers and goods to and from A, from and to B, and the defendant pleaded not possessed and a traverse of the ancient and entire right of ferry; and the jury found that there was a ferry from A. to B. only,—Held, that the verdict might be entered distributively for the plaintiff for so much as was proved at the trial.*

The declaration stated that the plaintiffs before and at the time, &c. were and from thence hitherto have been and still are pos-

assessed, to wit, as trustees for the society of free watermen of the river Thames, residing at Greenwich, in the county of Kent, called the Isle of Dogs Ferry Society, of an ancient ferry, called "Potter's Ferry" for foot passengers and goods belonging to such foot passengers, across the river Thames to and from a certain place, in the Isle of Dogs, in the parish of St. Dunstan, Stebonheath, otherwise Stepney, in the county of Middlesex, from and to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers and their goods over and across such ferry, in any boat or boats kept by or by the authority of them, the plaintiffs, for that purpose, certain reasonable freights or ferryages in that behalf due, and of right payable; nevertheless, the defendant, well knowing the premises and wrongfully contriving, &c. to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of their said ferry, to wit, on &c., and on divers other days and times, &c. wrongfully, injuriously, and unlawfully obstructed, disturbed and interrupted the plaintiffs, their servants and labourers, in the use and enjoyment of their said ferry and passage, and hindered and prevented them from carrying divers foot passengers, for hire, over and across the said river Thames, &c., by reason whereof the said plaintiffs have been deprived of large profits, and have been and are greatly injured, &c. in the possession thereof and their rights and title thereto.

Pleas—First, that the plaintiffs were not possessed of the ancient ferry in the declaration mentioned, *modo et formâ*. Second, that there was not at the said several times when, &c. in the declaration mentioned, or either of them, such ancient ferry as in the declaration mentioned, *modo et formâ*, &c.

The defendant took issue on both the above pleas.

At the trial, before Parke, B., at the Summer Assizes for Kent, 1847, at the close of the plaintiffs' case, it was submitted, on the part of the defendant, that the evidence did not support the claim as laid. The learned Baron reserved leave to the defendant to move to enter a nonsuit; and witnesses were called on the part of the defendant, who proved that the only right of ferry was from Greenwich to the Isle of Dogs, but not to bring back, and the jury having found accordingly that there was a

ferry from Greenwich to the Isle of Dogs for passengers and their goods, but negating the remainder of the right as claimed, the learned Judge directed a verdict to be entered for the plaintiffs for so much of the right as was proved, damages 1s., with liberty to the defendant to move to enter a nonsuit if the Court should be of opinion that the declaration was not distributable (1).

A rule nisi having been obtained accordingly,—

*Channell, Serj. and Pigott* shewed cause (June 10).—It may be admitted, that before the New Rules, the verdict in such a case as this could not be entered distributively, so as to sustain the right of the plaintiffs to part of that which they claimed, by evidence of user of that part only; but that was by reason of the difficulty which was supposed to exist as to what the record would prove, there being no other plea than not guilty—*Kingsmill v. Bull* (2). It may be admitted, also, that there is no one of the New Rules, Hil. T. 4 Will. 4, which in terms comprehends such a case as this; but by *Reg. 6. tit. 'Trespasse,'* "in all actions in which such right of way or common or other similar right is so pleaded that the allegations as to the extent of the right are capable of being taken distributively, they shall be taken distributively." This rule is applicable to all pleadings where a right is claimed, and will operate to prevent an inconvenient number of counts. In framing the rules, it was impossible to provide in terms for every sort of case. If so, then this is a case in which the verdict is capable of being entered distributively, as the plaintiff has proved part of the right claimed—*2 Wms. Saunders*, 175, *l.*, *Knight v. Woore* (3); and not a qualified right as in *Higham v. Rabett* (4), *Ivatt v. Mann* (5). And for this purpose it is not material to consider whether the claim is in the nature of a franchise or an easement merely—*Pim v. Curell* (6), *Bailey v. Appleyard* (7), *Beardsworth v.*

(1) The learned Judge refused to certify that the action was brought to try a right, as the right tried was not that which the action was brought to try.

(2) 9 East, 185.

(3) 3 Bing. N.C. 3; s. c. 6 Law J. Rep. (N.S.) Exch. 135.

(4) 5 *Ibid.* 622.

(5) 4 Sco. N.R. 342; s. c. 11 Law J. Rep. (N.S.) C.P. 82.

(6) 6 Mees. & Wels. 234.

(7) 8 Ad. & El. 161; s. c. 7 Law J. Rep. (N.S.) Q.B. 145.

*Torkington* (8), *Rickets v. Salway* (9), *Phythian v. White* (10), *Tafley v. Wainwright* (11).

*Montagu Chambers, Peacock and Baddley*, in support of the rule.—The declaration contains an allegation of an entire and indivisible right, specifically described as "Potter's Ferry for foot passengers to and from the Isle of Dogs from and to Greenwich." The entire right is traversed by the defendant; and it is not pretended that there was any disturbance in respect of the more limited right which is now suggested. The plaintiff must stand or fall by the right which he claims—*Morewood v. Wood* (12).

[PATTESON, J.—Where a prescription consists of two distinct parts, as of a right to toll, and a right to distrain for it, you may traverse either part (13).]

That is the case of two distinct rights. This is like a claim of a right of way from A. to B, and proof of a right from A. to C. It is admitted that, but for the New Rules, the verdict could not be entered distributively; but the rule referred to does not apply to such a case as this: and it may be doubted whether it can apply to declarations at all. The intention was, that where a right of way or other right was set up in answer to an action, if the proof fell short of the right claimed, the verdict might be distributed so as to apply to the previous pleading; but there is no rule which gives a plaintiff the right of entering the verdict distributively for so much of his declaration as he has proved in such a case as this. The declaration cannot be taken distributively with reference to itself. Again, the rule can only apply to such a right as might be pleaded as an answer to an action of trespass; but a right to ferry is not such a right, it is a franchise and an exclusive right of passage, and does not include a right to the bank or shore. The plaintiffs should have applied to amend. There was no plea of not guilty; but the defendant

would not have admitted the violation of the minor right, if it had been correctly claimed. This is one entire ferry, not two ferries: if two had been claimed, the defendant might have pleaded not guilty as to the disturbance of one of them—*Anderson v. Chapman* (14). And the Court will not extend the principle of the New Rules in favour of a claim of a ferry, which is in the nature of a monopoly and against common right—*Churchman v. Tunstall* (15). *Prudhomme v. Fraser* (16) was an action of libel, and there was a plea of not guilty, and the question arose on Reg. Gen. 2 Will. 4. r. 74, which applies to plaintiffs. So *Doe d. Bowman v. Lewis* (17).

*Cur. adv. vult.*

LORD DENMAN, C.J. subsequently (July 12) delivered the judgment of the Court (18).—For the matter now in dispute, the case was shortly this: the plaintiffs claimed a right of ferry from Greenwich to the Isle of Dogs and back again, and they proved half what they claimed, the right to, but not from, the Isle of Dogs. The defendant admitted by his pleading that he had invaded the right claimed, supposing such a right in fact, but there was nothing to shew which part of that entire right he had invaded. Hence the plaintiffs claimed a verdict on the only issues on the record, viz., on "not possessed" and on the existence of the ancient and entire right of ferry. It appears to us, that in admitting the invasion of the right as stated, that right being on the face of it divisible, he, the defendant, must be taken to have admitted it as to each part which would entitle the plaintiffs to a verdict, and we think the plaintiffs may succeed as to any distinct part which they prove. The New Rule cited clearly applies in actions on the case as well as trespass; and for this purpose we cannot see any reason for difference where the plaintiffs claim as owners of a franchise or by virtue of an easement.

*Rule discharged.*

(8) 1 Q.B. Rep. 782; s.c. 10 Law J. Rep. (N.S.) Q.B. 244.

(9) 2 B. & Ald. 360.

(10) 1 Mee. & Wels. 216; s.c. 5 Law J. Rep. (N.S.) Exch. 148.

(11) 5 B. & Ad. 395.

(12) 4 Term Rep. 157.

(13) See *Griffith v. Williams*, 1 Wils. 338; s.c. 1 Term Rep. 268, n.

(14) 5 Mee. & Wels. 483; s.c. 9 Law J. Rep. (N.S.) Exch. 9.

(15) Hardw. 163.

(16) 2 Ad. & El. 646; s.c. 4 Law J. Rep. (N.S.) K.B. 87.

(17) 13 Mee. & Wels. 241; s.c. 14 Law J. Rep. (N.S.) Exch. 198.

(18) Lord Denman, C.J., Patteson, J., Coleridge, J. and Erle, J.



1848. } THE QUEEN v. BYRON AND  
May 29. } ANOTHER.

*Church-rate—Jurisdiction of Justices under 53 Geo. 3. c. 127.—Mandamus to convene.*

*Though the Justices, under 53 Geo. 3. c. 127. s. 7, have no power to inquire into the goodness of a church-rate, yet the Court will not grant a mandamus to compel Justices to convene a party before them for non-payment of a rate, which is bad or very questionable on the face of it.*

*Semble—that a church-rate, which purports in the heading of it to be made "for and towards the repairs of the church, and other incidental charges of the said parish and hamlet," is a rate bad on the face of it.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 134.]

1848. } THE QUEEN v. THE LONDON  
July 12. } AND SOUTH-WESTERN RAIL-  
WAY COMPANY.

*Railway Company—Lands Clauses Consolidation Act—8 Vict. c. 18.—Compulsory Power to take Lands—Mandamus.*

*By sect. 18. of the Lands Clauses Consolidation Act, when the promoters of an undertaking require to purchase any lands, they shall give notice to the parties interested therein, and every such notice shall state the particulars of the lands required, and that the promoters are willing to treat for the purchase thereof. By sect. 92. no party shall be required to sell to the promoters of an undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell the whole thereof:—Held, that this latter section is not obligatory on the promoters, though it protects an owner of a building, &c. from being compelled to sell a part of it only.*

*Therefore, when a company have given a notice requiring part of a manufactory, a mandamus directing them to summon a jury to assess compensation for the whole cannot be sustained.*

*Where a mandamus requires the company to take the whole manufactory, the*

*prosecutors cannot have the writ for a part only.*

Mandamus to the London and South-Western Railway Company to issue their warrant to the sheriff of Surrey, requiring him to summon a jury to assess compensation to J. H. Coward, Ellis Cancellor, and T. B. Illidge, in respect of their estate and interest as well in the lands and premises mentioned in the notice given to them by the said company as in the remaining part of the manufactory and premises known by the name of the Lambeth Starch Manufactory. The writ recited that J. H. Coward and Ellis Cancellor were lessees of the premises in question, and carried on the business of starch-manufacturers there in partnership with T. B. Illidge; that on the 14th of May 1846, the company being the promoters, according to "the Lands Clauses Consolidation Act, 1845," of the undertaking mentioned in the writ, gave a notice to the said J. H. Coward and E. Cancellor and all other persons whom it might concern, demanding the particulars of their estate and interest in such lands and premises and of the claims made by them in respect thereof, which notice stated the particulars of the lands and premises (a plan of which was annexed to it), and that the company were willing to treat for the purchase and as to the compensation to be made to the said parties for the damage by reason of the execution of their works; that the lands and premises specified in the notice were a part only of the said manufactory and premises called the Lambeth Starch Manufactory, and that the said J. H. Coward, E. Cancellor, and T. B. Illidge, were willing and able to sell their estate and interest in the whole of the manufactory and premises, whereof the company had notice on the 4th of June 1846, and within twenty-one days after the service of the said notice by them, and were then required to purchase the estate and interest of the said parties in the whole of the said manufactory and premises; that the said parties had not agreed as to the amount of compensation, the amount of which as claimed exceeded 50*l.* and amounted to 8,000*l.* for the purchase of the said estate and interest of the said J. H. Coward, E. Cancellor, and T. B. Illidge, in the said manufactory, and 35,000*l.* for damage sus-

tained by them; and that the claimants had required the company to issue their warrant for a special jury, which they had neglected to do.

The return by the company stated that J. H. Coward and E. Cancellor were lessees of all the lands, &c. mentioned in the notice of the claimants of the 4th of June 1846, under a lease for a term expiring by effluxion of time on the 24th of June 1847, but that the said J. H. Coward, E. Cancellor, and T. B. Illidge were not at the date of the company's notice, nor at any time since, jointly interested in the said lands and premises for a greater estate or interest than as tenants from year to year; that the lands, &c. in the said writ mentioned, and which the company had been required to purchase, consisted of a dwelling-house, with offices attached thereto, and a counting-house, cart-sheds, stables, coach-house, several yards and sheds, two large gardens, a greenhouse, and premises formerly occupied as piggeries and slaughter-house, together with a building of one story used for the manufacture of starch, with a mill or engine-house and drying-room, and warehouses attached thereto; that both the said

gardens, which constitute a large part of the said premises, were, at the date of the said notice, and thence hitherto, absolutely unused either as a manufactory or for any other purpose; that the said piggeries and greenhouse were, from disuse, in a state of extreme dilapidation and decay, and neither they nor the slaughter-house had been used in the manufacture of starch or any other manufacture, nor are they or any part of them essential or necessary to the carrying on of any manufacture. The return then set out the notice given by the company on the 14th of May 1846: which, after stating that the company required to purchase the messuages, &c. mentioned in the schedule thereto, and were ready and willing to treat for the purchase of all and any the estate of the claimants, J. H. Coward and E. Cancellor, therein, and as to the compensation to be made for the damage to be sustained by them, required from the claimants, and each and every of them, the particulars of their estate and interest in such messuages, and of the claims made by them, and each and every of them in respect thereof.

The schedule to the notice was as follows:—

No. on deposited Plan of the Work.	Owner or reputed Owner.	Lessee or reputed Lessee.	Present or late Occupier.	Description of Property.	Situation.
577	Thomas Lett and Mrs. Sarah Randall	Yourselves.	Yourselves.	So much of the Ground, Stabling, Coach-house, Factory, and Sheds as are coloured Red on the Plan hereunto annexed.	Princes Street, Vauxhall.

The return also set out the notice served on the company by the said J. H. Coward, E. Cancellor and T. B. Illidge on the 4th of June 1846, which stated that the said parties were able and willing to sell and convey to the said company all their estate and interest in the whole of those premises comprised in the schedule and plan annexed to the notice of the said company, as well so much of the said premises as was coloured red in the said plan, and which the said company required to purchase, as also all and singular the warehouses, &c., and other premises contained within the boundary

line of the said plan, and described in the said plan; &c., which said several premises were part and parcel of the said first-mentioned premises in the said plan coloured red; and they made a claim of 8,000*l.* for the purchase-money of their estate and interest in the whole of the above-mentioned premises, and 35,000*l.* for damage. The return then proceeded to state that the company thereupon abandoned all intention of purchasing the estate of the said J. H. Coward, E. Cancellor, and T. B. Illidge (if any), or the said estate and interest of the said J. H. Coward, and E. Cancellor, in the

said premises ; and that the whole of the said parties are still in peaceable possession of the whole of the said premises, and will so remain without any disturbance by the company until the expiration of their estate and interest therein.

The prosecutors traversed part of the return, and alleged that the said J. H. Coward, E. Cancellor, and T. B. Illidge were jointly interested in the lands and premises in the writ mentioned for a greater estate and interest than as tenants from year to year, and demurred to the residue. The grounds assigned for the demurrer were, that the return amounted to an argumentative traverse of the allegation in the writ, that the premises therein mentioned were all one whole manufactory and premises, called "The Lambeth Starch Manufactory"; and also that the return did not shew that the premises therein supposed to be not part of the said manufactory were not part of the lands and premises the particulars whereof were stated in the notice of the company of the 14th of May 1846, and which the company themselves required to purchase ; and for aught that appeared on the return, it might be that the additional premises which the said claimants required the company to take were part of the very building in which the manufacture of starch was carried on ; and that the return did not shew in what manner the company abandoned their intention of purchasing the estate and interest of the claimants, nor any consent by the claimants thereto, nor anything which would have legally exonerated the claimants from their liability to sell their estate and interest in the said lands and premises in the writ mentioned.

The company demurred to the plea on the ground that it tendered an immaterial issue, if the claimants did not intend to rely on some joint estate or interest in the said premises greater than a tenancy from year to year, as entitling them to compensation in respect of such joint estate or interest. That if the claimants relied on some joint estate or interest in all of them in the said lands and premises, as entitling them to compensation in respect thereof, the plea was bad, as not shewing what joint estate or interest in particular the said J. H. Coward, E. Cancellor, and T. B. Illidge claim to have in the said lands and premises, or in

what respect it is a greater estate than a tenancy from year to year, or by what deed created, or how much of the same was unexpired at the time of giving the said notice by the company and the claimants respectively, or whether it was such an interest as entitled the claimants to have the compensation in respect thereof assessed by a jury ; and that the company were unable to traverse the legal effect of any deed, by virtue of which such joint estate or interest is claimed, or to traverse the title of the grantors, or to shew that the interest of the claimants was not such as entitled them to have the compensation in respect thereof assessed by a jury. That the plea is a departure from the writ, as in the writ compensation is claimed in respect of an unexpired term, under a lease of the 24th of June 1838, legally vested in J. H. Coward and E. Cancellor only, yet in the plea the compensation is claimed in respect of a joint estate or interest in the said J. H. Coward, E. Cancellor, and T. B. Illidge in the said lands and premises comprised in the said lease.

Joinders in demurrer.

*Martin (W. R. Cole with him)*, for the prosecutors (1), contended that the company having given notice of an intention to take part of the manufactory, were therefore compellable to take the whole. He also argued, that if the writ could not be sustained to the whole extent of its requirement, it might, at all events, go for that portion of the manufactory and premises in respect of which the company had given notice.

*M. D. Hill (Burnie was with him)*, for the defendants, contended that the writ could not be supported, as there was nothing in sect. 92. of the Lands Clauses Consolidation Act which compelled a company to purchase the whole of any manufactory or building in respect of part of which they had given notice, though it enables the owner to refuse to sell less than the whole. And that a peremptory mandamus could not go for the part only which was specified in the company's notice, as there had been no

(1) Jan. 19 and 22, before Lord Denman, C.J. Patteson, J., Coleridge, J., and Wightman, J.

default as to that which the company were always willing to purchase (2).

*Cur. adv. vult.*

Judgment was now delivered by—

LORD DENMAN, C.J.—[His Lordship stated the substance of the writ, the return, the plea, and the demurrers, and then proceeded]—The writ was objected to as bad, because it claims assessment for the value of the entire premises when the company have required a part only. The claim is founded on the Lands Clauses Consolidation Act. But on examination of the sections which were supposed to give this right, namely, the 18th and 92nd, there is not the smallest pretence for an argument to that effect. Section 18. gives directions as to notice to be given by the company requiring lands, and provides that “every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.” This had been done, as appears by the writ itself; and assuming, for the sake of the argument, that the prosecutor’s premises are one entire manufactory, the notice requires only a part. The other,

section 93, enacts, “that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole.” The writ states that the prosecutors were willing and able to sell and convey the whole, and gave notice, and required the company to take the whole. Now the 92nd section, though it protects the owners from being obliged to sell a part, does not contain any words making it obligatory on the company who only want a part, to take the whole, as some other acts of parliament do; and therefore the writ, which is founded entirely on such a supposed obligation on the part of the company, manifestly cannot be sustained. This simple point decides the case for the defendants, and shews that the writ must be quashed. We have to lament the waste of time that has occurred from the obscurity thrown about the case by the superfluous matter foisted into the record. The learned counsel for the prosecutors contended as a last resource that the mandamus might go for a part though it claims the whole. This is impossible for that reason, and also because no claim has ever been made in respect of a part.

*Judgment for the defendants.*

(2) The following clauses of the act 8 Vict. c. 18. were relied on in the argument:—

Sect. 18. “When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act, or any act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.”

Sect. 92. “And be it enacted, that no party shall, at any time, be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if any such party be willing and able to sell and convey the whole thereof.”

NEW SERIES, XVII.—Q.B.

1848. } THE QUEEN v. THE INHABITANTS OF GOMERSAL.  
May 6; }  
July 12. }

*Poor Law—Examinations—Caption—Notice of Chargeability—Names of Paupers.*

*The caption of an examination which purports to be taken upon the complaint of the overseer, “touching the place of residence, chargeability, and last place of lawful settlement of the pauper”.—Held, insufficient.*

*A notice of chargeability should state the names of the paupers; and a notice stating that “the persons named in the order hereto annexed,” have become chargeable, &c., written on one side of a piece of paper, on the other side of which was a counterpart of the order of removal,—Held, insufficient.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 163.]

[IN THE EXCHEQUER CHAMBER.]

1847. }  
 Dec. 4. } THE MAYOR AND ALDERMEN  
 1848. } OF LONDON v. THE QUEEN  
 June 19. } (*In re ASHURST*).

*Attornies, Admission of to Lord Mayor's Court*—6 & 7 Vict. c. 73. s. 27.—*Inferior Court*—*Mandamus, Defect in Writ of—Return.*

*Attornies of the superior courts are entitled, by virtue of the statute 6 & 7 Vict. c. 73. s. 27, to be admitted to inferior courts of law. Where, therefore, a writ of mandamus directing the presiding officers of the lord mayor's court to admit A. B., described it as an "inferior court," without stating it to be a court of law,—Held, on error, that such writ was bad, and that the defect was not cured by such court being described in the return to the writ as a court of law.*

Error upon the judgment of the Court of Queen's Bench. The pleadings are fully set out in the report of the case in the Court below (*The Queen v. the Mayor and Aldermen of London*, 16 Law J. Rep. (N.S.) Q.B. 185).

R. Gurney appeared for the plaintiffs in error, and relied upon the following authorities:—

*Co. Litt.* 115, a.

*Com. Dig.* 'Parliament,' R, pl. 23, 24, 25.

*Simson v. Moss*, 2 B. & Ad. 543; s. c. 9 Law J. Rep. M.C. 120.

*The Mayor of Leicester v. Burgess*, 5 Ibid. 246.

*The King v. Pugh*, Doug. 179.

*The City of London case*, 8 Rep. 126.

*The Mayor of London v. Barnardiston*, 1 Lev. 14.

*The King v. the Chamberlains of Worcester*, 2 Lord Ken. 472.

*The King v. Tollin*, 1 Roll. Rep. 10.

*The King v. Bagshaw*, Cro. Car. 347.

*Appleton v. Stoughton*, Ibid. 516.

*The Salters Company v. Jay*, 3 Q.B. Rep. 109; s. c. 11 Law J. Rep. (N.S.) Q.B. 173.

*In re Gedye*, 2 Dowl. & L. 915; s. c. 14 Law J. Rep. (N.S.) Q.B. 238.

*Hastings's case*, 1 Mod. 23.

*Gillman v. Wright*, 1 Sid. 410.

*Wilson v. Hobday*, 4 Mau. & Selw. 120.

*Pulling*, contra, cited the following cases in support of his argument:—

*Beecher's case*, 8 Rep. 58.

*The King v. the Sheriffs of York*, 3 B. & Ad. 770; s. c. 1 Law J. Rep. (N.S.) K.B. 211.

*In re Islington Market Bill*, 3 Cl. & F. 518.

*Harcourt v. Fox*, 1 Show. 506.

*The King v. Cator*, 4 Burr. 2026.

*Ex parte Caruthers*, 9 East, 44.

*Paget v. Foley*, 2 Bing. N.C. 679; s. c. 5 Law J. Rep. (N.S.) C.P. 258.

*The King v. the Trustees of North Leach and Witney Roads*, 5 B. & Ad. 978.

*Burns v. Carter*, 5 Bing. 429; s. c. 7 Law J. Rep. C.P. 161.

*Grisling v. Wood*, Cro. Eliz. 85.

*Noble v. Durell*, 3 Term Rep. 271.

*Needler's case*, Hob. 227.

*Beckwith's case*, 2 Rep. 57.

*Parman v. Bowyer*, Cro. Eliz. 668.

*Horton v. Beckman*, 6 Term Rep. 764.

*Evans v. ———*, 2 Wils. 382.

*Hale's Analysis*, 27, 36.

*Bac. Abr.* 'Courts,' D.

3 *Black. Com.* 80.

*Morris v. Ludlam*, 2 H. Bl. 362.

*Com. Dig.* 'Abatement,' H, 24.

*Kerry v. Bowyer*, Cro. Eliz. 186.

*Blacquiere v. Hawkins*, Doug. 365.

*Clark v. Le Cren*, 9 B. & C. 52; s. c. 7 Law J. Rep. K.B. 186.

*The King v. the Chamberlains of Worcester*, 2 Ld. Ken. 472.

*Jordan v. Cole*, 1 H. Bl. 532.

*Bulmer v. Marshall*, 5 B. & Ald. 821.

*Welter v. Rucker*, 1 Brod. & Bing. 491.

*Holt v. Murray*, 1 Sim. 485.

*Martin v. Marshal*, Hob. 63.

*The Mayor of London v. Dormer*, Carey, 60.

*Coke's Institutes*, vol. 4, p. 250.

*Laughton v. Taylor*, 6 Mee. & Wels. 695; s. c. 10 Law J. Rep. (N.S.) Exch. 57.

*Braham v. Watkins*, 16 Mee. & Wels. 77; s. c. 16 Law J. Rep. (N.S.) Exch. 9.

*Hollingshed's case*, 4 Leon. 182.

*Berwick v. Shanks*, 3 Bing. 459; s. c. 4 Law J. Rep. C.P. 152.

*Ex parte Kinning*, 16 Law J. Rep. (N.S.) Q.B. 257.

*Clutterbuck v. Hulls*, 4 Dowl. & L. P.C. 80; s. c. 15 Law J. Rep. (N.S.) Q.B. 310.

*Cur. adv. vult.*

PARKE, B. now (June 19) delivered the judgment of the Court.—This case was argued before my Brothers Alderson, Rolfe, Platt, and Williams; my Brothers Cresswell and Coltman were here during part of the time, but gave no opinion. A writ of error has been brought on a judgment for the Crown, on a demurrer to a return to a writ of mandamus to admit W. H. Ashurst, an attorney of this court, an attorney of the mayor's court in the city of London. The question before us was, whether upon the facts admitted upon the demurrer to the return, the applicant, Mr. Ashurst, was entitled to be admitted, by virtue of the 6 & 7 Vict. c. 78. s. 27, an attorney of the lord mayor's court, and whether the mandamus was in a correct form if he was so entitled. The Court have considered the very able arguments which were urged on both sides, and I believe are not entirely agreed in the view taken of the principal point which was under discussion, that is, whether the Court of Queen's Bench were right or not in the opinion they formed upon the construction of this act. But then a further question arose, whether the mandamus in its present form is sustainable, and we all agree that it is not. The objection to it is, that it does not state that the lord mayor's court is an inferior court of law, but only an inferior court, and it is only to inferior courts of law that attorneys of the superior courts of law are entitled to be admitted. The mandamus does not shew any obligation to admit to this court. This objection is fatal, unless the return, which admits it to be a court of law, cures the defect. On a plea, an admission of that nature would have that effect, though the plea should be bad; but it was argued, that in a mandamus the judgment is, that the return be quashed: and if that be the case, it is the same as if no return were made. The judgment in this case is, however, not that the return is to be quashed, but that

it is invalid in law; but a peremptory mandamus is always awarded, and that form being used it must be the same as the one originally awarded, otherwise the defendant would have a right to make a new return to it. The peremptory mandamus would, therefore, upon the face of it be equally bad, and derives no benefit from the admission in the previous return. We think, therefore, no peremptory mandamus ought to go in the present form; and, consequently, the judgment of the Court of Queen's Bench awarding such mandamus ought to be reversed. It is now perfectly settled law that after the return to a mandamus objections may be taken to the form of the writ—*The King v. the Margate Pier Company* (1) and *The Queen v. Powell* (2). The judgment of the Court of Queen's Bench must be reversed upon this ground. This matter does not appear to have been considered in the Queen's Bench at all.

*Judgment reversed.*

1848. } THE QUEEN v. THE INHABITANTS OF CHATHAM.  
June 19. }

*Poor Law—Pauper Lunatic—Order—Appeal*—8 & 9 Vict. c. 126.

*By an order of Justices, the settlement of a pauper lunatic was adjudged to be in S, and the overseers of that parish were thereby ordered to pay to the treasurer of the M. union, within which the parish of C. was included, the expenses incurred by C. in and about the examination, conveyance, maintenance, &c. of the lunatic. The parish of S. appealed against this order, which was thereupon quashed by the Sessions, and an order made that the parish of C. should pay to the parish of S. the costs of the appeal:—Held, that the Sessions had jurisdiction to make this order on C, as that parish was substantially the respondent in the appeal, and that the payment directed to be made to the treasurer of the union by the prior order was merely on behalf of the parish of C.*

*Held also, that the order of Sessions*

(1) 3 B. & Ald. 220.

(2) 1 Q.B. Rep. 352; s. c. 10 Law J. Rep. (N.S.) Q.B. 148.

*shewed on the face of it that the parish directed to pay costs was a party to the appeal.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 161.]

1847.	} THE QUEEN v. KENSINGTON AND ANOTHER.
Feb. 4.	
1848.	
Jan. 12;	
July 1.	

*Mandamus — Overseer — Certificate of Householder's Occupation — Sale of Beer Act, 3 & 4 Vict. c. 61.*

*An overseer is not compellable to grant a certificate that a person is the real resident holder and occupier of a house under the provisions of the 3 & 4 Vict. c. 61.*

*To a mandamus commanding the overseer to give such certificate to T. H., he returned that he had no evidence that T. H. was the real resident holder and occupier, and that he had reason to believe that T. H. was not the real resident holder, &c., because he was rated jointly with T. D. To this return there was a plea, that when the certificate was demanded, the defendant (the overseer) well knew that T. H. was the real holder and occupier. The jury having found a verdict for the Crown:—Held, on motion for a new trial, and in arrest of judgment, first, that the defendant could not be made responsible on the facts as they appeared on the pleadings, if he judged wrong but honestly; secondly, that, at all events, the judgment ought to be arrested for the insufficiency of the writ.*

Mandamus tested the 8th of May 1845, to F. Kensington and J. Forster, the overseers of the parish of St. Andrew Hubbard, in the city of London, reciting that T. J. S. Hamper, for some time past, viz. since the month of September 1844, had been and still was the real resident holder and occupier of a dwelling-house, situate in the parish of St. Andrew Hubbard aforesaid, in the said city of London, being No. 19, Eastcheap, in the said parish, and that the said dwelling-house, with the premises occupied by the said T. Hamper therewith, whereof the said Thomas Hamper, during all the time aforesaid, hath been and is such real resident

holder and occupier as aforesaid, were during all the time aforesaid, and still are rated to and in the name of the said Thomas Hamper in one sum, to the rate for the relief of the poor of the said parish, on a rent or annual value of 40*l.* per annum. The writ averred, that F. Kensington and J. Forster had been all the time aforesaid, and still were, overseers of the said parish; that the said T. Hamper had oftentimes since he became and whilst he was such real resident holder and occupier, &c., and whilst the said dwelling-house and premises were so rated as aforesaid, demanded of them and each of them, as and whilst they were such overseers, &c., a certificate in writing from one of them, as such overseers, certifying that he, the said Thomas Hamper, is the real resident holder and occupier of the dwelling-house and premises aforesaid, and also certifying the true rent or annual value at which the said dwelling-house, with the premises occupied therewith, is rated in one rating to the poor's rate, according to the last sum or rate made and allowed in the said parish for the relief of the poor, according to the form of the statute, &c., in order and for the purpose that he, the said T. Hamper, might apply for and obtain a licence to sell beer and cider by retail, to be drunk and consumed on his said premises, and that the said F. Kensington and J. Forster had wholly refused to give such certificate. The writ then commanded them that they or one of them should give to the said T. Hamper a certificate in writing, certifying, &c., according to the form and effect of the said statute, or shew cause to the contrary.

Return by F. Kensington, (30th of May 1845,) that he did not know, nor had the within-named T. Hamper, or any other person at any time furnished him with evidence that the said T. Hamper is the real resident holder and occupier of the within-mentioned dwelling-house and premises, situate at No. 19, Eastcheap, in the parish of St. Andrew Hubbard, in the city of London, and that he had reason to believe that the said T. Hamper is not the real resident holder and occupier of the said dwelling-house and premises, within the true intent and meaning of the within-mentioned statute, for that in and by the last rate made and allowed in and for the said parish for the relief of the poor thereof the

said dwelling-house and premises are rated to and in the names of one Isaac Day and the said T. Hamper, and not in the name of the said T. Hamper alone; that the words "Day, carman, 19, Basteheap," are conspicuously placed in three several places on the outside of the dwelling-house; that the name of the said T. Hamper does not appear on the said dwelling-house, wherefore, &c.

Return by T. Foster, "that I am not nor was I on the 8th of May 1845, being the teste of the within writ, nor have I at any time from the teste of the said writ hitherto been an overseer of the said parish of St. Andrew Hubbard, in the city of London, as by the said writ is supposed, wherefore it does not appertain to me to give to T. Hamper within named the certificate within mentioned, as by the said writ I am commanded."

Plea, that the said F. Kensington did at the said several times when the said certificate was demanded of him by the said T. Hamper as in the said writ mentioned, well know and was furnished with sufficient evidence; to wit, by the said T. Hamper, that he, the said T. Hamper, was during all the said time in the said writ in that behalf mentioned the real resident holder and occupier of the said dwelling-house and premises, situate, &c. within the true intent, &c., *modo et forma*. Issue thereon.

At the trial, before Lord Denman, C.J., at the Sittings in London, after Michaelmas term, 1845, it appeared, that in 1843 one Isaac Day being the owner of the premises in question, demised them to Hamper at a yearly rent of 70*l*. for the purpose of his establishing a beer-shop, but that certain baskets and other property belonging to Day were kept in one of the rooms over which his name was painted, and he had also a counting-house on the premises, of which he had the exclusive use.

It was objected that it ought to have been proved that T. Hamper was the *sole* resident owner of the premises, and also that the statute did not make it imperative on the overseer to give a certificate.

The Lord Chief Justice directed the jury, that if Hamper who paid an entire rent for the premises had a *bonâ fide* intention to occupy them, he was the resident owner within the meaning of the statute, and that he might at any time have withdrawn per-

mission from Day to occupy a part, and that it was not necessary that the person applying for a certificate should be the occupier of the whole house, and he left it to them to say, first, whether the prosecutor was *bonâ fide* the owner and occupier of the premises at the time he applied for the certificate; secondly, whether the defendant Kensington knew it. The jury having returned a verdict for the Crown,

*Whitehurst*, in the following Hilary term, obtained a rule *nisi* for a new trial, on the ground of misdirection, or to arrest the judgment on the ground of the insufficiency of the writ, or for judgment for the defendant Kensington *non obstante veredicto*.

*Cockburn* and *E. James* shewed cause. —First, as to the question of misdirection, which goes to the fact, whether or not Hamper was the real resident holder and occupier within the meaning of the statute; he was the tenant of the whole premises and paid the entire rent. If a burglary had been committed on the premises, the dwelling-house must have been laid in the indictment as the dwelling-house of Hamper, as the permission to Day to occupy it was confined to the daytime. The occupation of Hamper would have been sufficient, even if the act of parliament had used the words "sole occupier"; but it is sufficient if his occupation is such as would render him liable for use and occupation. Secondly, the overseer is compellable by mandamus to grant the certificate. There is no penalty provided by the statute for refusing to grant a certificate as to the holding and occupying, though by the 4 & 5 Will. 4. c. 85. s. 8. a penalty is imposed on persons granting or making use of any false certificate; and by the 3 & 4 Vict. c. 61. s. 5 (1), an overseer refusing to certify *as to*

(1) 3 & 4 Vict. c. 61. s. 2. enacts, "That every person who shall apply to be licensed to retail beer or cider shall produce to the proper officer of Excise authorized to grant such licences a certificate in writing from an overseer of the township, parish, or place in which he shall reside, certifying that such applicant is the real resident holder and occupier of the said house, and also certifying the true rent or annual value at which such house, with the premises occupied therewith, is rated in one rating to the poor-rates, according to the last sum or rate made and allowed in such township, parish, or place for the relief of the poor; and every such certificate shall be deposited and left with the proper officer of Excise by whom such licence shall be



the rating, subjects the overseer to a penalty. Lastly, it is contended that the issue raised is immaterial, as the plea alleges that Kensington knew that Hamper was the real resident occupier at the time the certificate was applied for, whilst the return states that in the last poor-rate he was rated jointly with Day, and assigns that as a reason for the defendant's belief that Hamper was not the real resident occupier; but the plea raises the true question, namely, whether when the defendant refused the certificate he knew that Hamper was entitled to it—*The King v. Round* (2). The immaterial averment was put on the record by the defendant himself, and he cannot have judgment *non obstante veredicto*—*Round v. Vaughan* (3). The overseer is not to be the judge whether he will grant a certificate or not.

*Whitehurst and J. Henderson, contra.*—Day let all but one room to Hamper, and the latter could not, therefore, be called the real occupier of the whole house. When the object as well as the nature of the provisions of the acts regulating the sale of beer are considered, it is obvious that the person applying for a licence should have the exclusive controul of the premises. A certificate was first required by the 4 & 5 Will. 4. c. 85. (which was passed to amend the 11 Geo. 4. & 1 Will. 4. c. 64.) That act provided that a person applying for a licence should produce the certificate of six inhabitants as to his character, as well as the certificate of the overseer. The 3 & 4

granted; and a duplicate thereof shall be deposited and left with the clerk of the peace for the county, riding, or city within which such township, parish, or place is situate."

Sect. 5. enacts, "That every overseer of the poor who shall refuse to grant a certificate of the rating or assessment of any rated house and premises, when demanded, or of any person having claimed to be rated in respect of any newly-erected house not yet rated, or who shall falsely certify any house to be rated, when the same was not duly rated at the time of the making and allowance of the last rate made and allowed for the relief of the poor, and every overseer or other person who shall falsely certify any person to be the real resident holder and occupier of any house contrary to the fact, or falsely certify the rent or annual value at which any dwelling-house and premises shall now or will be rated, or shall grant any certificate which shall in any other respect be wilfully false, shall forfeit 20*l*."

(2) 4 Ad. & El. 139.

(3) 1 Bing. N.C. 767; s.c. 4 Law J. Rep. (N.S.) C.P. 239.

Vict. c. 61. further provides that the person applying for a licence shall be the real occupier.

[LORD DENMAN, C.J.—I put it to the jury to say whether Hamper was substantially the occupier.]

[WIGHTMAN, J.—He might be so, though he let off a part.]

Day was not a mere lodger, but he had reserved to himself the exclusive occupation of a portion of the premises. If Hamper is the real occupier here, he would be equally so though Day had reserved more than half of the rooms in the house. Soldiers might be billeted over the whole house, and it might be visited by the police at all hours. Hamper was not an occupier within the Settlement Acts—*The King v. the Inhabitants of Tonbridge* (4), *The King v. the Inhabitants of St. Nicholas, Rochester* (5), *The King v. the Inhabitants of St. Nicholas, Colchester* (6). The issue found is also immaterial; the defendant tendered an issue, and the prosecutor, if he objected to it, should have demurred; but if he did not demur, he was bound to traverse in the terms in which it is alleged. It would have been a good return to shew that at the time of making it the prosecutor was not in a situation to apply for a certificate or the overseer to grant it—*The King v. Round*, *The King v. Payn* (7), *The Queen v. Hopkins* (8). The return also shews good grounds for a belief by the overseer that Hamper was not the occupier within the meaning of the statute. If what he states is true—and it is not denied—he would incur a penalty under sect. 5. by certifying, as the certificate would, in his belief, be false. Besides, there being a good return on the record, which is neither traversed nor avoided, the defendant is entitled to judgment *non obstante veredicto*—*The Queen v. the Governors of Darlington School* (9). The most important question, and which is

(4) 6 B. & C. 88.

(5) 5 B. & Ad. 219; s.c. 3 Law J. Rep. (N.S.) K.B. 45.

(6) 2 Ad. & El. 599; s.c. 4 Law J. Rep. (N.S.) M.C. 46.

(7) 6 Ibid. 392; s.c. 7 Law J. Rep. (N.S.) M.C. 37.

(8) 1 Q.B. Rep. 161; s.c. 10 Law J. Rep. (N.S.) Q.B. 63.

(9) 6 Ibid. 682; s.c. 14 Law J. Rep. (N.S.) Q.B. 67.

raised by the motion in arrest of judgment, is, whether the overseers are bound to certify in any case. The granting of a certificate is matter of discretion. If it were maliciously withheld perhaps an action would lie, but the Court will not interfere by mandamus. In extra-parochial places two inhabitant householders are empowered to certify—(s. 4.) If the overseer is compellable to certify in this case, such householders would be so also.

*Cur. adv. vult.*

The judgment of the Court (11) was subsequently (July 1) delivered by—

**LORD DENMAN, C.J.**—This was a mandamus to two overseers of the parish of St. Andrew Hubbard, to certify that the prosecutor was the real resident occupier of a house within his parish, in order to his obtaining a victualler's licence. The return led to various issues, which were tried at Guildhall. A rule for a new trial has been obtained for misdirection.

At the trial of the issues that grew out of the return of Kensington, stating that he did not know, and was furnished with no evidence, that Hamper, the prosecutor, was the real resident holder and occupier of the house in question, and that he had reason to believe that Hamper was not the real resident holder and occupier thereof, within the true intent and meaning of the statute, for that, in the poor-rate, the said house is rated in the joint names of one Isaac Day and Hamper, and for that the words "Day, carman, 19, Eastcheap," are conspicuously placed in several places on the outside of the said house, and the name of "Hamper" does not appear on the said house, "wherefore I am not able to give the certificate within mentioned, as in the writ I am commanded;"—the facts here stated were proved; and further, that the prosecutor had let off part of his house to Day, who had the entire controul of that part, and carried on his trade there; and then the counsel for Kensington contended, that Hamper clearly was not the real resident occupier within the act, which requires the victualler to have the exclusive possession of his own house at all hours, in order to give opportunity for the exercise of the

power of visitation, which it confers on the police and magistrates. Accordingly, he complained of misdirection on my part, in telling the jury to consider whether the prosecutor was the substantial occupier under the circumstances proved. The jury found that he was such occupier.

But, supposing that ruling and the verdict were right, there was an issue in the terms of the plea, whether the defendant knew the prosecutor to be the true resident occupier of the house. If he is to be considered such upon the facts stated upon the true construction of the law, it does not follow that the defendant believed the evidence of those facts, and much less that he drew that inference. If he judged wrong, but honestly, can he be made responsible, as knowing the contrary of what he thought?

These observations, joined to a careful examination of the several acts, lead us to doubt seriously whether the overseer is compellable to certify. The licence required by the 4 & 5 Will. 4. c. 85. is not to be granted to any person without the certificate of six rated inhabitants, and one overseer, who is bound under a penalty to certify that those six are rated, if such be the fact; but the statute 3 & 4 Vict. c. 61, deeming it advisable to amend that law, provides that no such licence shall be granted to any but the real resident occupier of a house, paying a certain rent, and producing the certificate of an overseer of the parish that he is the real resident occupier of his house. Now, as the six rated inhabitants had clearly an option to grant or withhold their certificate, it is argued that the overseer applied to was intended to have the like discretion. This notion is strengthened, by observing, that whereas the former act required a certificate of rating, which must be known officially to the overseer, and imposed a penalty for refusing it, the present act requires a certificate of facts which the overseer has no special means of knowing, and no means of compelling witnesses to attend to prove, and which are, in some respects, matter of opinion; and he is subject to no penalty for refusing. These considerations have induced the Court to think the act does not compel the overseer to grant the certificate; and if so, the judgment ought to be arrested for the insufficiency of the writ.

(11) Lord Denman, C.J., Patteson, J., Coleridge, J. and Wightman, J.

The other defendant merely returned that he was not in office at the time of the date of the said writ; and that return does not appear to have been further noticed in the pleadings.

*Judgment arrested.*

1848. }  
May 5; } THE QUEEN v. THE INHABIT-  
July 12. } ANTS OF EAST STONEHOUSE.

*Poor Law — Examinations — Caption — Complaint — Removability under 8 & 9 Vict. c. 66.*

*The caption of the examinations stated that they were taken on oath "upon the complaint of the churchwardens and overseers of the parish of A":—Held, insufficient.*

*The wife of a marine had resided in parish A. from February 1841 to October 1846, when she became chargeable. At this time her husband, who had only occasionally resided with her during the above period, had been absent for six months serving at sea:—Quære, if she was removable under 8 & 9 Vict. c. 66.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 166.]

1848. }  
July 12. } *In re CHABOT.*

*Compensation—Battersea Park—9 & 10 Vict. c. 38.—Prohibition.*

*Under 9 & 10 Vict. c. 38. (being the Act for making Battersea Park) the Commissioners of Woods and Forests gave notice to C. that they required three pieces of land, described in the schedule to the act as the property and in the occupation of C. There being a dispute as to the amount of compensation, the commissioners, under section 23, issued their warrant for summoning a jury to ascertain what recompence should be made to C. for the value of the lands, &c. therein mentioned (describing them fully as in the schedule), and of the estate and interest of the said C. therein. By section 27. the jury are to assess the value of the fee simple, and then to apportion*

*the values of respective interests therein; and by section 45. persons in possession are to be deemed entitled until the contrary is shewn. At the trial the claimant called several witnesses to the value of the land, who assessed it at 7,000*l.* On the part of the commissioners no witness was called; but an adverse right to part of the land in question was set up, as existing either in the Crown or the city of London, because it was situated between high and low water marks of the river Thames. The jury were directed to estimate not simply the value of the land taken and described in the notice and warrant, but the value of the land and of the claimant's estate and interest in it with reference to the question of his title to the part to which it was suggested he was not entitled. The jury, under these circumstances, gave their verdict for 750*l.*, which was the proved value of the residue only of the land:—Held, that the duty of the jury was only to estimate the value of the property taken, and the estate and interest, if it appeared to be divided among several persons; and that they had no power to decide whether the title was in the claimant; and a prohibition to restrain the recording of the verdict was granted.*

*Montagu Chambers* had, in a former term, obtained a rule, calling upon the sheriff of Surrey and the Commissioners of Her Majesty's Woods and Forests to shew cause why a writ of prohibition should not issue to restrain them from entering and recording the assessment and verdict of the jury, in the matter of the compensation of Charles Chabot, for three pieces of land taken to form Battersea Park, under the 9 & 10 Vict. c. 38, and numbered respectively 63, 64, and 78. in the schedule thereto, and the judgment thereon, and from further proceeding for the purpose of using, acting upon, or enforcing, or otherwise making available the same assessment, verdict, or judgment.

The facts upon which the rule was founded were as follows:—In 1835 Mr. Chabot purchased from Earl Spencer the fee simple of the pieces of land in question, for the sum of 120*l.* The land so purchased consisted of 2 acres 1 rood 38 perches, abutting on the Thames, with a river frontage of 520 feet, and of a strip of meadow land, running inland from the other land, and containing 2 roods 12 perches. Mr. Chabot had been

from that time in the occupation of all the said land, and no claim had been ever made thereto by any other person. On the part abutting on the river, Mr. Chabot had deposited large quantities of earth and rubbish for the purpose of converting it into a wharf. In October 1846 the Commissioners of Her Majesty's Woods and Forests gave Mr. Chabot notice of their intention to take for the purposes of the above-mentioned act the land in question, and required him to state the particulars of the estate, share, interest, or charge which he claimed to be entitled to, or authorized to receive satisfaction for, in respect of the said land: Mr. Chabot, accordingly, sent in a claim of a sum of 10,212*l.* for his land, containing 3 acres 10 perches, stating that the whole was freehold and in his own possession. The commissioners having declined to give the sum so claimed, on the 3rd of November 1847 made Mr. Chabot the offer of a nominal sum, and on the 16th of the same month, in pursuance of section 28. of the act, issued their precept to the sheriff of Surrey, directing him to impanel a jury for the purpose of inquiring into and ascertaining what recompence should be made to Mr. Chabot for the value of the lands, &c. therein mentioned, and of the estate and interest of the said C. Chabot therein, that is to say, [describing the parcels as in the schedule to the act, and stating them to contain 3 acres and 10 perches, and as all in the occupation of the claimant,] and to assess the sum of money to be paid to him for the purchase of such lands, &c., or of such his estate and interest therein, and also for any injury or damage whatsoever, that might affect the said C. Chabot, or which he might sustain for or on account of the taking of such lands, &c. for the purposes of the act. Notice of the inquiry was duly given to the claimant, and used the same terms as those in the precept.

At the trial, before the assessor to the sheriff of Surrey, the claimant examined several witnesses to the value of the land, who assessed it at various sums, from 7,117*l.* upwards. The claimant's purchase from Lord Spencer was also proved. The Attorney General, who appeared as counsel for the commissioners, called no witnesses, nor did he attempt to disprove the value as proved by the claimant, but set up a claim

to the portions numbered 63. and 64. as belonging to the Crown, and contended that the soil thereof being situate between high and low water mark, belonged either to the Crown or to the corporation of the city of London, and not to Mr. Chabot, and referred to the preamble of the act, with regard to the disputed rights of the Crown and City, and shewing that Mr. Chabot had bought a doubtful title. The Recorder, who was also of counsel for the commissioners, confirmed the Attorney General's argument, by stating, from his own knowledge, that the corporation claimed the land in question as part of the soil between high and low water. The assessor told the jury that there appeared to him to be some little difficulty as to that part between the embankment and the river, and that when a question turned on such a nice point he regretted that there was no further evidence; and further stated, that if the said land was within the high water mark, the claimant had no right to use it as a wharf. The foreman of the jury thereupon asked, if the depositing of the soil made any difference in point of law, to which the assessor said, I think not. The portion of the land claimed by the Attorney General for the Crown or the corporation contained 2 acres 1 rood 10 perches, which would leave as the property of the claimant 3 roods only, instead of 3 acres 10 perches, the quantity described in the precept as that for which the jury were to assess compensation. No notice had been given to the claimant that his title to the whole of the land mentioned in the precept would be questioned, and he was consequently unprepared with evidence to meet the claim made by the Attorney General. The assessor directed the jury to find the value of the said lands, &c., and of the estate and interest of Mr. Chabot therein, and the jury therefore gave a verdict for 750*l.* only. In the evidence given by the claimant the surveyor had estimated the piece of land running inland from the dock at the value of 743*l.* 15*s.*, so that the verdict was consistent with the jury having given compensation for that portion only, excluding from their consideration the value of the piece of land abutting on the Thames. Immediately on the verdict being pronounced, the counsel for the claimant objected that the jury ought to find separately,

first, the value of the land as described in the precept; and secondly, the value of the claimant's estate and interest therein, with which the assessor refused to comply. The assessor was then requested to ask the jury whether they had considered in their verdict that the Crown had any interest in the soil so claimed as part of the Thames, which he also refused to do.

*Sir J. Jervis (Attorney General)* and *Welsby* shewed cause (1).—First, prohibition will not lie to the sheriff, who acts merely ministerially in such a case as this.

[*PATTESON*, J. referred to section 30. directing the verdict to be recorded by the clerk of the peace.]

Then there has been no excess of jurisdiction. All the proceedings were regular, and the question was properly left to the jury. It would produce infinite mischief if every disappointed claimant were to apply for a prohibition. They referred to *Com. Dig.* 'Prohibition,' (A).

*Lush (Montagu Chambers* was with him), in support of the rule.—First, prohibition will lie, as the sheriff sits in a judicial capacity. Prohibitions have been issued to Commissioners of Excise, to courts-martial, to Justices at petty sessions, if they have exceeded their jurisdiction.

[*LORD DENMAN*, C.J.—Is there excess of jurisdiction here?]

Yes; the jury are to inquire what is the value of the land, or if the claim made be for less than the fee, what is the value of the claimant's interest. The jury have no right to inquire whether the claimant can make a good title. The warrant to the sheriff is radically defective.

[*WIGHTMAN*, J.—You are too late to raise that objection; you should have applied on the issuing of the warrant.]

*Doe d. Hutchinson v. the Manchester, Bury and Rossendale Railway Company* (2) is directly in point. Looking to this act of parliament, the presumption is, that the claimant being in possession has the interest which he claimed. The onus of rebutting that presumption lies on the commissioners. Here the verdict of the jury was plainly founded both on the value of the land and of

the claimant's interest therein. The commissioners are estopped from saying that this is Crown land, as they treat with the claimant for the purchase of it, and describe it in their notice as being his. *The Queen v. the Sheffield and Manchester Railway Company* (3) decides that this Court will interfere to stay the entry of the verdict.

[*WIGHTMAN*, J.—Is a *certiorari* taken away by this act?]

On moving for the rule the Court intimated that a *certiorari* was not the proper course. Besides, that could only issue for a defect apparent on the face of the proceedings, which does not exist here.

[*The Attorney General* referred to *The Queen v. Bolton* (4), as shewing that affidavits might be used to shew want of jurisdiction.]

[*PATTESON*, J.—That only applies to a total want of jurisdiction. Here there is a general jurisdiction over the subject; the complaint is, that the jurisdiction is exceeded.]

*Cur. adv. vult.*

The judgment was now delivered by—

*LORD DENMAN*, C.J.—The Commissioners of Woods and Forests having required certain property of Mr. Charles Chabot, for Battersea Park, which they are empowered by act of parliament to form, and having disagreed with him as to the amount of his compensation, issued their warrant for summoning a jury before a sheriff, to determine its value. The property consisted of three pieces of land, numbered 63, 64, and 78. in the schedule to the act, and there described as the property and in the occupation of Mr. Charles Chabot. The claim was for the same three parcels, with their several dimensions; the warrant summoned the jury "to ascertain what recompence and satisfaction shall be made to Charles Chabot for the value of the lands, tenements and hereditaments hereinafter mentioned, and of the estate and interest of the said Charles Chabot therein;" and then fully described the three parcels scheduled. The notice of trial used the same language, which must also be presumed

(1) May 9, before Lord Denman, C.J., Patteson, J., Wightman, J. and Erle, J.

(2) 14 Mee. & Wels. 687; s.c. 15 Law J. Rep. (N.S.) Exch. 208.

(3) 11 Ad. & El. 194; s.c. 9 Law J. Rep. (N.S.) Q.B. 13.

(4) 1 Q.B. Rep. 66; s.c. 10 Law J. Rep. (N.S.) M.C. 49.

to have formed part of the oath of the jury. The claimant called numerous witnesses to the value of his land, none of whom rated it lower than 7,800*l*. On the part of the commissioners no witness was called, and the jury found a verdict for 750*l*. The matter is brought before this Court on a complaint that the jury were directed to estimate, not the value of the land taken and described, but the value of the land, *and of the claimant's estate and interest in it*, with an intimation that he was not, or might not be entitled to the fee simple or to the land itself, because, being land between high and low water marks, it belonged either to the Crown by virtue of its prerogative, or to the city of London, as conservators of the River Thames in that part: and those parties were said to be contending in Chancery for the land so situated, comprehending, though not specifying Nos. 63. and 64. The jury having been pressed by this argument, pronounced the verdict, "Under all the circumstances of the case, we find our verdict for 750*l*." The circumstances thus alluded to were the doubts whether the claimant could make a perfect title to the property. The claimant's counsel repeatedly urged the learned assessor to ask, whether they awarded the full value of the property as belonging to him, but it was not thought right to permit them, though willing, to answer that question. The assessor appears to have thought he was bound to direct the verdict to be given conjointly for the value of the tenements and the claimant's estate and interest, or rather for that value reduced by so much estate and interest as any other person possessed adverse to the claimant.

Now, they had no materials for making that reduction, or deciding whether the Crown or the city had the whole estate and interest in the premises, or none at all. They must have made a rough guess at the depreciation that any doubt thrown on the title might produce. But the duty of the jury was to estimate the value of the property taken, and the estate and interest as it appears to be divided among several persons, the person in possession being deemed entitled to the whole interest until the contrary be shewn (sec. 45), and the case of doubtful titles being provided for

(sec. 44,) quite independently of the jury's assessment. Perhaps the commissioners are estopped from denying Charles Chabot's ownership after their own act had affirmed it, and the title by purchase from Lord Spencer was fully proved, subject only to the question, whether there was not elsewhere a title paramount either in the Crown or the City. The jury, therefore, have manifestly taken into their account of compensation the estate and interest of Charles Chabot in the property in some sense inconsistent with a valuation of the three parcels of land which alone they were sworn to make; and as their verdict is to be recorded and deposited with the clerk of the peace (sec. 30), and is made final, binding and conclusive (sec. 23), the claimant is well warranted in asking for our writ of prohibition against those further proceedings which would have the effect of binding his interests for ever.

*Prohibition granted.*

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1848. } THE QUEEN v. THE INHABIT-  
May 5; } ANTS OF ST. THOMAS, NEW  
July 12. } SARUM.

*Poor-Law—Order of Removal—Examinations—Caption—Complaint.*

*The caption of an examination stated that the examination was taken "touching the legal settlement" of the pauper (not stating any complaint):—Held, insufficient.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 164.]

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1847. }  
Dec. 6; }  
1848. } THAME v. BOAST.  
July 12. }

*Pleading—Payment—Satisfaction of Debt and Costs.*

*Where after action brought the debt is paid and accepted in satisfaction, and costs are offered but refused, the damage is merely nominal independently of the costs, and the plaintiff therefore cannot proceed for the costs.*

*To an action on a cheque for 25l. there was a plea of payment of 60l., after action brought, in satisfaction of the debt, damages, and costs. It was proved that after action brought the defendant paid the amount of the cheque, and offered to pay any costs, which offer the plaintiff refused, saying that he would pay them himself:—Held, that the defendant was entitled to a verdict on the plea.*

Assumpsit on a banker's cheque for 25l., dated the 25th of June 1845, payable to bearer, drawn by the defendant.

Plea—that the defendant, after the commencement of the suit, paid the plaintiff, and the plaintiff accepted a large sum, to wit, 60l. in satisfaction of the promise and damages, and of the costs then incurred.

Replication, traversing payment and acceptance.

It appeared at the trial, before Lord Denman, C.J., at the Sittings in London after Michaelmas term, 1846, that the cheque having been dishonoured, a writ was issued on the 28th of June at the suit of the plaintiff, and that the defendant being ignorant of that fact, afterwards called on him and paid the 25l. and offered him 1l. to pay any expenses. This the plaintiff refused, saying that whatever the expenses were, he would settle them himself. The jury, under the learned Judge's direction, returned a verdict for the defendant; leave being reserved for the plaintiff to move to enter a verdict for nominal damages. A rule nisi having been obtained accordingly, or for a new trial,

*Lush* shewed cause (Dec. 6, 1847).—The real question is, whether it is not competent to a plaintiff, after action brought, to forego the costs; and whether he is not bound by an agreement to do so. This is not like an agreement to pay a less sum in satisfaction of a larger, which might be perhaps contended to be void—*Cumber v. Wane* (1). At the time the 25l. was paid, neither party was aware of the amount of the costs; and the money was intended to be paid, to avoid dispute. In *Sibree v. Tripp* (2), the law

laid down in *Cumber v. Wane* was much considered. That law is not to be extended to the case of a claim for nominal damages after payment of the full amount of the actual debt—*Beaumont v. Greathead* (3), *Horner v. Denham* (4).

[PATTESON, J.—On the face of the pleadings it would appear that more has been paid than was due.]

Yes: the plaintiff does not seek to enter judgment *non obstante veredicto*. In *Wilkinson v. Byers* (5) it was held that a cross action might be maintained on an agreement to take a fixed sum, and give up the costs after action brought for an unliquidated demand. And an agreement to take a specified sum when the result of a suit is doubtful, is a good consideration for a promise to pay that sum—*Longridge v. Dorville* (6).

*Simons*, contra. — First, the plea was not proved, as the 25l. was not paid in satisfaction of the debt, damages, and costs. Nothing was said about the costs at the time of the payment. Secondly, the agreement, if it had been proved, would not have been binding. This was not a case of liquidated damages, but a debt certain, and there was no consideration, as in *Wilkinson v. Byers*, for giving up the costs. The plaintiff is entitled to a verdict for nominal damages—*Down v. Hatcher* (7), *Wright v. Acres* (8). (He then offered to enter a *stet processus*, on which the Court suspended their judgment.)

*Cur. adv. vult.*

LORD DENMAN, C.J. subsequently (July 12) delivered the judgment of the Court (9). —This was an action upon a cheque for 25l. Plea, payment of 60l. in satisfaction of debt, damages, and costs, after action brought. It appeared by the evidence that the defendant, after the action was commenced, paid

(3) 2 C.B. Rep. 494; a.c. 15 Law J. Rep. (N.S.) C.P. 180.

(4) *Ante*, p. 29.

(5) 1 Ad. & El. 106; a.c. 3 Law J. Rep. (N.S.) K.B. 144.

(6) 5 B. & Ald. 117.

(7) 10 Ad. & El. 121; a.c. 8 Law J. Rep. (N.S.) Q.B. 190.

(8) 6 Ibid. 726; a.c. 6 Law J. Rep. (N.S.) K.B. 181.

(9) Lord Denman, C.J., Patteson, J., Wightman, J. and Erle, J.

(1) 1 Stra. 426.

(2) 15 Mee. & Wels. 23; a.c. 15 Law J. Rep. (N.S.) Exch. 318.

the debt, 25*l.*, and offered 1*l.* for any expenses, which the plaintiff refused, saying that he would pay the expenses himself. The jury found a verdict for the defendant, liberty being reserved for the plaintiff to move to enter a verdict for him, with nominal damages, if the Court should be of opinion that, notwithstanding the acceptance by the plaintiff of 25*l.* in satisfaction of the debt, damages, and costs, he was entitled to the verdict upon the pleadings.

We are of opinion that the verdict is right, and that the plea was substantially proved. The debt was paid and accepted, and the damage was merely nominal, independently of the costs. The case of *Beaumont v. Greathead* is an authority to shew that after acceptance of the debt in satisfaction, the plaintiff cannot proceed for nominal damages; and, as he would not be entitled to proceed for costs only, independently of some damage, we think that the verdict for the defendant is sustainable, and that the rule must be discharged.

*Rule discharged.*

1848. { THE QUEEN v. THE INHABITANTS OF ST. MARY, WHITE-CHAPEL.  
July 12.

*Poor Law—Order of Removal—Irremovability—9 & 10 Vict. c. 66. s. 2.—Widow—Appeal.*

*By 9 & 10 Vict. c. 66. s. 2. no woman residing in any parish with her husband at the time of his death shall be removed, nor shall any warrant be granted for her removal for twelve calendar months next after his death, if she so long continue a widow:—Held, that this provision renders irremovable widows whose husbands died before the passing of the act.*

*The order of removal was made prior to, but the pauper was removed subsequent to, the 9 & 10 Vict. c. 66:—Held, that irremovability under that statute was a good ground of appeal against the order.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 172.]

1848. { THE QUEEN v. THE COMMISSIONERS OF WOODS AND FORESTS, (*In re BUDGE*).  
July 12.

*Mandamus—Crown—Commissioners of Woods and Forests—Notice to take Lands—Compensation—9 & 10 Vict. c. 38.*

*By the 9 & 10 Vict. c. 38. the Commissioners of Woods and Forests are authorized to treat for and purchase lands for the purpose of forming Battersea Park. Where notice of their intention to take lands had been given, but there had been no actual taking,—Held, that a mandamus would lie to compel the Commissioners to issue their warrant to the sheriff to summon a jury to assess compensation.*

*The fact of the Commissioners having no funds is matter of return to the mandamus.*

This was a rule, which had been obtained, calling upon the Commissioners of Her Majesty's Woods and Forests to shew cause why a mandamus should not issue directed to them, commanding them to issue their warrant to the sheriff of Surrey for the purpose of summoning a jury to assess compensation to Mr. Budge, under the 9 & 10 Vict. c. 38, for land required by the Commissioners for the purpose of forming Battersea Park. The affidavits on which the rule was founded were not material to the only point on which a decision was given.

*Sir J. Jervis (Attorney General) and Welsby shewed cause (1).—A mandamus will not lie to the Crown, as must be the case if this rule be made absolute. In the case of Carmichael Smith—The Queen v. the Lords of the Treasury (2), there was a specific appropriation of money, which does not occur here. A mandamus has been refused in the case of a copyholder of a royal manor applying for admission, though he had an inchoate right of property, and the manor was vested in the Commissioners of Woods and Forests, and not immediately in the Sovereign—The Queen v. the Steward of the Manor of Richmond (3). But, secondly, a mandamus to assess com-*

(1) June 13, before Lord Denman, C.J., Patteson, J., Coleridge, J., and Wightman, J.

(2) 4 Ad. & El. 286; a.c. 5 Law J. Rep. (N.S.) K.B. 20.

(3) 1 Q.B. Rep. 352; a.c. 10 Law J. Rep. (N.S.) Q.B. 148.



pensation will only lie where a bill for specific performance could be sustained in case the value were agreed upon—*The Queen v. the Eastern Counties Railway Company* (4). By this act the Commissioners have five years within which they may take this land, and there is nothing to shew that they will not do all that is required within that time. Section 15. requires them to give six months' notice of their intention to take lands, and they have never taken possession.

[COLERIDGE, J.—That cannot prevent a mandamus issuing to them after the six months.]

Sir F. Thesiger, in support of the rule.—If a mandamus does not lie in such a case as the present, the only remedy will be by *monstrans de droit*, or a petition of right, to which the Court will be reluctant to drive a party. This is a duty cast on the Commissioners by the statute, which contemplates suits being brought against them. Then, assuming that the writ is not objectionable on this ground, it will lie, as the effect of the notice and subsequent proceedings is to create a contract in equity between the owner and the Commissioners, who are by section 19. authorized to treat for the purchase of lands. On this ground, therefore, the mandamus will lie—*The King v. the Hungerford Market Company* (5), *Doo v. the London and Croydon Railway Company* (6), *Stone v. the Commercial Railway Company* (7), and it is immaterial, so far as the right to the writ is concerned, whether the Commissioners have funds or not.

*Cur. ado. vult.*

The judgment of the Court was now delivered by—

LORD DENMAN, C.J.—In this case cause was shewn against a mandamus to issue a warrant for assessing compensation under the 9 & 10 Vict. c. 38. for land, which being in their schedule, the Commissioners of Woods and Forests have given notice to take towards forming Battersea Park, that this writ lies not: first, because it would be directly ad-

dressed to Her Majesty, and could not be enforced. But we think that this is otherwise, and that the Commissioners are public officers invested with public duties, which may affect the rights of private persons; but not without making just compensation to them, which it describes the proper means of enforcing. *The Queen v. the Steward of Richmond Manor* was quoted. In that case it was objected that the Queen was not lady of the manor, which vested in the Commissioners of Woods and Forests; and we thought it was so vested only for the purpose of management, the property being still in Her Majesty, and that, consequently, the writ would have been addressed to her individually, which could not be. The second objection, that the Commissioners had not actually taken possession of the prosecutor's land, but had done no more than serve him with a notice of intention so to do, we think untenable, having often held, agreeably to the justice of the case, that this notice, which prevents the owner from doing what he pleases with his own land, is equivalent to an actual taking, and entitles him to compensation.

The other matters urged against the rule are to be returned to the mandamus if available. The rule is for a mandamus to take steps for assessing the amount of compensation, not to pay it.

*Rule absolute.*

1848. } THE QUEEN v. COLLINGWOOD  
May 4; } AND ANOTHER.  
July 12. }

*Poor-Law—Bastardy—Order of Maintenance—Married Woman.*

*Under the 7 & 8 Vict. c. 101. and the 8 & 9 Vict. c. 10, an order of maintenance may be made on the putative father of the bastard child of a married woman, though those statutes in their language only apply to single women.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 168.]

(4) 10 Ad. & El. 531; s. c. 8 Law J. Rep. (N.S.) Q.B. 340.

(5) 4 B. & Ad. 327; s. c. 5 Law J. Rep. (N.S.) K.B. 50.

(6) 1 Rail. Cas. 257.

(7) Ibid. 375; s. c. 4 Myl. & Cr. 122.

[IN THE EXCHEQUER CHAMBER.\*]

1847.

Jane 15;

Dec. 3. }

WHITAKER v. HARROLD.

*Pleading—Covenant running with Land—Defeasance—Plea—Duplicitv—Payment and Release—Dates under a Videlicet.*

A declaration in covenant for rent set out an indenture of the year 1820, by which, after the recital of a mortgage deed of 1818, containing an assignment by Y. of certain premises to J. E. S, for the residue of a term of 5,000 years, subject to redemption on payment by Y. to J. E. S. of 1,200*l.*, with interest, J. E. S. demised the premises to R. L. for a term at the request of Y, he, the said R. L. covenanting for himself, his assigns, &c., to pay the rent during the term demised, and the continuance of the recited mortgage to J. E. S, and after payment and satisfaction of the mortgage to Y, his executors, &c. It was then stated that in 1821 J. E. S. assigned to G. H. S, subject to R. L.'s lease; and that G. H. S. assigned one moiety to the plaintiff on the 15th of December 1843, and the other on the 18th of February 1835; that R. L.'s term became vested in the defendant, and that after the defendant became possessed of the residue of such term (to wit), on the 25th of March 1844, two years' rent became in arrear to the plaintiff.

*Plea, that before the rent became due J. E. S. was paid and satisfied the principal and interest due on the mortgage out of monies arising from the sale of part of the premises; and that J. E. S. by indenture acknowledged the payment out of such monies, and released Y. from all claims, &c. —On special demurrer the Court of Queen's Bench held the plea bad for duplicity, and the declaration good.*

*The Court of Exchequer Chamber affirmed the judgment, and held that the plea was bad for duplicity; and also for not sufficiently shewing that the mortgage debt was discharged, and the estate exonerated.*

*Also that the covenant in the declaration to pay Y, &c. until payment and satisfaction of the mortgage ran with the land, and did not become a covenant in gross till the*

*happening of the event. That the payment of the mortgage money was a condition in defeasance, which ought to have been pleaded by the defendant; that it sufficiently appeared in the declaration that the rent became due after the assignments to the plaintiff, because on demurrer the dates of the assignments must be taken to be true, and that on the 25th of March 1844 the plaintiff was entitled to half a year's entire rent, and a moiety of the other year and a half year's rent; and that the Court below having power to assess the damages, the declaration was good.*

Error from the Court of Queen's Bench.

*Covenant.* The declaration (which is stated at length in the report of *Harrold v. Whitaker* (1)) was for the recovery of two years' rent of 18*l.* 18*s.* per year, amounting to 37*l.* 16*s.*, which rent was reserved by an indenture of demise, dated the 17th of August 1820, made between Benjamin Yeoman of the first part, and James Eyre Salmon of the second part, and Robert Lee of the third part, and which indenture recited an indenture of assignment and mortgage, dated the 5th of August 1818, and made between Yeoman of the first part, certain persons therein named of the second and third parts, and the said J. E. Salmon of the fourth part, whereby the premises therein mentioned to have been demised were amongst other premises assigned to the said J. E. Salmon, his executors, administrators and assigns, for the residue of a term of 5,000 years, mentioned to have been created as therein set forth, subject to redemption on payment by the said B. Yeoman to the said J. E. Salmon of 1,200*l.*, with interest; and after such recital the said Salmon by such indenture did at the request of Yeoman lease and demise the premises therein described, for the term therein mentioned, to the said Robert Lee, he, the said Robert Lee, yielding and paying during the term demised, and during the continuance of the recited mortgage, to the said Salmon, his executors, administrators, and assigns, and after payment and satisfaction of the said mortgage, unto the said Yeoman, his executors, &c., the yearly rent of 18*l.* 18*s.*, by equal portions quarterly,

\* Before Wilde, C.J., Parke, B., Alderson, B., Colman, J., Maule, J., Rolfe, B., Cresswell, J., and Platt, B.

as therein mentioned ; and in which indenture of demise was contained a covenant on the part of the lessee, the said Robert Lee, to pay the said rent in manner as the same was reserved and made payable by the said indenture ; and the declaration then set out two indentures of assignment, dated the 6th of February 1821, and by each of which indentures Salmon assigned a moiety of the premises comprised in the mortgage, subject to the lease granted to Lee, to one George Hicks Seymour. The declaration also set forth an indenture, dated the 15th of December 1843, by which Seymour assigned to the plaintiff one of the moieties which had been assigned to him by Salmon in the mortgaged premises, and further set forth an indenture, dated the 18th of February 1835, by which Seymour assigned to the plaintiff the other moiety of the said premises. And it was averred that by these assignments the plaintiff had become possessed of and entitled to the entirety of the demised premises for the residue of the term of 5,000 years, subject to the term which had been so granted and demised to the said Robert Lee, and the residue of the said term so granted and demised to the said Robert Lee had by assignment legally come to and become vested in the defendant. And it was further averred, that after the defendant became possessed of the residue of the term (to wit, on the 25th of March 1844), two years' rent became in arrear and unpaid to the plaintiff, contrary to the covenant, and so the defendant, although often requested, hath not kept the covenant, but hath broken the same.

To this declaration the defendant pleaded that, before the alleged arrears of rent became due, and after the mortgage debt of 1,200*l.* and interest had become due, and before the commencement of this action, to wit, &c. the said Salmon was paid and satisfied all the principal money and interest due under and by virtue of the mortgage, by and out of monies arising from the sale of part of the premises comprised in the mortgage, and equal to the amount of the said mortgage debt and interest; and the plea further alleged, that by a certain indenture therein described and set forth the said Salmon acknowledged that he had been paid the whole of the said mortgage debt, interest, and monies due to him upon the mortgage

out of monies arising from the sale of part of the premises comprised in the said mortgage, and that all the mortgage debt, interest, and monies due to him under and by virtue of the said mortgage had been paid off and satisfied, and the said Salmon did thereby release and discharge the said Yeoman from all claims and demands of him, the said Salmon, under and by virtue of the said mortgage; and the plea concluded with a verification.

To this plea the plaintiff demurred specially, assigning, among many other causes, that the plea was double, by first stating a payment to Salmon, and then an alleged acknowledgment and release by him of the mortgage debt and interest; and the demurrer also assigned for cause that the mode in which the deed was pleaded was uncertain and ambiguous. Upon the argument, in the Court of Queen's Bench, the then defendant, and now plaintiff in error, contended that the plea was good, and also that the declaration was bad on various grounds. The Court of Queen's Bench held the plea to be double and bad, and the declaration to be good, and gave judgment for the plaintiff; whereupon a writ of error was brought in this court (2).

*Peacock* (June 15, 1847), for the plaintiff in error (the defendant below).—The plea is good. The first objection made to it is, that it does not sufficiently confess and avoid the cause of action. But surely it acknowledges the deed upon which the action is founded, and shews that before the rent became due, the reversion had been assigned over. It admits the rent to be due, but denies that the plaintiff is the proper person to receive it, and it therefore does not amount to *riens in arrear*, and is a sufficient confession and avoidance. It is said in the second place, that the plea does not give the plaintiff colour; but the plaintiff's colour is contained in the declaration. It is next said, that the plea is defective for not shewing that the premises had been redeemed; that there had been a legal termination of the mortgage, and that raises the question, whether under the words of the *reddendum*, it was necessary that there should be a reconveyance of the term. It is submitted, that it is quite sufficient to

(2) This is the statement of the pleadings which was given in the judgment of the Court.

shew that the mortgage had been paid off, and that the mortgagee had released. Then it is said, that the plea is double, because it states payment of the mortgage money, and also a release; but the former part is only inducement to the release. The plea would not have been sufficient if it had stated the payment only. The release made the defence perfect. There are several cases which shew that payment in accord and satisfaction is no answer to a claim under a deed, but that there must be a release under seal—*Blake's case* (3), *Com. Dig.* tit. 'Pleader,' 2 *Wils.* 29, 30. The principal question as to the goodness of the plea arises upon the reservation of the rent. If the rent was to be paid to the mortgagee till the mortgage was paid off, then the plea is good; but if it was payable till the premises were reconveyed, it is bad.

[*PARKE, B.*—The plea does not aver by whom the payment was made; and if you rely on the release, it does not appear when it was executed. It might have been executed just before the plea.]

When a date is material, on demurrer it must be assumed to be true, although laid under a *videlicet*—*Nightingale v. Wilcoxon* (4); and it therefore sufficiently appears on the plea that the deed was executed before the rent became due—see the notes in *Dakin's case* (5), *Ring v. Roxborough* (6), *White v. Wilson* (7), *Giles v. Bourne* (8), *Down v. Hatcher* (9). Supposing the plea to be bad on the ground that the rent was payable till reconveyance, still the declaration cannot be supported. The covenant was a joint covenant in gross, and the mortgagor and the mortgagee should have joined. What was the meaning of the parties with regard to the duration of the time during which the rent was to be paid? If it was payable to the mortgagee till reconveyance, it was only rent payable to the assignee of the reversion, and there was no necessity for a special covenant to pay Yeoman.

[*MAULE, J.*—It may be that a reconvey-

ance would not put the party in the place of assignee, as the reversion might merge in the fee.]

This was either a joint covenant in gross from the first, or became so after the payment of the mortgage money. It is unnecessary to cite *Sorsbie v. Park* (10) and *Bradburne v. Botfield* (11) to shew that where there is a joint interest the action ought to be joint, even although the interest be several. The rent was to go to Salmon and his assigns till payment and satisfaction.

[*MAULE, J.*—The words in the *reddendum* are "during the continuance" of the mortgage and "after payment and satisfaction." It may be said that the "continuance" is to explain the satisfaction, or the "satisfaction" to explain the continuance. Should you not then go to the statement of the title?]

If the *reddendum* was to be construed with reference to the title, then the ordinary covenant would have been used. The intention of the parties was that the covenant should run with the land while Salmon and his assigns were entitled to the rent, and afterwards that it should be a covenant in gross with Yeoman when he was entitled in equity. If the dates in the declaration cannot be considered as material, there is no sufficient averment that the rent became due after the assignment to the plaintiff. It was said in the court below that the statement that the rent became due to the plaintiff was sufficient, but it is submitted, that no such averment can be implied from those words occurring in the breach in the declaration—see *Fryer v. Coombs* (12). The defendant, being merely assignee of the lease, cannot be liable on any covenant not running with the land. It lay upon the plaintiff to aver that the mortgage was continuing. The presumption of fact was not sufficient.

*Butt* (23rd June), for the defendant in error.—It is said that the mortgagor and the mortgagee should have joined in this action: but the mortgage conveyed the legal estate to the mortgagee, which remained in him till reconveyance. The

(10) 12 *Moe. & Wels.* 146; s. o. 13 *Law J. Rep.* (n.s.) *Exch.* 9.

(11) 14 *Ibid.* 559; s. c. 14 *Law J. Rep.* (n.s.) *Exch.* 330.

(12) 11 *Ad. & El.* 403.

(3) 6 *Rep.* 44.

(4) 10 *B. & C.* 212; s. c. 8 *Law J. Rep.* K.B. 23.

(5) 2 *Wms. Saund.* 290, a.

(6) 2 *Cr. & Jer.* 418; s. c. 1 *Law J. Rep.* (n.s.) *Exch.* 169.

(7) 2 *Bos. & Pul.* 113.

(8) 6 *Mau. & Selw.* 73.

(9) 2 *Per. & Dav.* 292; s. o. 8 *Law J. Rep.* (n.s.) Q.B. 190.

construction attempted to be given to the *reddendum* on the other side is, that by its terms the rent was to be paid to the mortgagee while the mortgage debt remained unpaid and no longer; but that would be doing violence to the language of the *reddendum*, and construing the covenant as not making the rent payable to the owner of the legal estate. The covenant must be read along with the *reddendum*. At no period could the mortgagor and the mortgagee join. While the legal estate remained in the mortgagee, he alone could sue. The case of *Bradburne v. Botfield* is not applicable, and *Anderson v. Martindale* (13) is distinguishable. In that case there was a joint covenant with two for the benefit of one of them; and the covenant applied to one subject-matter, one period of time, and one person during the whole time. This covenant is similar to one for the payment of two several annuities. In *Withers v. Bircham* (14) two separate annuities were granted, and the interest was held to be several. It can make no difference in the present case how the mortgages was to apply the rent. A reservation of rent to a stranger who is party to a lease is not void—*Co. Litt.* s. 345. It was next objected, that the declaration did not aver that the mortgage was continuing.

[PARKE, B.—The Court below considered that the mortgagee's right to the rent continued till the debt was paid off, and not during the continuance of the estate.]

It escaped the observation of the Court that the declaration shews the continuance of the mortgagee's estate, for the term is stated to have been unexpired at the time of action brought. *Fryer v. Coombs* is distinguishable from this case. The distinction is between a certain particular estate and an uncertain one. Here the particular estate for a certain term of years is shewn to be in existence. See *Thursby v. Plant* (15). *Dayrell v. Hoare* (16) also is distinguishable in this respect. It is a clear rule of pleading that conditions in defeasance must be averred to have happened by the party wishing to take advantage of them—*Brooke*

*v. Spong* (17). As to the plea: in the first place, it does not shew that the payment and the release took place before the rent became due. The substantial objection to the plea is that it does not shew a reconveyance. It is consistent with the plea that the mortgage continued. It does not shew by whom the debt was paid; and it is double, because it states payment in satisfaction and then a release. It amounts to *riens in arrear*, which is not a good plea in covenant. For these reasons the plea is bad on demurrer.

*Peacock*, in reply.

*Cur. adv. vult.*

WILDE, C.J. now (Dec. 3,) delivered the judgment of the Court.—[After stating the pleadings he proceeded:]—On the argument of the writ of error before us, it was contended, on the part of the defendant in error, that the judgment of the Court of Queen's Bench was erroneous in holding the plea to be bad, on the ground of its being double; and that it was not bad in any other respect; secondly, that if the plea were bad, the declaration was bad in substance. We are of opinion that the plea is bad, and the declaration is good: and consequently the judgment of the Queen's Bench must be affirmed. As to the plea, the Court of Queen's Bench held that it was double, and that such duplicity was well pointed out as cause of special demurrer. The duplicity consists in relying, first, on the payment of the mortgage as matter *in pais*, and then on the release of the mortgage debt; and this duplicity is pointed out among the causes of special demurrer. But for the plaintiff in error it was argued, that the payment without a release was insufficient, and that, therefore, the debt being due by specialty, the payment and release together constituted complete payment. The foundation of this argument was, that the mortgage debt was covenanted to be paid. But it is a sufficient answer to this argument that on the pleadings it does not appear, and it cannot be assumed that there was a covenant to pay the mortgage debt on any certain day, or at any time, and therefore there is an entire absence of the

(13) 1 East, 497.

(14) 3 B. & C. 254; s. c. 3 Law J. Rep. K.B. 30.

(15) 1 Wms. Saund. 235, n.

(16) 12 Ad. & El. 366; s. c. 9 Law J. Rep. (N.S.) Q.B. 299.

(17) 15 Mee. & Wels. 153; s. c. 15 Law J. Rep. (N.S.) Exch. 94.

foundation of the argument, and we are of opinion that the Court of Queen's Bench rightly held the plea double, and therefore bad. Further, we think that if the plea were not bad for duplicity, it is bad for not shewing distinctly that the original mortgage debt was discharged, and the estate exonerated therefrom. It is consistent with the plea that Salmon may have assigned the mortgage to another, and may have been paid by the assignee the amount of it in consideration of the assignment, and that the payment may have been made by the assignee, by selling a portion of the estate purchased by him; and besides, the release may have been made by Salmon *after the assignment to Seymour*, when it could have no effect on Seymour's vested interest, which could only be defeated by the actual payment of the mortgage, not by its release, for he was entitled to the rent until *payment and satisfaction* of the mortgage in point of fact, not until Salmon should release it. For these reasons we think the plea bad.

On the part of the plaintiff in error it was then contended, that the declaration was bad for three reasons: first, that the covenant to pay the rent was a covenant in gross; secondly, that the continuance of the mortgage was not averred; and thirdly, that it did not appear that the rent sued for became due after the assignment of the reversion to the plaintiff. We agree with the Court of Queen's Bench in the construction of the covenant, and think it is a covenant to pay to the lessor and his assigns until payment and satisfaction of the mortgage debt; for the covenant runs with the land, and does not become a covenant in gross until that event happens. Secondly, we think that as the estate in the reversion and the right to sue on the covenant commenced on the execution of the lease, the payment of the mortgage money was a condition subsequent, operating in defeasance of the covenant, and should therefore have been pleaded by the defendant—*Brook v. Spong*. The declaration therefore is in this respect sufficient. The last objection was, that it did not appear that the rent became due after the assignment to the plaintiff. The Court of Queen's Bench held that the averment of its being due and in arrear to the plaintiff was sufficient on general demurrer. The judgment of Patteson, J., in the case of

*Fryer v. Coombs*, raises a doubt whether it was so; but if it was not, the declaration may be supported upon the ground on which the counsel for the plaintiff in error relied, in answer to one of the objections to the plea, namely, that dates, when material, though laid under a *videlicet*, are on demurrer to be assumed to be correct, and the dates of the assignments of the two moieties of the premises to the plaintiff, may therefore be taken to be the true dates, though under a *videlicet*, if they are essential to the plaintiff's case, according to the doctrine of Bayley, J., in the case of *Nightingale v. Wilcoxon*. Assuming the dates to be correct, the assignment of one moiety was made by Seymour to the plaintiff on the 18th of February 1835, and the other on the 15th of December 1843. The rent was payable on the 29th of September and the 25th of March, and two years were due ending on the 25th of March 1844, which is a material date, and must be assumed to be true on demurrer, so that the plaintiff was, upon the supposition of the truth of the dates, entitled to half-a-year's entire rent on the 25th of March of 1844, and a moiety of the remaining year and a half.

It may be that, on this supposition, the Court of Queen's Bench, which may assess damages on a demurrer or judgment by default without the intervention of a jury, have awarded too much damage, but this being a matter in the discretion of the Court, cannot be inquired into on a writ of error. This objection, therefore, cannot prevail, and the judgment of the Queen's Bench must be affirmed.

*Judgment affirmed.*

[IN THE EXCHEQUER CHAMBER.]

1848. }  
June 19, 23, 24. } DOUGLAS v. THE QUEEN.

*Information—Receiving Gifts in India—Extortion—Certainty—7 & 8 Geo. 4. c. 64. s. 21.—Construction of 33 Geo. 3. c. 52. ss. 62, 63.—Forfeiture and Fine—Assessment of Value.*

*An information under the 33 Geo. 3. c. 52. s. 62. alleged that the defendant being a British subject, and exercising an office in the East Indies, and residing there, un-*

lawfully did receive from a certain person called Sevajee Rajah a certain sum of money, to wit, &c., as a gift and present :—Held, affirming the judgment of the Court of Queen's Bench, first, that the offence was sufficiently described, as the statute prohibited a receipt of any gifts whatever. Secondly, that it was not necessary to allege for whose use the money was received (Platt, B. dubitante). Thirdly, that it was not necessary to aver that the money was received extorsively, or under colour of the defendant's office.

Held also, that the provisions of 7 & 8 Geo. 4. c. 64. s. 21, curing defects by verdict, apply to all informations and indictments triable in England, whether the offences were committed abroad or not.

The information charged the receipt of a certain number of rupees. The jury found the value of each rupee at the time of the receipt. The Court passed judgment, imposing a fine upon each count, and a forfeiture of the value of the gift, adopting the value of a rupee as found by the jury, and sentence of imprisonment until the fine and forfeiture were paid :—Held, that under the 33 Geo. 3. c. 52. s. 63, where money was received, it was not necessary to give the defendant the option of returning the gift or the value ; and that the information and judgment were therefore right.

Held also, that the proper time to estimate the value was at the time of the receipt, and not of the conviction.

Held also, that the Court had power to pass sentence of imprisonment until the forfeiture was paid.

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 176.]

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1848. } LAURIE AND OTHERS v.  
June 27. } BENDALL.

*Bankruptcy—Insolvent Act, 5 & 6 Vict. c. 116.—Pleading—Petition and Final Order for Protection—Jurisdiction where Petitioner has no Assets—Pleading General Plea of Final Order.*

*The Court of Bankruptcy has jurisdiction to entertain a petition for protection from*

*process, and to grant to the petitioner a final order for protection and distribution, although at the time of presenting such petition and granting such final order, the petitioner has no assets.*

*The general plea shewing that such final order was granted to the defendant is good, without setting out any special preliminary averments for the purpose of shewing that the defendant was entitled to take the benefit of the act.*

Assumpsit by the indorsee against the acceptor of a bill of exchange.

Plea—That after the accruing of the said cause of action in the said declaration mentioned, and before the commencement of this suit, to wit, on the first day of January, A.D. 1844, a petition for the protection of the defendant from process was duly and according to the form of the statute made and passed in the session of parliament holden in the fifth and sixth years of the reign of our Lady Victoria the Queen, and entitled 'An Act for the Relief of Insolvent Debtors,' presented by the defendant to her said Majesty's Court of Bankruptcy, and thereupon afterwards on the 4th day of May, A.D. 1844, being a day before the commencement of this suit, a final order for protection and distribution was made in the matter of the said petition by Edward Holroyd, Esq., a commissioner of the said Court of Bankruptcy duly authorized in that behalf. And the defendant further says that the said cause of action in the declaration mentioned accrued before the date of the filing of the said petition in the said Court of Bankruptcy. Verification.

Replication—That at the time of the giving of such notice as is required by the said act by the defendant of his intention to present the said petition, and at the time when the said petition was presented by the defendant to the said Court of Bankruptcy as aforesaid, the defendant owed divers just and lawful debts, and was justly and lawfully indebted in divers sums of money to divers persons, amounting in the whole to a large sum, to wit, 200*l.*; yet the defendant had not, at the said time of the giving of the said notice, or at the time when the said petition was so presented by the defendant, or at any time afterwards, before or at the time of the

making the said order, any property or debts owing to him or any estate or effects for payment of the defendant's just and lawful debts, or any part thereof, within the meaning of the said act of parliament, or that could or might be distributed amongst the creditors of the defendant according to the true intent and meaning of the said act. *Verification.*

*Rejoinder*—That at the time when the said petition was so presented, the defendant had a certain amount, to wit, the amount of 2*l.* 15*s.* then due to him, the defendant, from one Thomas Pearson, which said debt, at the time when the said petition was so presented, was an estate of the defendant according to the true intent and meaning of the said act. And of this the defendant puts himself upon the country, &c. To this there was a *similiter*.

At the trial, before Lord Denman, C.J., at the sittings in London, after Michaelmas term, 1847, the plaintiff had a verdict.

*Knowles* (13th of January 1848) moved for and obtained a rule to arrest the judgment on the ground that the replication was no answer to the plea.

*Ogle* (27th of June 1848) shewed cause.—The point that arises in this case is, whether an insolvent, who has no assets to distribute, can take advantage of the provisions of the 5 & 6 Vict. c. 116. A difference of opinion exists on this point amongst the Commissioners of Bankrupts; the majority, however, holding that insolvents cannot take advantage of this bankrupt law unless they have assets to distribute. The final order is to be an order for protection and distribution. If there be no assets, of what is there to be distribution? By the preamble and the first section of the act it is provided that a person not being a trader may present a petition to the Court of Bankruptcy for protection from process, which petition shall have annexed to it a schedule of the petitioner's debts, with the names of his creditors, and also of the nature and amount of his property and of the debts owing to him. The section then goes on to provide that on a petition being so presented it shall then be lawful for the Judge or Commissioner to grant the petitioner protection from process. It therefore appears that a petition with a schedule an-

nexed containing a statement of the property of the petitioner, is a condition precedent to the granting such protection. By sec. 7, the whole estate of the petitioner, present and future, is vested in the official assignee and the assignee appointed by the creditors. It would have been idle to have provided for the appointment of assignees and the vesting of the property in all cases, if it had been contemplated that the statute was providing for cases in which the petitioner had no property. By sect. 13. of the act, the Commissioners are empowered to make rules for carrying the act into operation. These rules have been promulgated, and they none of them contemplate that the act would be resorted to by any other parties than by petitioners who have some property to distribute. Unless this be the proper construction of the act, great inconvenience will arise, and the act will be the means of relieving from final process persons who have acted in the most fraudulent manner, the Commissioners not having the same power to punish as is given by the general insolvent acts. On looking at the subsequent statute, the 10 & 11 Vict. c. 102, which is a statute to amend this act, the legislature appears to consider that the construction now contended for is the true construction of the act. Then, secondly, the plea is a bad plea. By this act traders owing less than 300*l.* may take advantage of this act. But what is there in this plea to shew that the defendant was not a trader owing 10,000*l.*?

[COLERIDGE, J.—The plea is given by s. 10. of the act.]

A defendant must shew jurisdiction before he can use the plea.

[ERLE, J.—What would be the use of the legislature giving a general plea if a defendant were obliged to set out all those preliminary averments that would be necessary if no general plea were given? How many times has this plea been held good?]

*Cowch*, who appeared to support the rule, was not called on.

LORD DENMAN, C. J.—I have seldom heard a case argued which presented less doubt than the present one. The replication is clearly bad.

PATTON, J.—The meaning of the general clauses of the act, in my opinion, is



this—that the estate of the insolvent, if there be any, is to be vested as directed by the act; but the having such estate does not appear to me to be necessary to entitle a person to the benefits of the act. As to the plea, it is sufficient to say, that it is, at all events, good after pleading over.

COLERIDGE, J.—The machinery given for the vesting and distribution of assets was necessary in all cases, for although there be no present property, there may be future property. It has been contended that we should encourage fraud if we held that petitioners could take advantage of the provisions of this act, who have no property to distribute. But why is this so? It does not appear to me a necessary conclusion. The Commissioner is not bound to grant the final order—he is to examine into the facts of the case, and may then exercise his discretion whether he will grant or refuse the final order. Why should relief be refused because there are no assets—the case which in all others it seems most required?

ERLE, J.—The words of the statute are, “any person not being a trader,” and “any person being such trader, but owing less than 300*l.*,” may obtain protection. Mr. Ogle calls upon this Court to put into the statute these words, “provided such persons have assets to distribute.” There is no such exception in the act, and the replication is therefore bad.

*Judgment arrested.*

1848. }  
May 3; } THE QUEEN v. THE INHABITANTS  
July 12. } OF ADDINGHAM.

*Order of Removal—Examination—Caption.*

*It is sufficient if the caption of an examination states a complaint that the pauper has come to inhabit, and is actually chargeable to, the removing parish, and it need not further state (as in the case of orders of removal) that the pauper had not gained a settlement in such parish.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 175.]

1848. }  
May 15, 29. } GRACE HUMBLE v. HUNTER.

*Principal and Agent—Evidence—Varying written Contract—Charter-party.*

*In an action on a charter-party, which purported to be made by A. B., “owner of the ship Ann,” &c., it is not competent to give parol evidence that A. B. acted not as owner, but as agent for the real owner in making the charter-party.*

*Assumpsit on a charter-party.*

*Plea (inter alia), non assumpsit.*

At the trial, before Wightman, J., at the Durham Summer Assizes, 1847, the charter-party was put in evidence, which was signed not by the plaintiff but by C. J. Humble, and commenced as follows:—“It is this day mutually agreed between C. J. Humble, Esq., owner of the good ship or vessel, called the *Ann*,” &c. C. J. Humble, who was the son of the plaintiff, was called as a witness, and it was proposed to ask him whether he did not enter into the charter-party as agent of his mother, the plaintiff, and whether she was not the real owner. This was objected to as being a contradiction of the charter-party; but the objection was overruled, and the witness then stated that he had made the contract on behalf of the plaintiff. The plaintiff had a verdict for 141*l.*; and in the following term a rule nisi for a new trial having been obtained on the ground that the above evidence was inadmissible,—

*Knowles and F. Robinson* shewed cause (May 15).—The objection is, that this evidence was improperly received, as it contradicts a written document. But it has always been permitted to shew by parol evidence whether a party was acting as agent or not—*Wilson v. Hart* (1). It makes no difference that the witness is described as owner on the face of the document, for he would be taken to be so if nothing were said about it. The rule prohibiting the admission of parol evidence to vary a written contract is not applicable to matters like this of mere description. The real party to a contract may come in and sue subject to two qualifications: first, that the contract is not under seal, as

(1) 7 Taunt. 295.

in *Appleton v. Binks* (2); secondly, as in *Higgins v. Senior* (4), that the agent, if sued, cannot discharge himself by such evidence. In that case, Parke, B. said, "There is no doubt that where such an agreement is made it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand, and charge with liability, on the other, the unnamed principals, and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement." So it is submitted here the evidence was admissible to give the benefit of the contract to the plaintiff, the real owner.

[ERLE, J.—Your argument would go to this, that a party entering into a contract in his own name may turn round and say he was acting as agent for some man of straw. Is there any authority for that where an objection was taken to the principal coming in to sue in such a case?]

[PATTESON, J.—Mr. Smith, in his note to *Thomson v. Davenport* (5), certainly lays down the proposition so; and that is in accordance with *Sims v. Bond* (6)].

[WIGHTMAN, J. referred to *Skinner v. Stocks* (7). Actions on policies of insurance may be brought in the name of the principal or agent.]

*Smith's Merc. Law*, 134, *Story on Agency*, p. 373, *Bateman v. Phillips* (8), *The Duke of Norfolk v. Worthy* (9), and *Cothay v. Fennell* (10), were cited. The only case apparently against the plaintiff is *Bickerton v. Burrell* (11). There, however, is this distinction in that case, that the party had stated that he was acting as an agent, and therefore he was held estopped from afterwards setting up that he was a principal. The word "owner," being merely descriptive, has not the same effect.

*Watson and Pashley*, in support of the rule (May 29).—All the cases cited by the other side are consistent with the proposition, that evidence to vary, add to, or take from a positive written agreement cannot be admitted. In *The Duke of Norfolk v. Worthy* the agent did not represent himself as owner of the estate; and moreover the action was not brought on the agreement, but for money had and received, founded on a rescission of the contract.

[PATTESON, J.—Could Hunter have sued Grace Humble on this contract made for her by her son?]

It is submitted not. What Holroyd, J. says, in *Bickerton v. Burrell*, is very strong in favour of the defendant. *Cornfoot v. Fowke* (12) was also cited.

[LORD DENMAN, C.J.—In *Lucas v. De la Cour* (13), in an action by several partners evidence of conversations with one of the plaintiffs on the subject of the contract, and in which he stated the goods to be his property, was held to be admissible. Lord Ellenborough's remark there applies very closely to this case: "If one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made."]

Here, too, there is a warranty of the ship, and that cannot be contradicted by parol evidence—*Walton v. Shelley* (14). In *Greenleaf on Evidence*, it is said, "Where one signed a premium note in his own name, parol evidence was held inadmissible to shew that he signed it as agent of another, on whose property he had caused insurances to be effected by the plaintiff at the owner's request." The Courts are very cautious in not deviating from the general rule in mercantile instruments—*Adams v. Wordley* (15), *Hollier v. Eyre* (16), *Vinery v. the Bedford Commercial Company* (17), *Graves v. the Boston Company* (18).

(2) 5 East, 148.

(3) 8 Mees. & Wels. 834; s.c. 11 Law J. Rep. (N.S.) Exch. 199.

(4) 2 Smith's Leading Cases, 224.

(5) 5 B. & Ad. 389.

(6) 4 B. & Ald. 437.

(7) 15 East, 272.

(8) 1 Campb. 337.

(9) 10 B. & C. 671; s.c. 8 Law J. Rep. K.B. 302.

(10) 5 Mau. & Selw. 383.

(11) 6 Mees. & Wels. 358; s.c. 9 Law J. Rep. (N.S.) Exch. 297.

(12) 1 Mau. & Selw. 249.

(13) 1 Term Rep. 296.

(14) 1 Mees. & Wels. 374; s.c. 5 Law J. Rep. (N.S.) Exch. 158.

(15) 9 Cl. & Fin. 1.

(16) 8 Meli. (American), 348.

(17) 2 Caines (American).

**LORD DENMAN, C. J.**—At first I treated this according to the rule, that a principal may generally come in and take the benefit of a contract made by his agent; but when a party appoints another to act for him, and the person so appointed contracts in his own name, the principal cannot afterwards come in and declare that the contract was for his benefit. The language of Lord Ellenborough, in *Lucas v. De la Cour*, is very just, and must rule the present case.

**PATTESON, J.**—This question turns entirely on the terms of the written contract. If it had merely named C. J. Humble as the contracting party without saying more, it would have been ambiguous, and evidence to explain it would have been receivable. But he calls himself "owner," and thereby binds himself as principal: it is very like *Lucas v. De la Cour*. In *Robson v. Drummond* one of the plaintiffs was a dormant partner, and the acting partner with whom the contract was made had transferred all his interest in the partnership and in the contract in question to the dormant partner, and it was held that the action would not lie, because a contract entered into by one in his own name cannot be transferred to a third party. So here, the right of suing on this contract made by C. J. Humble, as owner, cannot be cast by the evidence on the plaintiff. The general principle is quite clear and untouched by our decision, that where there is nothing to define the character of the contracting party, he may be shewn to be agent merely so as to cast the right of suing on the real principal (18).

**WIGHTMAN, J.**—I thought *Skinner v. Stocks*, and that class of cases, decided the present when it was at *Nisi Prius*; but there the contracting party gave himself no special description, and therefore it was not generally inconsistent with the written contract to shew that the party was only an agent. Here the witness expressly states himself to be owner, and that brings the case within *Lucas v. De la Cour* and the other authorities cited by Mr. Pashley as having been decided in the American courts.

**LORD DENMAN, C. J.** added—*Robson v. Drummond* is rather different; but Parke, B. there says, You have a right until the end of the contract to the judgment of the

(18) Coleridge, J. had not heard the whole of the argument, and gave no opinion.

party with whom you appeared to contract: so here, I say you have a right to the credit and character of the party who entered into the contract as owner.

*Rule absolute.*

1848.

July 12.

THE QUEEN v. JAMES LORD.

*Infant—Contract—Master and Servant—Conviction.*

*A contract whereby an infant agreed to enter into the service of a master for twelve months, at certain weekly wages, and to serve him at all times during that term, and to work fifty-eight hours a week, contained a proviso, that in case the steam-engine should be stopped from accident, or any other cause, the master might retain all wages of the servant during that time. Held, that the agreement was void against the infant, and that a conviction for absenting himself from such service could not be supported.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 181.]

1848.

Feb. 8;

July 12.

FOLLOCK v. STABLES.

*Vendor and Purchaser—Railway Stock—Notice of Usage of Brokers—Money paid.*

*The plaintiff, a share broker at Leeds, bought for and by the orders of the defendant ten railway shares, to be paid for on delivery. The shares were delivered, and had fallen in price between the time of the sale and the delivery. The plaintiff not being able to pay at the time of delivery the vendor demanded the shares back from the plaintiff, who gave them back to the vendor, who sold them at the then market price, and called upon the plaintiff according to the usage of the Stock Exchange at Leeds, to pay the difference, which he did. Held, that the plaintiff was entitled to recover the sum so paid from the defendant as money paid to his use, as he must be taken to be cognizant of the usage of the Stock Exchange, which his broker attended.*

Assumpsit for money paid, and for commission.

*Plea, non assumpsit.*

At the trial, before Alderson, B., at the Spring assizes for Yorkshire, 1846, it appeared that the plaintiff, who was a share-broker at Leeds, and who had been employed on previous occasions by the defendant, received an order on the 1st of September 1845, to buy for him ten shares in the Huddersfield and Manchester Railway. The plaintiff accordingly bought ten shares in the above railway, and sent the following advice to the defendant:—"3rd September, —Bought for Mr. Stables ten shares in the Huddersfield and Manchester Railway, at 28*l.* per share; commission 5*s.* per share; payable on delivery." Before the following account day, the vendor delivered the scrip for ten shares, which had fallen 8*l.* 10*s.* per share since the purchase, and the defendant not being able to pay the contract price, the vendor's broker demanded the shares back from the plaintiff, who delivered them to him, and they were sold by him at the then market price, the difference being 85*l.* The plaintiff was, according to the usage of the Stock Exchange at Leeds, called upon by the broker of the vendor to pay him the difference, which he accordingly did, and the action was brought to recover the sum so paid by him, as well as his commission on the original purchase. It was objected that the 85*l.* not having been paid by the defendant's authority, he was not bound to repay it, and that at all events an action for money paid was not maintainable.

The learned Judge directed a verdict for the plaintiff for 2*l.* 10*s.*, the amount of the commission, but directed a verdict for the defendant on the count for money paid, leave being reserved to the plaintiff to move to enter the verdict for the full amount.

A rule nisi having been obtained accordingly,

*Watson and Pashley* shewed cause (1). There was no authority or request by the defendant, that the plaintiff should pay the amount of the difference; and if the

contract, as here, is in the name of the principal, no liability is cast on the broker, as between him and the vendor—*Trueman v. Loder* (2).

[PATTESON, J.—The bought note sent to the defendant is one thing; you cannot infer from thence that the name of the defendant was communicated to the vendor of the shares at the time of sale.]

That was to be extracted from the evidence. Secondly, the custom was improperly received in evidence. There were two stock exchanges at Leeds. The custom of holding the broker responsible only existed at one of them, and there was no proof that the defendant knew of such a custom. In *Bayliffe v. Butterworth* (3), it was assumed that the contract was made at the exchange.

[PATTESON, J.—It is not clear in this case that any notice was given to him that the shares would be sold.]

There was an option in the seller either to claim the whole purchase-money, as if the shares had been taken by the purchaser, or to claim the difference on the re-sale; and if there is an option, notice is necessary. The defendant is not to be left to his cross action against the plaintiff for not giving him notice, if the plaintiff having himself had notice failed to communicate it to the defendant.

[LORD DENMAN, C.J.—You would argue that the loss was incurred entirely through the fault of the plaintiff?]

Yes.

[PATTESON, J.—If the shares fell before notice was given to the plaintiff, the plaintiff could not give notice to the defendant; it all arises from the defendant not providing the plaintiff with means to take up the scrip.]

In *Scott v. Irving* (4), it was held that a principal is not bound by a custom among brokers of which he is not cognizant. That case was not referred to in *Bayliffe v. Butterworth*.

[COLERIDGE, J.—The liability here is collateral, arising from the general custom

(2) 11 Ad. & El. 589; s. c. 9 Law J. Rep. (n.s.) Q.B. 165.

(3) *Post*, Exch. 78.

(4) 1 B. & Ad. 605; s. c. 9 Law J. Rep. (n.s.) K.B. 89.

(1) Before Lord Denman, C.J., Patteson, J., Coleridge, J. and Wightman, J.

among share-brokers. Must not the defendant be taken to be cognizant of the custom of the market to which his agent goes? and a general authority to buy might indeed authorize the broker to buy in the particular market.]

Lastly, the action for money paid will not lie; the defendant did not assent to the payment—*Moore v. Pyrke* (5), *Bowley v. Bell* (6), *Davies v. Humphries* (7).

*Baines and T. F. Ellis*, contra.—In *Bowley v. Bell* there was an express order to the broker not to pay; and the circumstances were, in other respects, peculiar. Here the obligation to pay, on the part of the plaintiff, raises an implied promise by the defendant to repay him—*Brittain v. Lloyd* (8). The defendant had broken his contract before the sale was made; and the payment was made in consequence of that breach of contract.

[WIGHTMAN, J.—The principal difficulty in your case is, that you did not give the defendant notice that the scrip would be sold. Had you done so the defendant might have paid the difference.]

The notice to the broker is notice to the defendant—*Sutton v. Tatham* (9). The principal objection made at the trial was, that the action should have been special; and it is not disputed that the defendant authorized the plaintiff to contract in his (the defendant's) name.

*Cur. adv. vult.*

The judgment of the Court was subsequently (July 12), delivered by—

LORD DENMAN, C.J.—This was an action of assumpsit, for money paid and for commission. At the trial, it appeared that the plaintiff, a sharebroker at Leeds, bought for the defendant, and by his directions, ten shares in the Huddersfield and Manchester Railway, at 28*l.* a share, to be paid on delivery of scrip. The defendant not being

ready to pay when the scrip was delivered to the plaintiff, the vendors demanded the money or the scrip of the plaintiff, who delivered the scrip back, which had fallen in price; and, according to the custom of the Stock Exchange at Leeds the vendors sold the shares for the then market price, and called upon the plaintiff to pay the difference, which he did, according to the usage. The present action was brought to recover the money so paid, amounting to 85*l.*, and also commission upon the original purchase. The jury found a verdict for the plaintiff for 2*l.* 10*s.* in respect of the commission; but under the direction of the learned Judge, who was disposed to think that an action for money paid was not maintainable, found a verdict for the defendant upon the count for money paid, with liberty for the plaintiff to move to enter a verdict upon that count for 85*l.* damages, in case the Court should be of opinion that the plaintiff was entitled to recover the amount paid by him for loss upon the transaction, and that it was recoverable under the count for money paid. The case of *Bayliffe v. Betterworth* is not, we think, distinguishable in principle from the present. It was there held by the Court of Exchequer, under circumstances very similar to those in the present case, that an action for money paid was maintainable by a sharebroker against his principal, where the former was, by the custom of the share-market in which he dealt, obliged to make good deficiencies occasioned by the default of his principal; and that the latter must be considered as dealing with his broker according to the usage of the market in which he deals; and that a contract according to such usage was equivalent to a request to the broker to pay the deficiency, if the principal failed to do so himself. That decision is in accordance, as far as the circumstances are parallel, with the case of *Sutton v. Tatham*. We are, therefore, of opinion that the rule should be made absolute to enter a verdict for the plaintiff on the count for money paid, for 85*l.*

*Rule absolute to enter a verdict for the plaintiff.*

(5) 11 East, 52.

(6) 3 Q.B. Rep. 284; s.c. 16 Law J. Rep. (N.S.) C.P. 18.

(7) 6 Mees. & Wels. 153; s.c. 9 Law J. Rep. (N.S.) Exch. 263.

(8) 14 Mees. & Wels. 762; s.c. 15 Law J. Rep. (N.S.) Exch. 43; see *McEwen v. Woods*, ante, 206.

(9) 10 Ad. & El. 27; s.c. 8 Law J. Rep. (N.S.) Q.B. 210.

1848. }  
July 12. } WRAY v. TOKE AND ANOTHER.

*Beer Acts*—11 Geo. 4. & 1 Will. 4. c. 64.—4 & 5 Will. 4. c. 85.—Conviction—Jurisdiction—Statement of Offence—Limitation—Particularity—Duplicity—Penalty—Costs.

By the 11 Geo. 4. & 1 Will. 4. c. 64. s. 13. a penalty is imposed on beer sellers licensed under that act, who shall permit drunkenness or disorderly conduct in their houses, not exceeding for the first offence 5l., and for the second such offence 10l. By section 15. all penalties under the act are to be recovered before two Justices in petty sessions, and are to be sued for within three calendar months. By section 85. a general form of conviction is given. By the 4 & 5 Will. 4. c. 85. this act was amended, and licences were to be granted for the sale of beer, &c. to be consumed on the premises or not, but all the provisions, penalties, &c. of the 11 Geo. 4. & 1 Will. 4. c. 64. were to apply to persons licensed under the subsequent act.

A conviction stated that W, of the parish of Ashford, in the county of K, was convicted by two Justices in and for the county of K, acting in petty sessions in and for the division of Ashford in the said county, for that he, being a seller of beer licensed to sell the same by retail to be consumed on the premises, under the provisions of the statutes in such case made and provided, did at the parish of Ashford aforesaid, permit drunkenness and other disorderly conduct in the house mentioned in such licence, and situate in the said parish of Ashford, against the tenour of such licence granted under the provisions of the said statutes, and contrary to the form of the said statutes, whereby the said W. had forfeited 10l.; this being adjudged to be his second offence against the provisions of the aforesaid statutes to permit the general sale of beer, &c. by retail in England; and the Justices thereby awarded one moiety of the penalty, after deducting the costs of the conviction, to the informer, and the other moiety, after deducting the costs as aforesaid, to the treasurer of the county.—Held, first, that the conviction need not be by two Justices of the division within which the licensed house was situate, but that if it were necessary it appeared from the conviction that they were so.

Secondly, that it was unnecessary to allege that the conviction took place within three calendar months after the offence.

Thirdly, that the offence was properly stated to be contrary to the form of the statutes.

Fourthly, that the conviction need not state the names of the persons permitted to be drunk or allege that they were unknown.

Fifthly, that the offence charged to have been committed was not double.

Sixthly, that it was unnecessary to set out the licence in the conviction.

Seventhly, that the conviction was not bad for not ascertaining the costs.

Lastly, that the conviction need not be on parchment.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 183.]

1848. }  
Feb. 7. \* } NICHOL v. ALISON.

*Witness—Order and Commission to examine*—1 Will. 4. c. 22. s. 4.

A Judge's order for a commission to examine witnesses need not contain the names of the commissioners, as they are to be ascertained by subsequent arrangement between the parties.

Such a commission is not a writ, nor has it the incidents of one, and therefore it need not be tested in term time.

Assumpsit for freight.

Pleas—Non assumpsit, set-off, and other pleas.

At the trial, before Alderson, B., at the Spring assizes for York 1847, it appeared that the action was brought to recover 360l. 10s. 9d., in respect of freight earned by the ship *Triton*, on a voyage from Valparaiso to London; and the defendant sought to avail himself, under the plea of set-off, of various advances alleged to have been made by him above the sum of 250l., which was admitted to have been paid under the terms of the charter-party. An order was made by Williams, J., for examination of witnesses, named in the order, at Valparaiso, in Chili, on behalf of the de-

\* Decided in a previous term.



applies to the particular writs mentioned in it.

LONG DENMAN, C. J.—I think that a commission to examine witnesses is not a writ, and that there is nothing to lead us to attach the incidents of any known writ to such a document. As to the second point, I think the names of the commissioners need not be mentioned in the order. Here the plaintiff had an opportunity of objecting, and did object to some of them; after this had been done, it cannot be said that he is now to be allowed to object that they were not named.

PATTESON, J.—I am of the same opinion. The statute 3 Will. 4. c. 22. provides for three things. First, for a mandamus to the Judges of the colonies and other places under the British dominion in foreign parts, extending the provisions of 13 Geo. 3. c. 63. s. 4; and such a mandamus is clearly a writ; secondly, by s. 4. it empowers the Courts or the Judges in every action depending in the court, to order the examination on oath of any witnesses within the jurisdiction of the Court, before the Master or Prothonotary, or any persons to be named in such order; and thirdly, in the same section, the Court or Judge may order a commission to issue for the examination of witnesses by interrogatories or otherwise. If the Court were to order a commission to issue in the first instance, that might contain the names of the commissioners; but when an order is made at chambers for a commission it would not be possible to ascertain at the time of making it who are the most proper parties to be named as commissioners. It is true that the order might direct the commissioners to be named by the parties, or in any other manner; but the statute does not require them to be named in the order. As to the other objection, I do not think a commission can be in strictness called a writ. The 4th section of the statute only uses the term "commission," and I do not say that any test is necessary; it might simply purport to be "by the Court."

WIGHTMAN, J.—I am of the same opinion. It is contended that this commission is a writ, because it contains the formal incidents of one, and that it is therefore improperly tested; the argument being derived

from the ancient well-known writs, which could only issue in term time, and though they really issue in vacation, still they are only recognized as having issued in term, and are so tested. But this is a proceeding under a modern act of parliament, which gives power to the Court or a Judge to issue a commission. If any Judge may issue it in vacation, it would be quite an anomaly to require it to be tested in term. It is difficult indeed to say that anything in the nature of a test is necessary. As to the objection that the names of the commissioners are not inserted in the order, my Brother Patteson has already remarked that the statute does not require them to be mentioned, and in practice it never is done.

*Verdict for the plaintiff for 191l.*

1848. }  
June 24; } THE QUEEN v. THE INHABITANTS OF SALFORD.  
July 12. }

*Poor Law—Order of Removal—Statute 9 & 10 Vict. c. 66.—Five Years' Residence—Residence out of Respondent Parish.*

*The statute 9 & 10 Vict. c. 66. s. 1. does not apply where there has been a residence by the pauper out of the parish at any time during the five years preceding the order of removal.*

*Quære—If the statute applies to an order which has not been appealed against, or which has been confirmed on appeal, before the passing of the statute.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 170.]

BAIL COURT. }  
1849. } LILLY V. HARVEY.  
June 7, 15. }

*County Court—Jurisdiction—Claim of Title to Land—Duty of Judge—Prohibition.*

*Under the 58th section of the 9 & 10 Vict. c. 95. the jurisdiction of the county court is not ousted by a mere claim of title, unless such claim appears upon the pleadings. Upon a parol claim it is the duty of the Judge to inquire and decide whether the title really is in question; but his decision is not final,*



for if the superior Court be satisfied that the title did come in question, a prohibition will be granted.

A plaint was brought in the Cambridge County Court by the plaintiff against the defendant for use and occupation of certain premises at Bourne, in the county of Cambridge. When the plaint came on to be heard, the defendant took an objection to the jurisdiction of the Court on the ground that he believed himself to be the owner of the property. By the direction of the Judge he was sworn, and on examination he stated that the premises were in his belief his own, and that he had bought them at an auction. No evidence of his title was adduced, and the Judge proceeded to hear the case, and gave judgment for the plaintiff. A rule had been obtained, calling on the Judge of the county court and the plaintiff to shew cause why a writ of prohibition should not issue, commanding them not to proceed further in the suit.

*Burham* shewed cause (June 7).—The rule must be discharged, as the course pursued was the proper one, and the Judge has already decided that there was no title in question. The Court before whom the claim is made must inquire as to the *bona fides* of the claim, and a mere allegation without evidence will not oust their jurisdiction. Similar cases have arisen under statutes as to proceedings before Justices. Under the Malicious Trespass Act, 7 & 8 Geo. 4. s. 30, it is not sufficient that the accused party says he acted under a reasonable supposition of right; but they must inquire and decide upon the circumstances whether he did so act—*The Queen v. Dodson* (1). So under the 53 Geo. 3. c. 127, a statement of a party called upon to pay church-rates that he disputes the rate is not alone sufficient—*The King v. Wrottesley* (2). In that case a caveat had even been entered, but the jurisdiction of the Justices was not taken away. Here the Judge has examined into the circumstances, and his decision must be conclusive. He referred to *Brittain v. Kinnaird* (3). The facts fully support the decision of the Judge.

(1) 9 Ad. & El. 704.

(2) 1 B. & Adol. 648; s.c. 9 Law J. Rep. (N.S.) M.C. 51.

(3) 1 Brod. & Bing. 432.

The Court called upon

*Naylor*, to support the rule.—The cases cited were under different acts of parliament.

[WIGHTMAN, J.—They seem to me to shew that it is not enough for a man merely to say, I claim the premises as owner, but he must shew some reasonable ground to satisfy the Judge, as against the plaintiff; and if the Judge should in fact be wrong in his decision, and the Court be satisfied that the title did come in question, a prohibition would go.]

In the old county court the jurisdiction was ousted as soon as a plea or cognizance shewing title was pleaded—*Timiswood v. Pattison* (4). Here it must be presumed there was *bona fides*, for the party deliberately swore that he believed himself to be the owner, and his affidavits now repeat the claim.

[WIGHTMAN, J.—In a note to Mr. Udall's work on the County Courts, the cases upon the Irish acts are referred to, and the inference drawn is, that the facts of each case must be investigated by evidence to see whether the right is *bona fide* in question.]

The claim is sufficient, as it was not intended to give jurisdiction in these cases; and if the Judge below is to decide the question, he can always extend his jurisdiction.

[WIGHTMAN, J.—But what title is shewn upon your affidavits?]

The defendant swears it is his. The title need not be proved. He referred to *In re Gwynne v. Knight* (5).

*Cur. adv. vult.*

Judgment was on a subsequent day (June 15) delivered by—

WIGHTMAN, J.—The question in this case was, whether the title to an hereditament came in question so as to take the case out of the jurisdiction of the county court under the proviso in the 58th section of the 9 & 10 Vict. c. 95. The demand was for use and occupation, and the defendant objected to the jurisdiction of the county court upon the ground that he claimed the premises as his own, and that consequently the title was in question. The Judge of

(4) 3 Com. B. 243; s.c. 15 Law J. Rep. (N.S.) C.P. 234.

(5) *Post*, Exch. 168.

the county court examined the defendant upon oath, who stated that he believed the premises were his, and that he had purchased them at a sale by auction. The Judge, however, went on with the case, and decided in favour of the plaintiff, being of opinion that the title did not really come in question; and upon examination of the affidavits, I am of opinion that there was not any real ground for the objection, and that the question of title was not raised *bond fide* by the defendant. The defendant did not pretend to have had any conveyance of the premises, or to have paid for them, or to have had possession, &c. On the other hand, it appeared that the plaintiff had been in possession of the premises, and in receipt of the rents and profits for upwards of twenty-five years; that he had a conveyance of them, and had paid the purchase-money; and that the defendant in 1843 took the premises of the plaintiff as tenant, at a rent of 30*l.* a year, which was paid down to November 1846. It also appeared that, in June 1847, the plaintiff distrained the goods of the defendant for the arrear, which were sold without replevin; that on a subsequent occasion, when it was a question whether the defendant had not taken the premises of the plaintiff jointly with his son, the defendant swore that he alone took the premises of the plaintiff. It appeared upon these facts that the defendant had no ground for bringing the title into question, and that it was not really in question in the case. It was, however, contended for the defendant that it was enough for him to state upon oath that he believed the premises were his to bring the case within the proviso, and to take it out of the jurisdiction of the county court, and that the Judge had no authority to inquire further. It appears to me that if the Judge has authority to ascertain whether the title really is in question, it is very difficult to define the limit to which his inquiry may go. It can hardly be intended by the statute that the mere assertion of the defendant that he claims title, or that it is in question, will suffice to take away the jurisdiction: the Judge must be satisfied that it is in question, and for that purpose must have authority to inquire into so much of the case as is necessary to satisfy him upon that point. Where there are special plead-

ings, and the question is raised upon them, the Judge can go no further; but where the question is not raised upon the pleadings, but is merely suggested by the defendant, the Judge must inquire into the circumstances before he can be satisfied that title does come in question. If he is wrong, and assumes jurisdiction when the title really is in question, the defendant, upon making that appear to the superior Court, would be entitled to a prohibition. Each case must depend upon its own circumstances. The cases that have been decided upon the 53 Geo. 3. c. 127. s. 7. are authorities for this view of the case. The terms of the provisions in the two statutes are not the same—but the point in question is common to both. In *The King v. the Chapel Wardens of Milnrow* (6), and *The King v. Wrottesley*, it was considered that the Justices in a case under the 53 Geo. 3. must be satisfied that there is a *bond fide* intention to dispute the rate before they are bound to stop. If, notwithstanding reasonable evidence that the title is really in question, the Judge of the inferior court still goes on, his assumption of jurisdiction may be superseded by a prohibition; but in the present case it appears to me that the Judge of the county court was right, and that title did not really come into question in the case. The rule, therefore, will be discharged.

*Rule discharged.\**

1848. } THE QUEEN v. THE INHABITANTS  
July 12: } OF GLOSSOP.

*Poor Law—Order of Removal—Irremovability—9 & 10 Vict. c. 66.—Residence—Widow—Appeal.*

*Residence by a pauper for five years next before the application for the warrant partly as wife and partly as widow, is sufficient to render her irremovable, under the 9 & 10 Vict. c. 66.*

*The 9 & 10 Vict. c. 66. does not give an appeal against an order made prior to its passing, on the ground of five years'*

(6) 5 Mab. & Selw. 248.

\* In *Owen v. Pearce*, a similar rule was discharged at the same time, Mr. Justice Wightman, upon the facts disclosed upon the affidavits, deciding that the Judge of the county court had rightly held that the title did not come in question.

*residence in the respondent parish, where there has been no actual removal of the pauper.*

[For the report of the above case see 17 Law J. Rep. (N.S.) M.C. p. 171.]

1848. }  
June 9; } DYER v. COWLEY.  
July 12. }

*Vendor and Purchaser—Delivery, what amounts to—Ambiguous Finding of Jury—New Trial—Entering Verdict.*

*Where a Judge at Nisi Prius reserves certain facts for the opinion of the Court, with the consent of the parties, such facts are in the nature of a special case; and if the verdict can stand consistently with those facts, though they might lead to an opposite conclusion, the Court, in its discretion, will order the verdict to stand, rather than grant a new trial, which could only end in the same verdict with additional expense.*

*In an action for goods sold and delivered, a verdict was found for the plaintiff, and leave was reserved to enter a nonsuit, "if the facts proved did not support an action for goods sold and delivered." Those facts being ambiguous, the Court refused to enter a nonsuit, as from the facts proved the jury might have inferred a delivery; and they would not grant a new trial, as it would only lead to an amendment of the declaration by inserting a count for goods bargained and sold, and another verdict for the plaintiff. They, therefore, in the exercise of their discretion, directed the verdict to stand for the plaintiff.*

Assumpsit, for goods sold and delivered.  
Plea—Non assumpsit.

At the trial, before Wilde, C.J., at the Summer Assizes at Bristol, 1847, it appeared that the plaintiff was the captain of a Bristol trader; and that the defendant, who resided in London, was a dealer in wild and foreign animals, and birds. The plaintiff brought two leopards to Bristol by his ship, and they were placed in the Zoological Gardens there for the purpose of being sold. The defendant heard of them through a person of the name of Gregory, and being at Bristol, an agreement was entered into between the plaintiff and the defendant that

the defendant should purchase them for 30*l*. It was proved that the plaintiff, the defendant and Gregory went together to the ship, and that 5*l*. was paid in part of the purchase-money. The three then went together to the Zoological Gardens, where the leopards were handed over to Gregory, and were taken by him to his house, to be kept till Cowley should pay the remainder of the purchase-money, and fetch them away. Cowley then set off for London, saying that he should return in three days. He did not return till after the expiration of that period, and during his absence both the animals died.

It was contended, for the defendant, that, as the plaintiff had a lien on the animals till the remainder of the 30*l*. was paid, there could not be said to have been a delivery, and that the action for goods sold and delivered would not lie. The jury found, on the question being put to them by the Chief Justice, that 5*l*. was paid to complete the bargain; and a verdict was entered for the plaintiff for 25*l*., leave being reserved for the defendant to move to enter a nonsuit if the facts proved did not support an action for goods sold and delivered. In Michaelmas term, 1847,—

Kinglake, Serj. moved accordingly, and referred to *Maberly v. Shepherd* (1), *Boulter v. Arnott* (2), *Goodall v. Skelton* (3), and *Bladey v. Parker* (4). A rule nisi having been granted to enter a nonsuit, or for a new trial,—

Prideaux shewed cause.—The delivery to Gregory was a delivery to the defendant, and at all events it became so after the time limited for the return of Cowley from London—*Salter v. Woollams* (5). On the evidence, either Gregory was not the plaintiff's agent, or if he was, he was equally the agent of the defendant—*Boulton v. Arnott*. In *Goodall v. Skelton* there was no proof of a delivery.

[COLERIDGE, J.—The defendant treats this as a ready-money transaction.]

The 5*l*. was expressly found to be paid to complete the bargain; and the parting with the possession did away with the lien.

(1) 10 Bing. 99; s. c. 2 Law J. Rep. (N.S.) C.P. 181.

(2) 1 Cr. & M. 333; s. c. 2 Law J. Rep. (N.S.) Exch. 97.

(3) 2 H. Bl. 316.

(4) 2 B. & C. 37.

(5) 8 Scott, N.R. 59; s. c. 10 Law J. Rep. (N.S.) C.P. 145.

In *Dobley v. Farley* (6) a delivery to a third person, under similar circumstances, was held a delivery to the defendant, though the plaintiff might be considered as still retaining a special interest in the goods.

*Prize*, in support of the rule.—There is no period at which it can be said that the property passed to the defendant. The plaintiff might have maintained trespass or trover, if they had been taken from Gregory's custody. By the civil law no property in goods sold passed to the buyer till delivery. "Venditor venditacionem rei venditis et conditionibus exhibere debet emptori, quia nec qui mendum emptori tradidit, adhuc ipse dominus est." *Fustin. Inst. lib. 2, tit. 24 s. 2d*.

[*Patterson, J.*—(That does not contemplate the intervention of a third party.)]

There may be a delivery and acceptance within the Statute of Frauds, 29 Car. 2, c. 3 s. 17, which may yet not be such a delivery as to support an action for goods sold and delivered.—*Curtis v. Page* (7), *Edm. v. Duffield* (8).

The judgment of the Court (9) was, subsequently (July 12), delivered by

**LORD DENMAN, C. J.**—We find it necessary to consider what is done at *Nisi Prius* when points are reserved for the opinion of a superior Court, and the verdict is to be entered according to that opinion. The facts so found are in the nature of a special case submitted to the consideration of the Judges, whose decision of the law thereupon arising will then become final in the case. This cannot be done without the consent of both parties at *Nisi Prius*; and either party, if not satisfied that this course will do justice according to law, is bound to withhold his consent, and require the facts to be ascertained by the proper tribunal—the jury. If the facts found leave the case imperfect, and in consequence a new trial takes place, the process carefully employed for saving expense will have the effect of driving the

parties to a new and increased expenditure, and prolonged litigation, with all its inconveniences and evils. What the Judge reports, the parties to have agreed to must bind them; and in this case the learned Lord Chief Justice informs us, that, having taken the jury's opinion upon a single fact, that of payment, he directed a verdict for the plaintiff, giving leave to the defendant, by consent of the plaintiff, to move for a nonsuit, "if the facts proved did not support goods sold and delivered." We have heard them largely and learnedly discussed, and cannot arrive at a clear conviction on the law arising on these facts, because they are ambiguous. They would support that count, if they led the jury to one conclusion on the intention of the parties, but not otherwise.

There are strong reasons urged on both sides of this question; and we cannot avoid exercising a discretion in the case.

We cannot enter a nonsuit, because there are facts which would support the count for goods sold. We would grant a new trial to ascertain the intention; but it is obvious that, if we do so, the plaintiff will apply for and obtain leave to amend his declaration by inserting a count for goods bargained and sold, which, as all agree, would be proved by the evidence produced by the plaintiff at the trial. We should be loath to make a rule absolute which would make the expense incurred useless, and could only produce the same result as the jury have already arrived at with a great additional expense to both parties. We do not see that the proof fails; and therefore we are of opinion that the verdict must stand. We are aware that the defendant will thus lose an advantage, to which he might possibly have been found entitled in the state of things that existed at the trial, but this is in consequence of his not taking the proper means to secure it, which we do not regret, as it is wholly independent of the merits, and, indeed, would give him a triumph over the justice of the case through a trivial slip of the pleader.

*Rule discharged.*

(6) 12 Ad. & El. 632.

(7) 16 Law J. Rep. (N.S.) Q.B. 199.

(8) 1 Q.B. Rep. 302.

(9) Lord Denman, C. J., Patterson, J., Coleridge, J., and Erle, J.

1848.  
June 2.

*In the matter of the arbitration between THE EAST AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY COMPANY and BRADSHAW.*

*Railway—Lands Clauses Consolidation Act—8 Vict. c. 18.—Arbitration—Award—Umpire.*

*Where a claim for compensation is referred to arbitration under the Lands Clauses Consolidation Act, the award need not assess the price of the land taken and the damage separately.*

*The arbitrators awarded a sum for the fee simple in possession of the claimant's land, and also for the immediate possession thereof:—Held, unobjectionable, though it appeared that there was an existing lease of part of the land, the claimant having used the same terms in his notice of claim.*

*The Court will not entertain an objection that the award is contrary to the evidence.*

*Where two arbitrators have been appointed by the parties, the appointment of an umpire by the Board of Trade, more than twenty-one days after the appointment of the last arbitrator, is valid.*

*The three months within which the umpire is bound to make his award are to be calculated from the time when the duty devolves upon him.*

This was a rule, calling upon the above-named railway company to shew cause why the award or umpirage made between these parties should not be set aside, on the following grounds:—First, that the award was not warranted by the submission, the price to be paid for the land, for compensation for the damage by severance, and for other injuries sustained by the claimant being assessed in one sum of 2,560*l.*; whereas the sum to be paid for the land, the sum to be paid as compensation for severance, and the sum to be paid for other injuries, should each have been assessed and awarded separately. Secondly, that the award was not according to, nor warranted by, the claim upon which the umpire professed to adjudicate, in this, that the umpire has awarded a sum for the value of the land and for the immediate possession thereof; whereas, it appeared by the claim and the proceedings,

that the claimant had not possession, and could not give such immediate possession, but that part of the land was in the occupation of J. Baum under a lease expiring in 1850, and that other part of the land so to be taken was in the occupation of J. Low as tenant thereof. Thirdly, that the umpire had exceeded his authority in awarding a sum of money to be paid (*inter alia*) for the immediate possession of the said land. Fourthly, that the umpire received evidence and statements not upon oath. Fifthly, that he decided contrary to all the evidence before him. Sixthly, that the declarations of the arbitrators and umpire respectively were not made in due time. Seventhly, that the umpire was not properly and legally appointed, and that the award was made after the umpire's authority had ceased. Eighthly, that the award was not certain nor final. Ninthly, that the Board of Trade had no authority to appoint an umpire.

The following were the facts on which the rule was founded:—William Bradshaw being possessed of the fee simple of an estate at Hackney Wick, consisting of a manor house, out-buildings, and twenty-five acres of land, on the 3rd of November 1846 received a notice from the secretary of the above-named company that they were willing to treat for his estate and interest in the land and premises described in the notice, and calling upon him for the particulars of his estate and interest therein. On the 21st of December 1846, the following claim, signed by Mr. Bradshaw, was sent to the company for the land described in the notice (being a portion of ten acres which would be wholly destroyed for building purposes), and for injury and damage to the residue of the ten acres by reason of severance, the sum of 17,325*l.*, subject to a deduction for the value of the land destroyed for building purposes which might not be required by the company. He also claimed, as the value of the manor house, garden, and out-buildings described in the notice, and in the occupation of J. Baum, 1,500*l.*, and for the stabling, out-buildings, and yard, also described in the notice, 750*l.*, and also claimed to be paid for any injury or damage he might otherwise sustain, and all costs, &c. to be incurred by rea-

son of the company taking the land, and in addition, compensation for being dispossessed of his estate. Mr. Bradshaw also stated in his claim that he desired to have it settled by arbitration under section 23rd of the Lands Clauses Consolidation Act, 1845. On the 25th of March 1847, a notice was served on the claimant that the company had, on the 23rd of March, appointed Mr. F. Fuller as their arbitrator, and requesting the claimant to appoint another; and he accordingly, on the 6th of April 1847, duly appointed Mr. Gadsden to act as arbitrator on his behalf. The notice given to the company of this appointment stated "that the matter required to be referred to arbitration was as follows—viz. to settle the amount of compensation to be paid to me by the said company, for the *fee simple in possession* of and in the land, farm-house, yard, and cow-shed in the occupation of J. Low; the manor house, garden and out-buildings, the stabling, out-buildings, and yard in the occupation of J. Baum (which said manor house, &c. are subject to a lease thereof granted to the said J. Baum for a term of years which will expire at Michaelmas 1850, at a yearly rent of 38*l.*); all which said premises are described or referred to in my aforesaid claim; and for injury and damage by reason of the severance of my said land, and for all other injury, damage, costs, charges, and expenses mentioned and detailed in my said claim." In consequence of the arbitrators not having appointed any umpire, the two parties joined in an application to the Board of Trade to appoint an umpire. But before the 29th of April Mr. Bradshaw requested them to appoint a barrister, as many points of law were likely to arise on the reference. The company afterwards made a separate request to the arbitrators to appoint an umpire; and, they having neglected to do so for seven days, made another application to the Board of Trade, who, on the 17th of May 1847, appointed Mr. Powell (who was clerk to the Waterloo Branch Company and a surveyor) as umpire. On the 27th of May the two arbitrators and the umpire made the declarations as required by section 33 of the Lands Clauses Consolidation Act. On the same day, the arbitrators and umpire went over the estate, accompanied by the surveyor and other persons brought

there by the company, and also by the claimant's surveyor. It was alleged in the affidavits, on behalf of the claimant, that after having viewed the premises, the umpire asked many questions, and heard observations made by persons who were not examined at the hearing, although remonstrated with, on the ground that it was unfair to the claimant for him to hear evidence not on oath, or to permit remarks to be made to his prejudice, and that the arbitrators and umpire ought, like a jury, merely to have the land shewn them by a surveyor on each side without any observations being made by either party (1). On the 5th of June 1847, the parties attended before the arbitrators and umpire, when witnesses were called for the claimant, who estimated his damages at 8,664*l.* for the land and premises required by the company, and the general damages by severance, subject to the lessee's and tenant's interest therein, the company having declined to take the whole ten acres mentioned in the claim, but confining themselves to two acres, ten perches, and the buildings. The hearing was postponed until the 9th of June, when the case of the claimant closed, and the company did not call any witnesses. On the 26th of July 1847, an award made by Mr. Powell, the umpire, was received by the claimant, assessing the compensation at 2,560*l.* The award stated that this sum was given by way of compensation for the absolute purchase of the fee simple in possession, free from incumbrances (except the tithe commutation rent-charge) of the lands taken, and also for the immediate possession thereof, and also for all damage by reason of severing or otherwise injuriously affecting the lands of the claimant.

*Sir J. Jervis (Attorney General), Sir F. Kelly, and Cowling*, shewed cause (2).—There is a preliminary objection to this rule. The award of the umpire has not been made a rule of court, but only the submission to the two arbitrators. There is, therefore, no proper submission to the umpire before the

(1) The affidavits in answer explained that the observations and questions related only to the situation and character of the land and not to the value.

(2) May 4, before Lord Denman, C.J., Patteson, J., Wightman, J., and Erle, J.

Court. Section 36. enables the parties to make the submission a rule of court.

[WIGHTMAN, J.—It is clear that we have jurisdiction, as the act directs an umpire to be appointed on the original submission.]

Then as to the merits : first, it is objected that the damage by severance is not assessed separately ; but it does not appear that there is any such damage ; and besides, in the case of arbitration, no such separate finding is required. Section 49. applies only to the verdict of a jury, not to an award. This clause has also been held to be only directory—*Corrigall v. the London and Blackwall Railway Company* (3), *In re the London and Greenwich Railway Company* (4). Section 34. treats the sum to be awarded as one single sum. Secondly, it is said the award is not warranted by the claim, as Mr. Bradshaw has not immediate possession of the estate. This is answered by the claim itself, which does not shew that Baum and Low have more than tenancies at will. Besides, if Baum is tenant till 1850, the company cannot take possession without paying him ; and the claimant cannot object that he has compensation for more than he is entitled to, and it is nowhere alleged that he cannot give immediate possession. Section 37. cures all errors of form in the award. The third objection is included in the second. There is no ground shewn for the fourth and fifth objections, and the affidavits of the company quite answer them.

[PATTESON, J.—Nothing was said about the award being contrary to the evidence when the rule was moved for ; if there had, I should not have allowed it.]

Sixthly, the declarations were made in due time. The umpire clearly did so ; and the other two persons never acted as arbitrators for any other purpose than to enable the Board of Trade to appoint an umpire. The seventh and ninth objections raise the question as to the power of the Board of Trade to appoint an umpire. The arbitrators having made no declaration, amounted to a refusal by them to act, so as to give the Board of Trade authority under section 28. Section 23. will be relied on ; but the three months

within which the award is to be made runs from the date of the appointment of the umpire or arbitrator, as the case may be ; that is the time when the duty of making the award is cast upon them. It was stated when this rule was moved for, that Patteson, J. had decided that the time ran from the appointment of the last arbitrator.

[PATTESON, J.—My note of that case, *In re the Great North of England Railway Company* (5), shews that the award was made by the umpire more than three months after his appointment. It was not shewn that the appointment was brought to his notice more than three months before the award ; but I thought that made no difference.]

This very point has been expressly decided in *Skerratt v. the North Staffordshire Railway Company* (6), by the Lord Chancellor, who held that the time ran from the appointment of the umpire.

[PATTESON, J.—One point made in moving for the rule was, that twenty-one days having expired since the last arbitrator was appointed, the submission fell to the ground, and no umpire could be appointed.]

That is founded on section 31 ; but here the arbitrators have refused to act : and besides, the application by the claimant to appoint an umpire with the knowledge of the facts, waives any such objection. *Doe d. Turnbull v. Brown* (7), and *Cock v. Gent* (8) were cited. Lastly, there is no objection to the finality of the award.

*Butt and Hugh Hill*, in support of the rule.—As to the first point, the arbitrators are to discharge the same duties as a jury, and, therefore, ought to assess the sums in the same manner. Then as to Baum's lease, it clearly appears on the affidavit that he has a right to possession till 1850, and the award is, therefore, erroneous. Next, the umpire had no lawful authority to act, nor had the Board of Trade any power to appoint him. After the lapse of twenty-one days, the power of the arbitrators to award had ceased. By section 27. an umpire may

(3) 5 Man. & Gr. 219 ; s. c. 12 Law J. Rep. (N.S.) C.P. 209.

(4) 2 Ad. & El. 678 ; s. c. 4 Law J. Rep. (N.S.) K.B. 103.

(5) Bail Court, M.T. 1847.

(6) 2 Phill. 475.

(7) 5 B. & C. 384.

(8) 13 Mee. & Wels. 364 ; s. c. 16 Law J. Rep. (N.S.) Exch. 33.

be appointed by the arbitrators before they enter upon the matters referred to them, to decide "on any such matters on which they shall differ"; and by section 28. in case of their refusal or neglect, for seven days after request, to appoint an umpire, the Board of Trade is empowered to appoint; and his decision as to matters "on which the arbitrators shall differ" shall be final. Those clauses suppose that there are arbitrators in existence who are capable of deciding, but who differ in their opinions as to the matters referred. The fact that the parties have attended the umpire, does not get rid of the objection that he had no authority or jurisdiction whatever. Consent cannot give jurisdiction. Lastly, the umpire has admitted statements not made on oath. This is not denied on the affidavits.

[LORD DENMAN, C.J.—No collusion or improper conduct is charged: in fact, what you call receiving evidence not on oath, was not receiving evidence at all, but talking about some of the matters referred.]

The Court will not draw any line as to the degree of importance of the information received by the umpire—*Dobson v. Groves* (9).

[LORD DENMAN, C.J.—That was quite a different case.]

*Cur. adv. vult.*

Judgment was now delivered by—

LORD DENMAN, C.J.—In this case several objections were made against the award of the umpire. First, that one sum was awarded for damage and price, instead of a separate sum on each account. The answer is, that in respect of arbitration, there is no requirement in the statute for separate assessments; and that in respect of verdicts upon inquiries, such requirements as are in s. 49. of the present statute are directory, and not conditional—*In re London and Greenwich Railway Company, Corrigan v. London and Blackwall Railway Company*. Secondly and thirdly, that the award assumes the claimant to be in possession. The answer is, that such assumption if actually made is in his favour and to his advantage, and therefore no matter of complaint for him. But it does not appear clearly that any such assumption

was made. The expression "fee simple in possession" in the claim is used in contradistinction to "fee simple in reversion or remainder." The compensation given can only be taken to be in respect of what was claimed; and if the tenants have any claim in respect of the actual possession of the land, their remedy is against the company, and not against the owner of the fee. Fourthly, fifthly and eighthly, that the umpire received statements not on oath, and that he decided contrary to the evidence, and that the award is not final. But the proof of these assertions fails, and with respect to the fifth objection, even if the decision had been contrary to the evidence, that would not be any ground for the interference of this Court. As to the ninth, sixth and seventh objections against the appointment of an umpire by the Board of Trade, the time of his declaration and the time of making his award, the facts appear to be, that the company appointed their arbitrator on the 23rd of March 1847, and the claimant his on the 6th of April; these arbitrators did not appoint an umpire or enter on the matters referred, and both parties before the 29th of April joined in applying to the Board of Trade to appoint an umpire. On the 29th of April the claimant objected to the appointment of any umpire not a barrister. The company afterwards made a request to the arbitrators, and after seven days another application to the Board of Trade, who, on the 17th of May appointed a surveyor to be the umpire; and he made his declaration on the 27th of May, and his award on the 26th of July.

Upon these facts the objections are, that the appointment of an umpire must be completed within twenty-one days, and the award of the umpire made within three months after the appointment of the arbitrators; that their appointment was complete on the 6th of April, and that consequently the appointment of the umpire on the 17th of May, and the making of the award on the 26th of July, were too late. But it appears to us, that the powers given for arbitration continue for three months after the arbitrators are appointed, and are determined then only by sect. 23. enacting that the question shall be settled by a jury, if, when the matter shall have been referred to arbitration, the arbitrators or their umpire

(9) 6 Q.B. Rep. 637; s.c. 14 Law J. Rep. (N.S.) Q.B. 17.



shall for three months have failed to make their or his award, or if no final award shall be made. That the 31st section, providing that the umpire shall determine where neither of the arbitrators refuses or neglects to act, and they fail for twenty-one days from their appointment to make their award, operates only to take from the arbitrators the power of making an award, and to vest that power in the umpire, but not to render void the submission to arbitration, and the other powers incidental thereto, such as the appointment of an umpire. The statute contemplates three cases where a single arbitrator is to award, and in each of those cases he has three months for the purpose, viz., where a single arbitrator is originally appointed under s. 25, or a vacancy is left unsupplied under s. 26, or one of the two refuses or neglects to act under s. 30. It is to be observed, that the umpire cannot be brought into action in either of these cases. Then s. 31. provides for two arbitrators acting and failing to award; if they so fail for twenty-one days, and do not extend their time, the power to award is taken from them and vested in such umpire as is duly appointed under the other provisions of the statute, which are not affected by this section. The incapacity to make an award has no effect upon the power given to the arbitrators under s. 27, and to the Board of Trade on their default under s. 28. to appoint a new umpire in case of the death or failure of the first; and we see no reason why the same incapacity to award should have any effect upon the powers given for appointing the original umpire. If the construction contended for by the claimant is correct, it might happen that at the end of twenty-one days the power to award might cease, and the power to resort to a jury still be suspended for the residue of three months, which would be a delay without purpose. On these grounds, we have come to the conclusion, that the appointment of the umpire was valid. There appears no foundation for the objection, that the umpire did not make his declaration in time, as he was appointed on the 17th of May, and made it on the 27th, before he entered on the matters referred. The remaining objection is, that the award of the umpire is too late, there being more than three months between the appointment of

the arbitrators and his award. But we find it decided in *Ex parte Skerratt v. the North Staffordshire Railway Company* that the three months for the umpire commences from the duty devolving upon him. In this decision we fully concur, and as this award of the umpire was made within three months from the duty devolving upon him, and indeed within three months from his appointment, it is not too late. The rule, therefore, must be discharged with costs.

*Rule discharged.*

1848. } MASON v. LAMBERT.  
July 12. }

*Clergy—Dilapidations, Repair of—Ecclesiastical Livings.*

*A perpetual curate (not removable at the will of the donor or patron) possessed of a house and lands in right of his curacy, is bound to keep the same in repair. Therefore, an action for dilapidations is maintainable by the new incumbent against his predecessor in the curacy for leaving such house or lands out of repair.*

Case. The declaration stated that by the law and custom of England hitherto used and approved of, all and singular the rectors, vicars, and other incumbents of ecclesiastical livings and benefices in this kingdom, not being incumbents removable at the will or pleasure of the patrons or donors of such livings and benefices, whereunto do belong any house or houses or other buildings, are bound and ought to repair, support, and sustain all and singular the houses and other buildings of and belonging to their respective rectories, vicarages, or other ecclesiastical livings or benefices, and to leave the same so repaired, supported, and sustained to their successors. That the curacy of Mar- rick, in the county of York, is a perpetual curacy and ecclesiastical living, and perpetual cure and benefice, whereunto do belong a house and certain, to wit, twenty other buildings, and the said curacy is within the diocese of the Bishop of Ripon. That the incumbent for the time being of the said curacy is not removable at the will or pleasure of the patron or donor thereof.

That the defendant heretofore, to wit, on the 1st of January A.D. 1840, was duly nominated and licensed to the said curacy, and then became and was and thenceforth down to the time next hereinafter mentioned, continued to be and was the true and lawful curate and incumbent of the said curacy, and the said defendant during all that time was seised in right of the said curacy, of and in a certain messuage, to wit, a house called Bank House, and of and in divers, to wit, twenty other buildings, and of and in divers, to wit, five gardens, and of and in divers, to wit, fifty acres of land, situate, lying, and being in the parish of Gunton, in the said county of York. And the said defendant, being such curate and incumbent, and so seised as aforesaid, afterwards, to wit, on the 1st of January 1847, freely, and in due form of law, resigned the said curacy to Francis Morley, who then was, and ever since has been, and still is, the true and lawful patron and donor of the said curacy. And the said Francis Morley afterwards, to wit, on the day and year last aforesaid, accepted the said resignation, and thereupon, to wit, on the same day and year last aforesaid, the said Francis Morley then being the true and lawful patron, and having the donation of the said curacy, in due form of law nominated the said plaintiff to be curate of the said curacy; and the said plaintiff being so duly nominated to the said curacy, was afterwards, to wit, on the day and year last aforesaid duly licensed by the Right Reverend Father in God, Charles Thomas Lord Bishop of Ripon, to perform the office of curate of the said curacy. And the said plaintiff thereby and by means aforesaid, then and there became and was, and ever since has been, and still is, the curate and incumbent of the said curacy, and the next successor of the said defendant of and to the same. And the plaintiff in fact saith, that at the time of the resignation by the said defendant of the said curacy as aforesaid, the said messuage and buildings and the fences of the said gardens and lands were, and that the same still are, out of repair and greatly dilapidated, ruinous, broken, and in great decay for want of due repairing thereof, and that the same were so left by the said defendant out of repair and greatly dilapidated, ruinous, broken,

and in great decay at the time of his said resignation.

To this declaration there was a special demurrer and joinder therein; but the argument was restricted to the general question of liability to keep in repair.

*Addison* (27th of June), for the defendant, contended that there was no authority to shew that a perpetual curate, as such, was liable to an action for dilapidations at the suit of his successor. The action for dilapidations is sustainable by the common law of England. Perpetual curates originated after the time of memory; their liability, therefore, could not arise by immemorial custom. At common law curates had no successors, and were not corporations. Where there is a perpetual curate the repair of the church devolves on the lay rector, as pointed out by Coleridge, J., in giving his judgment in *Doe d. Richardson v. Thomas* (1). A perpetual curate is not seised in right of his church: a perpetual curate is neither instituted nor inducted, which are necessary to confer the temporalities. This declaration, indeed, avers that the defendant was seised, but that is put as a conclusion of law, for it is not shewn how he was seised. A perpetual curacy is not a living or benefice. The impropiator is to be sued, which prevents any inconvenience. The impropiator is the owner of the rectory; the curate his curate, but not removable.

The argument on both sides is much abridged, on account of its being so fully gone into in the judgment of the Court.

The following books and cases were cited:—*Gibson's Codex*, 819, 2 *Burn's Ecc. Law*, 55, b, *Duke of Portland v. Bingham* (2), *Browne v. Ramsden* (3), *Price v. Pratt* (4), 1 *Burn's Eccl. Law*, tit. 'Benefice,' 155, 2 *Burn's Eccl. Law*, tit. 'Curate.' *The Constitution of Othobon*, A.D. 1268, 2 *Burn's Eccl. Law*, tit. 'Donative,' 223, 1 *Gibson's Codex*, 715.

*Manisty*, for the plaintiff.—It is not necessary to shew that the liability existed before the time of legal memory. Vicarages, themselves, are generally within memory. All spiritual persons holding lands not re-

(1) 9 Ad. & El. 556; a. c. 8 Law J. Rep. (n.s.) Q.B. 145.

(2) 1 Hag. Cons. Rep. 157.

(3) 8 Taunt. 559.

(4) Bunbury, 273.

movable at will, are liable to repair. If the benefice were created within memory, the custom would attach. But little can be inferred from curates not being mentioned in the provincial constitutions in express terms, for although not so mentioned, "prebends" are liable to repairs. The important constitution is that of *Othobon*, A.D. 1268. The words used are "Universi clerici." Curates are included under those general words. If it be denied that the estate was held in right of the incumbency, the defendant should so plead, and raise the question that he was not seised. The declaration states that the perpetual curacy was a benefice to which a house belongs; therefore this living must have been made a corporation in some way. There is no reason why a different law should be applicable to perpetual curacies than is applicable to rectories and vicarages.—He cited, besides the authorities above referred to, *Digge's Person's Counsellor* (5), 2 *Burn's Eccl. Law*, 149, *Lyndwood's Glossary*, 112, 13 *Edm. c. 10*; *Wise v. Metcalfe* (6), *The Attorney General v. Breton* (7), 1 *Geo. 1. sess. 2. c. 10. s. 4*, *Radcliffe v. D'Oyly* (8), *Bird v. Rolph* (9).

*Addison*, in reply.—If the liability of the perpetual curate depend on the fact that the curacy has been augmented, then that fact should have been averred. A traverse of the seisin in this declaration would be rather a traverse of a conclusion of law than of fact. As to the liability of a vicar, that is not a parallel case, as the vicarage endowment is something carried out of rectorial estate. The endowment was, at one time, a part of the rectory. The argument that this is not a beneficed living has not been touched.

*Cur. adv. euit.*

LORD DENMAN, C.J. now (July 12) delivered the judgment of the Court.—In this case the plaintiff is the present holder of the perpetual curacy of Marrek, the defendant his next immediate predecessor; and the action is brought to recover damages

for dilapidations. The declaration is demurred to specially; but the main question on the argument was whether the law of dilapidations applies in regard to a benefice, if this may be so called, of the description and with the incidents which are particularly stated in this declaration. The curacy is described as a perpetual curacy, and an ecclesiastical living, "whereunto do belong a house and certain buildings," and the incumbent is not removable at the will of the patron. The defendant became curate by the nomination of the patron, and was licensed to perform the office by the bishop of the diocese, and he ceased to be curate by resignation to the patron and donor. Further, it is alleged that the defendant, while incumbent, "was seised, in right of his curacy, of and in the house, buildings, and land in question." This allegation, however, is so much more a conclusion of law from the preceding statement of facts, than a mere fact, that it cannot be taken as admitted by the demurrer; and in one view of the case it may be of main importance to consider whether the allegation is warranted by the premises apparent in the declaration. The curacy is not stated to have been augmented by the Governors of the Queen Anne's Bounty, under 1 *Geo. 1. sess. 3. c. 10*.

In order to shew that the action would not lie under these circumstances, the nature of perpetual curacies and their probable commencement since the time of legal memory, the interest which the curate takes in any endowment of his church, and his incapacity of taking anything in succession, were much insisted on by the defendant, it being assumed rather than proved that some seisin of the church endowments in a corporate character was a necessary condition both to the maintenance of the action and the liability of the defendant. But upon consideration of the authorities cited, and of the principle on which the action is maintainable, in any case we think this assumption cannot be supported. The principle is stated by Willes, C.J., in the case of *Sollers v. Lawrence* (10), and whether against the predecessor in his lifetime, or his personal representative after his death, it is this, that the maintenance of the houses,

(5) 1 *Wms. Saund.* 216, A, note a.

(6) 10 *B. & C.* 299; *as* 8 *Law J. Rep.* K.B. 126.

(7) 2 *Ves. sen.* 425.

(8) 2 *Term Rep.* 630.

(9) 2 *Ad. & El.* 773; *as* 2 *Law J. Rep. (N.s.)* K.B. 99.

(10) *Willes*, 421.

buildings, and other premises belonging to the benefice is a duty which the law casts on the incumbent, because he enjoys the benefit. If he neglect to perform it he is guilty of no civil tort in his lifetime to any one—not to himself, of course, the present occupier—not to an unknown successor, in whom is no interest—not to the patron, in whom the common law recognizes no such personal interest in the lands, goods, and chattels of the church of which he is patron, that any action will lie for him against the incumbent for spoils or waste, actual or permissive. Further, if the incumbent were guilty of a tort, the action for it would have died with him, and would not have survived against his creditors at the time when this mode of proceeding was first sanctioned in the common law courts. It is true this last remark does not apply in a case between predecessor and successor, but it has never been suggested that the character or foundation of the action is different in this case from that in which it is brought against the executor. It is indeed an anomalous action, which did not obtain a settled allowance in our courts till after the case of *Jones v. Hill* (11), and no judgment would seem to be of less authority in itself than the one there pronounced. C. J. Pollexfen was strongly against it; the Court inclined to his opinion; it was ordered for further argument; then the Chief Justice and Ventris being dead, Powell and Rokesby gave judgment for the plaintiff. However, it is now unquestionably maintainable; but with reference to the question before us, it is proper to bear in mind these circumstances, and also that, although it is usual to commence the declaration with a recital of the custom, as if it were some special custom, casting the obligation of repair on incumbents, it is clear that the custom so alleged is the common law of England—*Wyse v. Metcalf*, though a concurrent remedy against the executors has always existed for the succession in the Courts Christian—*Fitz. N.B.* 'Consultation,' 51 b. This also is important, because a different rule of interpretation will be applied to a custom parcel of the common law, and a special custom in derogation of it.

It is not difficult to suggest a reason why the precedents usually allege the custom in terms: the canonists, it is known, often usually speak of the common law with reference to ecclesiastical matters as a custom, as in the case of the liability of the parishioners to repair the body of the church; and as this action was conversant with ecclesiastical subjects, and probably grew out of and was modified by the canon law, its language may naturally enough have been adopted. It will not, then, be conclusive against this action if it were to be conceded, either that in the precedents, which is still the custom, perpetual curates appear not to have been mentioned, or that it is now brought for the first time. The latter circumstance existed in the case of a prebendary so late as 1788, when the case of *Radcliffe v. D'Oyly* was decided; and though stress was there laid, and naturally enough, on the fact, that prebendaries were named in the recital of the custom in ancient precedents, yet that was clearly not the only ground on which the judgment rested, and the Court attached little importance to the want of any previous instance. Indeed, wherever a Court is dealing with an action brought on the common law, it looks rather to the principle than the instance: *ubi cedem ratio ibi idem jus*. As to the language of the precedents, it is not to be assumed that the term "vicarii," which is always to be found in them, does not include a perpetual curate, if irremovable at the will of the rector, and endowed. We do not know how such a functionary could be better described than by the general term "vicarius;" and if the origin of the perpetual curacies and vicarages be considered historically, it would seem to be the very term which ought to be used. The shortest, and at the same time clearest, account of appropriations to which we can refer will be found in Sir W. Scott's judgment in *The Duke of Portland v. Bingham*. Under one species the curate was *ad nutum removabilis*, and the curacy without permanent endowment. This was a great grievance; and the ecclesiastical authorities struggled with the religious houses, in whose favour the abuse existed, to put it down. Not to refer to papal decrees on this subject, the language of our own legatine and pro-

(11) 3 Lev. 268.

vincial constitutions is clear to shew, that the person deputed to perform the spiritual duties of the cure was known only by the name of "vicarius," and that the present distinction of institution and induction, as necessary to a vicar, were not originally known. Thus, the constitution of *Othoban*, 52 Hen. 3. 1268, found in *Gibson* 715, is expressed thus: "Universi religiosi exempti Cistercienses et alii quicunque, qui ecclesias in propriis usus habent, si vicarii non sunt positi in eisdem, infra sex mensium spatium vicarios præsentare diocesanis, qui eos instituere debeant, non omittant: quibus sufficienter pro facultate ecclesiarum studeant religiosi assignare portionem; aliquin diocesani ex tunc id facere studeant diligenter." The word "instituere" here has not its present technical and limited meaning, as appears from the preamble, where, in reciting the grievance, it is said that some religious houses either left the appropriated church *vicaria destitutam*, or if by chance *vicarium in ed instituerint* gave him only a miserable and inadequate portion of the fruits. "Instituere," therefore, in this constitution, means only to appoint, not to perform the episcopal act of institution; and the curate whose miserable provision was sought to be remedied was called *vicariss*. In confirmation of this, we may notice from *Gibson*, 717, an extract from *Extravagantes*, l. i. t. 10. c. 2, in which Pope Clement III. complains of the religious houses, with regard to their appropriated churches, that they "vicarios in eis pro sua institunt et destituunt voluntate," where the meaning clearly is, "appoint and remove." When the legislature interposed in aid of the episcopal power to prevent the abuse, in 15 Ric. 2. c. 6, and 4. Hen. 4. c. 12, the words used to express curate and curacy were "vicar" and "vicarage." In the latter statute there is an express prohibition that *any religious be in any way made vicar in any appropriate church*; that is, that no one of the body, no monk of the house, should be sent as before from the house to discharge the duty as vicar, but that some secular person should be ordained vicar perpetual. Indeed, in the times of which we are speaking, the term "curatus" would have had in England, as it still has in Roman Catholic

countries, a much wider meaning than that which a curate or perpetual curate now bears in England,--such a meaning as our liturgy still preserves in our church when it speaks of "bishops and curates." Whether, then, be the weight of the objection that perpetual curates are not in terms named in the precedents reciting the custom, it is not made out in fact, we think, that they are not impliedly included. Reverting, then, to what we have laid down as the principle on which the action is founded, the proper matter for inquiry is, not, *agere*, and solely whether, upon resignation or death of a perpetual curate, this action may be brought for dilapidations permitted, but also whether, during his incumbency, it was his duty to repair; whether he was then amenable to the same proceedings in the ecclesiastical court, to compel the repair, or punish the non-repair, as any rector or vicar. It would seem on principle that on the one hand we could hardly hold this action not maintainable, without also holding that he was not bound to repair during incumbency; for the action being founded on duty, to deny the action would seem to deny the duty; and on the other hand, if we should find that the perpetual curate has the same duty, *et* on him which a rector or vicar has, we arrive at the same foundation for the action in both cases. And it will be hard to resist the conclusion that when there is the same foundation and the same reason, the common law gives the same action.

This inquiry would naturally direct us to authorities in ecclesiastical law and practice in ecclesiastical courts; in them we should expect to find the clearest account of the duties of the clergy in this respect, and the most authoritative enforcement of them. But we must not be surprised if we should find these sources scanty in this particular matter, considering the original poverty of most perpetual curacies in the greater number of instances; the probability that in a very large proportion of instances, there was no residence house, nor endowment of land, and that a great number have passed into vicarages or presentable benefices in the course of time, by one or other of the modes which the common and statute law have provided for that purpose. Some

information, however, may be gleaned from constitutions and decrees, which is the more valuable, as it seems that the duty was always founded on the perception of profits or the enjoyment of the buildings or lands. Thus, a constitution of Edward, 21 Hen. 3. 1255, to be found in Lynd. and 3 Tr. 27, and Gibson, 751, after providing for a deduction to be made from the ecclesiastical goods of a deceased rector who shall leave the church houses in decay, goes on thus, "Idem statuimus circa illos vicarios, quod, solvendo modicum pensionem omnes ecclesie habent proventus. Nam cum ad pensionem (that is, the reparations) teneantur, tunc portio deducta satis potest et debet inter debita computari." The Glossary of Lyndwood on "illos vicarios" is, "non ergo circa omnes sed illos dantur de quibus sequitur;" shewing that the duty arose out of and accompanied the ability and the enjoyment of means. Again, the constitution of Othobon, 32 Hen. 3. 1268, speaking of the avarice of those who, receiving much from their churches and benefices, neglected to repair or restore the houses belonging to them, directs that all clerks (universi clerici,) should repair and be admonished for that purpose by their bishops and archdeacons—Gibson, p. 751. And in a commission for Thomas Arundel, Archbishop of Canterbury, issued in 1402, to be found in Gibson 1469, "Satis nota est preceptoribus fructuum reparari, non solum jure civili et canonice dictat auctoritas, sed et sacri eloqui pagina instruit ac constitutiones nostre provinciales penali quadam adfectione disponunt." In all these instances, without making any distinction, maintenance and reparation of ecclesiastical buildings are treated as a duty growing out of occupation and enjoyment. The term "satis nota," used in this commission, is said from the language of legal instruments among the Romans, and imports that the occupier, as tenant, is to keep in proper repair. See Calvo's *Lexicon Juridicum*, and *Facciolati*, in *verbo*. The use of it, therefore, here is significant. It was said by Mr. Addison that the constitution of Othobon, before referred to, cast the duty on the appropriator, but that is a misunderstanding of the passage to be found in Gibson, p. 715, which applies not to the

houses of the curate or vicar, but the old rectorial mansion, in which bishops or other superiors visiting officially had been and were still to be received. The Injunctions of Edw. 4. 1547, which directed that a fifth part of the revenue of benefices should be devoted to the repair of churches, chapels, or mansions belonging to them were directed to all proprietors, parsons, vicars, and clerks: vicars by this time had become a more limited term, and therefore perhaps the general word "clerks" was added. It appears to us upon the whole of this reasoning and these authorities, that the case of a perpetual curate who is not removable by his patron, and to whose curacy buildings or lands belong, is brought within the principle on which the action for dilapidations is maintainable if he holds such buildings or lands of such curate and as annexed to his curacy; and this is, we think, the conclusion fairly to be drawn from the facts stated in the declaration. If the buildings and lands belong to the curacy, his interest in them is in right of the curacy, and if he cannot be removed from the curacy at the will of the grantor, he has a freehold interest, and may properly allege that he is seised. The case of *Brown v. Ramsden*, cited by Mr. Addison, is entirely reconcileable with this view. There a vicar alleged himself to be seised of lands in right of his vicarage, whereas they appeared to be copyhold lands held by the Master and Fellows of Trinity College in trust to receive and pay over the rents and profits, after discharging certain outgoings, to the vicar. Of course the allegation was not proved. The case of the *Curate of Orpington* (12) proceeded entirely on the assumption that the curate was removable at the will of the patron. Nor is it needful for the plaintiff to allege how he became seised of the buildings and lands, any more than it would be for a vicar, for there is nothing in the legal character of a perpetual curacy as such which any more excludes an endowment in tithes or land at its first creation than in that of a vicar. In both cases the licence of the ordinary was necessary, in the first instance, to the creation, and the licence ought, in every

(12) *Powly v. Wiernan*, 3 Keble, 614.

case, to have been clogged with the condition of a competent allowance for the maintenance of him who was to perform the spiritual service of the church. Of course it might in one case as well as the other have stipulated for an endowment by a portion of the glebe land and a dwelling. In the absence of any specific statement of the manner how seised, we think the legal construction of the allegation is, that the curacy was lawfully endowed of the buildings and lands by the original ordinance and licence for creating it.

We think, therefore, our judgment should be for the plaintiff.

*Judgment for the plaintiff.*

The following cases will appear in the Volume for 1849 :—

BELL *v.* LORD INGESTRIE.

BOWERS *v.* NIXON.

DOE *d.* EGREMONT *v.* LANGDON.

FLANDERS *v.* BUNBURY.

HILTON *v.* LORD GRANVILLE.

SIMPSON *v.* ROBINSON.

THE QUEEN *v.* ALDBOROUGH.

*In re* WICKHAM *v.* LEE.

*In re* WINSOR *v.* DUNFORD.

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END OF TRINITY TERM, 1848.

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ADAM SMITH & CO. PRINTERS

**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**Court of Common Pleas,**

**BY**  
**THOMAS SANDERS, Esq.**  
**AND**  
**ALEXANDER JAMES JOHNSTON, Esq. BARRISTERS-AT-LAW.**

**AND IN THE**  
**Exchequer Chamber**  
**UPON WRITS OF ERROR FROM THE COURT OF COMMON PLEAS.**

**BY**  
**DAVID POWER, Esq. AND EDWARD WISE, Esq.**  
**BARRISTERS-AT-LAW.**

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**11 & 12 VICTORIÆ.**

<b>MICHAELMAS TERM . . . . .</b>	<b>1</b>
<b>HILARY TERM. . . . .</b>	<b>106</b>
<b>EASTER TERM. . . . .</b>	<b>190</b>
<b>TRINITY TERM . . . . .</b>	<b>281</b>





# CASES ARGUED AND DETERMINED

IN THE

## Court of Common Pleas.

MICHAELMAS TERM, 11 VICTORIÆ.

1847. } In the matter of MARY JANE  
Nov. 4. } DALY.

*Baron and Feme—Acknowledgment by married woman, abroad—Certificate.*

*An acknowledgment by a married woman was taken before Commissioners in India, pursuant to the provisions of 3 & 4 Will. 4. c. 74, and an affidavit to that effect was sworn before a magistrate having competent authority. A person describing himself as "Major General" certified that the affidavit had been so sworn, and that the authority was competent, and stated that there was no notary at the place. On affidavits of the General's handwriting and rank, the Court held the certificate sufficient.*

On the 17th of May 1847, Williams, J. granted a special commission under the 3 & 4 Will. 4. c. 74, to four officers of Her Majesty's 84th regiment of foot, to take the acknowledgment of Mary Jane, the wife of Barnard Daly, drum-major of the regiment, to a deed of conveyance. At the time when the commission issued, the regiment was at Madras; but when it arrived in India, the regiment had moved to Secunderabad, which is distant 300 miles from Madras. The acknowledgment was taken before two of the commissioners, who duly signed the certificate; and one of them, C. Franklin, made the usual affidavit of having taken the acknowledgment, which was sworn at Secun-

derabad before James Robertson, one of Her Majesty's Justices of the Peace and superintendent of police for the cantonment of Secunderabad. The affidavit was also taken in the presence of Lovell Benjamin Lovell, Major-General commanding the Hyderabad subsidiary force, who signed a certificate that C. Franklin was sworn in his presence to the truth of the affidavit, before the said J. Robertson, also that J. Robertson was a Justice of the Peace for the cantonment, and as such qualified to administer oaths, and that the names of C. Franklin and J. Robertson, subscribed to the affidavit, were of their handwritings respectively. In signing this certificate, General Lovell described himself as "Major-General commanding the Hyderabad subsidiary force, where there is no notary."

The commission and the certificate having been returned to England, an application was made at the acknowledgment office to file the certificate; but it was refused, on the ground that there was no evidence that there was no notary within a reasonable distance of Secunderabad.

*Channell, Serj.* (Nov. 4.) moved that the officer of the Court should be directed to receive the acknowledgment.

WILDE, C.J.—The reason for requiring a certificate in cases of this sort is, to preserve the necessary decree of security as to the validity of the acknowledgment. The Court,

as it cannot have the means of satisfying itself of the competency of the person professing to act, upon the face of the instrument itself, adopts the certificate by a notary, whose office is of a universal character, that the party administering the oath was competent to do so, according to the laws of the country in which he acted. A difficulty arises when there is no notary in the place where the acknowledgment is taken. In the present case, that which is offered as a substitute is the certificate of a person described as acting in the capacity of major-general in the army. The position and rank of such a person affords a greater security and sanction than those of a notary; but on the present occasion there is no affidavit that the certificate in question is signed in the handwriting of the officer whose name it bears, or that he holds the rank which he professes to hold. The Court, therefore, acting in support of the rule which it has laid down, but adopting a new instance of discretion, can hardly hold the document now before it sufficient; but on proof, by affidavit, of the handwriting of the General, and that he holds the rank in question, the acknowledgment may be received by the officer of the court (1).

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[IN THE EXCHEQUER CHAMBER.]

1846. } CLIFT AND ANOTHER v.  
Feb. 4; } SCHWABE, ADMINISTRATOR,  
June 16.\* } TRIX, &c.

*Life Insurance—Policy, Construction of*  
—“Commit Suicide”—Responsible Moral Agent.

*To an action upon a policy of insurance effected by S. on his own life, expressed to be subject to a condition that the policy should be void if the assured should commit suicide, or die by duelling or the hands of justice, the defendants (the insurance office) pleaded that S. did commit suicide. It was proved that S. died by reason of having*

*taken sulphuric acid voluntarily, and for the purpose of killing himself, being at the time of unsound mind.*

*The Judge directed the jury that to find for the defendants, the jury must be satisfied “that S. died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act so as to be a responsible moral agent.”*

*On a bill of exceptions it was held, in the Exchequer Chamber (by Parke, B., Alderson, B., Patteson, J., and Rolfe, B.), that the direction, as to the necessity of S. being a responsible moral agent, and capable of distinguishing between right and wrong was erroneous, the terms in the policy, “commit suicide,” including all cases of voluntary self-destruction, whether felonious or not (dissentientibus Pollock, C.B. and Wightman, J.)*

Error from the Court of Common Pleas.

Assumpsit, by the plaintiff below, as administratrix of Louis Schwabe, deceased, on policies of insurance, granted by the defendants below, as directors of the Argus Assurance Company, to the said Louis Schwabe, upon his own life. The policy, as set out in the declaration, contained the usual proviso that it should be subject to the several conditions and regulations thereupon indorsed, so far as the same were applicable, in the same manner as if the same respectively were repeated and incorporated in the policy. The conditions and regulations were then set out, of which it is only necessary to state the following:—“Second, Policies will become void if the parties whose lives have been assured shall die on the high seas, except in passing in decked vessels or in steam-boats from one part of the United Kingdom of Great Britain and Ireland to another part of the same kingdom, and to and from the islands of Guernsey, Jersey, Alderney, Sark, and Man; and also in time of peace in king's ships, and packet or passage vessels, or steam-boats, from or to any part of Great Britain, to or from any part of the continent situate between Hamburg and Bordeaux, both inclusive, or shall go beyond the limits of Europe, or being or becoming military or naval men shall be called into actual service, unless in each case of going upon the seas

(1) Affidavits to this effect having been subsequently filed, the Court, on the motion of Channell, Serj., directed that the acknowledgment should be received by the proper officer.

\* The publication of this case has been unavoidably delayed.

or beyond the limits of Europe, or into actual service, permission shall have been granted by the board of directors, and such premium or premiums on account of the extra risk be paid as shall be required by the board of directors. Sixth, Every policy effected by a person on his or her own life shall be void if such person *shall commit suicide, or die by duelling or by the hands of justice*; but if any policy effected by a person on his or her own life shall afterwards be actually assigned to any person or persons by way of mortgage, or for the benefit of any creditor or creditors, or charged with any sum or sums for the benefit of any mortgagee or mortgagees, or creditor or creditors, and the person on whose life the assurance shall have been effected shall commit suicide, or die by duelling or by the hands of justice, then the policy so assigned or charged shall not be void to the extent of the principal sum or sums and interest secured by the assignment or charge; or if any policy effected by any person on his or her own life shall afterwards be absolutely assigned to a purchaser for valuable consideration in any transaction (except that of settlement upon or after marriage or any other occasion), and the person on whose life the assurance shall have been effected, shall commit suicide, or die by duelling or by the hands of justice, then the policy so assigned shall continue in full force notwithstanding such suicide or death." Averment of mutual promises, payment of the premiums down to 1844, and that while the policies were in force, to wit, on the 11th of January 1845, the said L. Schwabe died, and that the plaintiff was his administratrix.

The defendants below pleaded, that after the making of the said several policies and the said promises in the declaration mentioned respectively, to wit, &c., the said Louis Schwabe *did commit suicide*, whereby the said policies respectively became void. The replication traversed this allegation, upon which issue was joined.

The cause was tried, at the Liverpool Summer Assizes, 1845, before Cresswell, J., when a bill of exceptions was tendered to the ruling of the learned Judge, which in substance stated, that the defendants gave evidence in support of the above issue, that the assured, L. Schwabe, on the 10th of January 1845, voluntarily took and swal-

lowed a quantity of sulphuric acid, sufficient to occasion death, for the purpose of killing himself, and that he died on the following day by reason of the taking and swallowing of such acid as aforesaid; and the same witnesses, on cross-examination, gave evidence tending to shew that the said L. Schwabe, at the time when he took the sulphuric acid, was of unsound mind. The learned Judge directed the jury, "that in order to find the said issue for the defendants, it was necessary that the jury should be satisfied that L. Schwabe died by his *own voluntary act*, being then *able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent*. That the burthen of proof, as to his dying by his own voluntary act, was on the defendants; but, that being established, the jury must assume that he was of sane mind and a responsible moral agent, unless the contrary should appear in evidence." The counsel for the defendants excepted to the above ruling, and insisted that the jury ought to have been directed, as matter of law, that if the said L. Schwabe *voluntarily took the sulphuric acid for the purpose of destroying life*, being *conscious of the probable consequences* of the act, and having at the time of so taking it *sufficient mind to will to destroy life*, he had committed suicide within the meaning of the sixth condition of the policies. The jury found their verdict for the plaintiff below, with 5,140*l.* 13*s.* 9*d.* damages.

Judgment having been signed for the plaintiff below, a writ of error was brought by the defendants below, which was now (Feb. 4,) argued (1) by—

*Sir F. Kelly (Solicitor General)*, for the plaintiffs in error (2).—The question raised

(1) Before Pollock, C.B., Parke, B., Alderson, B., Patteson, J., Rolfe, B., Coleridge, J., and Wightman, J.

(2) The following were the points stated by the plaintiffs in error :—"That according to the true construction of the expression in the sixth condition, 'shall commit suicide,' if the assured by his own voluntary act put himself to death, intending at the time of committing the act to cause his own death, and being conscious that such would be the probable effect of the means employed by him for that purpose, the condition attached, and the several policies became forfeited, although at the time of so killing himself he might be of unsound mind and

by the present writ of error is one of great importance, and with the exception of *Borradaile v. Hunter* (3), and the cases there referred to, one upon which there is no precise authority. But that case need not be decisive of this question, as the words in the policy were there different from those in the present case; and the real point to be considered must be what is the meaning of the clause in the conditions of this office. The words "commit suicide" have no fixed legal meaning attached to them, and they must therefore be construed according to their ordinary acceptation among mankind, and with reference to the intention of the parties using them. "Murder" has received a known and fixed definition; but "suicide" is analogous to "homicide," and is the act of taking away life, which may be felonious or not, according to circumstances—3 *Inst.* 54. Applying that view to the present case, the question arises, whether one who puts an end to his own life, being at the time conscious of what is going on, so as to be aware that the act done will destroy life and intending to do so, but is under the influence of a high and overpowering excitement, can be said to commit suicide within the terms of this policy. And it is contended, that such ought to be the construction of this condition.

[POLLOCK, C.B.—In some offices, after such a clause as the present there is inserted another to the effect, that if the assured dies by suicide not being *felo de se*, the society may allow the amount due on the policy immediately before the death occurred.]

That is in favour of the larger sense of the word.

[ALDERSON, B.—The question is, whether the word means more than an intentional

incapable by reason of such unsoundness of mind of distinguishing between right and wrong, and that the jury ought to have been directed accordingly.

The defendant's points were:—That the charge of the learned Judge was correct and sufficient and proper for the direction of the jury, and that if the deceased died by his own voluntary act, being then of insane mind and unable to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent, he did not commit suicide avoiding the policies according to the provisos in that behalf therein respectively contained.

(3) 5 *Man. & Gr.* 639; *s. c.* 12 *Law J. Rep.* (N.S.) C.P. 225.

act of killing, or whether the idea of moral responsibility ought to be included.]

[POLLOCK, C.B.—*Borradaile v. Hunter* was a very different case from the present: there, many things were found by the jury; but here, we must take it on the Judge's charge.]

In that case, the jury negatived the fact of the assured being a responsible moral agent, and found that he was not capable of judging between right and wrong; and these are the very words adopted by the Judge in the present case. The argument of the plaintiffs in error is, that the being a responsible moral agent, with a capacity of judging between right and wrong, does not affect the present question, which is solely, did the assured do the act voluntarily and with a knowledge that it would destroy life?

[POLLOCK, C.B.—How can one who is not a responsible moral agent be said to do anything as his own act? or how can intention be predicated of any one who is not capable of judging between right and wrong?]

There is a difference between being a responsible agent and having the will under controul. In the present case, the party is responsible for these acts, because they are his own voluntary acts. The object of the office was to say, if you kill yourself we will not pay, and we will not inquire whether you killed yourself feloniously or not.

[POLLOCK, C.B.—If they had said that, it might be so.]

The expression used by Erskine, J., in *Borradaile v. Hunter*, "that the terms 'shall commit suicide' have been popularly understood and judicially considered as importing a criminal act of self-destruction, is not to be supported." *Garrett v. Barclay*, referred to in that case, is rather an authority against that position. In *Kinnear v. Nicholson* (4) the words were, "should die by his own hands," but it was agreed that the decision should abide the event of *Kinnear v. Borradaile* (4), where the words were "should commit suicide": the understanding therefore then was, that these two expressions were equivalent. Moreover, in

(4) Not reported, but cited in *Borradaile v. Hunter*.

the former of these two cases, the question was in fact decided by the verdict of the coroner's jury.

[ALDERSON, B.—If insanity takes away the intention of the act, and makes it as if it were an accidental act, the argument from the words "die by his own act" will not help you. May not a man have a partial intention according as his will is only partially perverted?]

If he has will enough to intend to destroy his own life, and mind enough to know that the act which he does will produce that result, and he does the act with that intention and that will, it is enough to avoid this policy without entering into any question as to the amount of perversion of the will.

[ALDERSON, B.—"Voluntary self-destruction" is tautology. Self-destruction of itself implies an act of the will.]

It will be said on the other side that the word "commit" involves the idea of a criminal act; but that is not so; it means nothing more than doing the act with intention.

J. Henderson, for the defendant in error.—If "suicide" necessarily imports crime, it is not disputed on the other side that the learned Judge's charge was correct; it comes then to the question of what does the word mean in this policy? The word is one of modern introduction, and is not found in the Bible.

[PARKE, B.—There is no such word as "suicidium" in *Facciolati* or any other Latin dictionary that I know of.]

One of the earliest instances of its being used is by Lord Hale—*Pleas of the Crown*, vol. i. ch. 31. p. 411. "First of self-killing. Felo de se or *suicide* is where a man of age of discretion and *compos mentis* voluntarily kills himself:" there it is expressly used as synonymous with *felo de se*. *Blackstone* also, 4 *Comm.* p. 189, uses the word as importing self-murder.

[ALDERSON, B.—It is quite clear that "suicide" includes *felo de se*: the question is, whether it is confined to it.]

In *Johnson's Dictionary*, "suicide" is defined as "self-murder; the horrid crime of killing oneself." Then, the word "commit" being used with "suicide" imports the deliberate exercise of the will. It is the same thing as if the words were "shall commit the crime of suicide." It is observ-

able, that the previous clauses of the policy include events dependent not merely on the intention of the assured: as "if he *shall die* on the high seas," "*shall die* by duelling or by the hands of justice;" but the word "commit" introduces the idea of an intention. As to the argument, that it is sufficient if the assured had mind enough to have an intention of destroying himself; there may be an intention not governed by reason, and the law means an intention influenced by the will.

[POLLOCK, C.B.—The law recognizes no degrees of non-capacity; if a man is *non compos*, he is beyond its reach in all cases. How can you predicate that one man who is *non compos* may have a will and another not? We are in fact using terms which are not strictly applicable to the supposed case. How can a madman be said to have a will?]

[ALDERSON, B.—A madman is exempted from punishment because he has no controul over his will. *Actio non facit reum nisi mens sit rea*.]

In the civil law there is a distinction between *furiosus* and *demens*, but the law of England is different in this respect.

[PARKE, B.—Surely there are degrees of insanity.]

[POLLOCK, C.B.—But there are no degrees of responsibility.]

In the summing up of Cresswell, J., in this case, he puts the test not merely of the deceased being able to distinguish between right and wrong, but adds, *so as to cease to be a moral responsible agent*. This arose from the opinion expressed by Tindal, C.J., in the answer given by the Judges to the questions proposed by the House of Lords in *M'Naughten's case* (5). It is therefore submitted, that the direction of the learned Judge at the trial was correct: if the office had intended to include all acts of self-destruction, it was their duty to have expressed that intention by clear words. This was a risk covered by the policy; it is as much an accident as if the deceased had died in consequence of a fall from his horse. *Borradaile v. Hunter* and *The Amicable Society v. Bolland* (6) bear out this view of the case.

(5) 8 Scott, N.R. 595.

(6) Selw. N.P. 1033, 10th edit.; s.c. 4 Bl. N.S. 194.

*Sir F. Kelly* was heard in reply.

*Cur. adv. vult.*

The Judges differed in opinion and delivered their opinions *seriatim* (June 16).

WIGHTMAN, J.—I am of opinion, upon the best consideration I can give to this case, that the direction of the learned Judge to the jury upon the trial of the cause was right, and that the deceased Louis Schwabe did not, under the circumstances found by the jury, commit suicide within the meaning of the exception in the policy of assurance upon his life. The exception or proviso in the policy is in these terms: "Every policy effected by a person on his own life shall be void, if such person shall commit suicide, or die by duelling or the hands of justice." The defendants below pleaded that Schwabe, whose life was insured by himself, did commit suicide, which was denied by the plaintiff in the action. The evidence was that the deceased voluntarily took poison in sufficient quantity to cause death for the purpose of killing himself, but that he was when he took the poison of unsound mind. The learned Judge told the jury, that to find a verdict for the defendants below they must be satisfied that the deceased died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent. To this direction a bill of exceptions was tendered, it being contended on behalf of the defendants that it was sufficient to entitle them to a verdict, if the deceased had sufficient mind to intend to kill himself, and to know that the poison would probably have that effect, and that he took the poison with that intent, though he might be unable to distinguish between right and wrong, or to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent. The question, therefore, is, whether by the word "suicide" as used in the policy, a criminal killing of himself, such as could only be committed by a responsible moral agent, was intended; for if it was, the direction of the learned Judge and the verdict of the jury were right; otherwise not. The term "suicide" has no technical or legal meaning; it is derived from the Latin, but the compound word "suicidium" from which

the English word is said to be derived, is not to be found in any Latin dictionary or glossary that I have met with. It is admitted that the word is not to be understood in the largest sense of which it is capable, as that would include an accidental or unintentional killing of himself. We must, therefore, consider the ordinary meaning of the word in the English language, and connect such ordinary meaning with the apparent object and intent of the proviso in the policy in which it occurs. In all the English books in which it occurs, legal or other, it is almost invariably used to denote a criminal act. In *Johnson's Dictionary* "suicide," when used as denoting an act, is said to mean "self-murder: the horrid crime of destroying oneself;" and when used as denoting a person is said to mean "a self-murderer." In *Webster's Dictionary* the same meaning is given, and so in *Rees's Cyclopædia* and in the *Encyclopædia Britannica*. *Blackstone*, in the 4th of his *Commentaries*, p. 189, uses the term "suicide" as meaning a *felo de se*. He says: "As the suicide is guilty of a double offence, one spiritual and the other temporal, the law has ranked it amongst the highest crimes." Innumerable instances might be given to shew that the word "suicide" is almost invariably used in the English language in a criminal sense, and that such is the meaning of the word in its general and ordinary acceptance. If that be so, is there anything in the policy or the terms of it to shew that it is used, in the proviso in question, not in the general and ordinary sense, but in another of which it is capable, though unusual? The word is used in a disqualifying proviso, by which, under certain circumstances, the insurance and the premiums paid are forfeited, and the benefit of the policy lost. The usual rule is to look strictly at the terms of such provisoes, and not to extend them beyond their ordinary meaning; but in the present case if the ordinary meaning of the term "suicide" were more uncertain than it seems to be, the terms used in the proviso itself in connexion with it tend to shew the sense in which the insurers, whose word it is, intended it should be used. The policy is to be void if the person "shall commit suicide, or die by duelling or by the hands of justice." The three excepted modes of death are classed together in one

exception or proviso, and two of them are unquestionably the consequences of crime; and if the maxim *noscitur à sociis* applies, it strongly tends to shew that the third is used in a criminal sense also. In *Borra-daile v. Hunter*, which was cited upon the argument, Mr. Justice Erskine, who agreed with the majority of the Judges, says, as one of the grounds for his judgment in the case, "when I find the terms 'shall commit suicide,' that have been popularly understood, and judicially considered as importing a criminal act of self-destruction, changed for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context that the parties used them in a more limited sense." And the Lord Chief Justice Tindal, in his judgment in the same case, says: "If the exception had run in the terms 'shall die by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a felonious suicide was intended thereby." I refer to these passages in the judgments of these learned Judges as shewing their understanding of the meaning of the term "suicide," when used in such an exception and in connexion with such other terms as occur in the present case. I forbear to speculate upon the probable object of the insurers in introducing such a proviso. It can hardly be because such modes of death as these excepted are events not to be calculated upon, for there is no doubt but that the probabilities of such events are as well calculable as any others; and moreover those modes of death are not excepted where the policies are upon the lives of others. It may be that the exception in case of suicide was introduced to meet the case of a person insuring his life with the intention of committing suicide in order to benefit his family, or it may be that the insurers were influenced by some higher motive, and wished to check such modes of death as those excepted. Either of these objects would seem to indicate that the word "suicide" was used in its ordinary sense, importing a crime. But as no satisfactory result can be drawn from such a speculation, it is better to judge of the case merely by the ordinary sense of the language used in connexion with the other

terms which are used along with it. Upon the whole, then, it seems to me that there is nothing in this case to shew an intention on the part of the insurers to use the word "suicide" in a more extended sense than that which is ordinarily and popularly attributed to it, and that, on the contrary, the context shews that it was their intention to use it in the ordinary and popular sense, and that they have so used it, and consequently that the direction of the Judge was correct, and that the defendant in error is entitled to judgment.

ROLFE, B.—The question in this case is very short, Louis Schwabe, in the year 1836, insured his own life for 999*l.*, in an office of which the plaintiffs in error were the directors, liable to be sued for money becoming due on the policies of insurance. The policy, by which the 999*l.* was insured, contained a clause in these words, "Every policy effected by a person on his own life shall be void if such person shall commit suicide, or die by duelling or the hands of justice." Schwabe died in 1845, and the defendant in error obtained letters of administration, and then sued the plaintiffs in error in an action of assumpsit for the 999*l.* secured by the policy. The plaintiffs in error pleaded, that Louis Schwabe did commit suicide, whereby the policy became void. On this issue was joined. The issue was tried, before my Brother Cresswell, at the Liverpool Summer Assizes, last year; and, on the part of the plaintiffs in error, witnesses were called to prove that Schwabe's death was caused by his having voluntarily, and for the purpose of killing himself, swallowed a quantity of sulphuric acid; and the same witnesses also gave evidence tending to shew that at the time of his so swallowing the said sulphuric acid Louis Schwabe was of unsound mind. My Brother Cresswell, in summing up the case to the jury, told them that in order to find the issue for the plaintiffs in error, they must be satisfied that Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent. To this ruling the plaintiffs in error have excepted, and we have, therefore, to say whether that ruling was right, and this depends on the meaning of the words in the



policy "shall commit suicide." If they mean shall destroy his own life under circumstances which will make him a *felo de se*, then the ruling was right; if they mean merely "shall intentionally kill himself," then the ruling was wrong. The word "suicide" is not, as it appears to me, a word of art, to which any legal meaning is to be affixed different from that which it is popularly understood to bear. The authorities referred to by the defendant in error, as shewing that "suicide" means the felonious taking away of a man's own life, do not at all bear out his proposition.

Lord Hale, indeed, in the 31st chapter of his *Pleas of the Crown*, vol. 1. p. 411, certainly speaks of *felo de se* and suicide as convertible terms, and defines both the one and the other as being where a man of the age of discretion, and *compos mentis*, voluntarily kills himself. But it appears to me plain, from the whole context of the passage in question, that Lord Hale did not understand that he was giving a definition of the term "suicide," except as it was often used to mean the same thing as *felo de se*; and this seems manifest from the fact, that what in the passage in question he calls "suicide" he, a few lines above, designates as *homicidium sui ipsius*. Now, there can be no doubt but that a man who takes away the life of another, commits homicide, even though the act was justifiable, or may have happened entirely *per infortunium*, and was, therefore, not criminal at all—see *Hale*, *P.C.* c. 39. And therefore, taking "suicide" as meaning the same thing as homicide of one's self, it seems to follow that in the opinion of Lord Hale, neither guilt nor moral responsibility is necessarily involved in its legal definition.

The passage to which we were referred in 4 *Black. Com.* 189, seems strongly to shew that "suicide" does not, in the opinion of Mr. Justice Blackstone, necessarily include the notion of moral responsibility. The learned commentator, after stating that the party who destroys himself is not *felo de se* unless he was in his senses, adds, that "coroners' juries are apt to push this principle too far, and to hold that the very act of suicide is evidence of insanity." It is plain that the word "suicide" is there used as designating the mere act of self-destruction, otherwise the passage would be insensible. The only

other authority referred to, in which the word "suicide" occurs, is the recent case of *Borradaile v. Hunter*, which was an action, like this, on a policy of insurance, in which was a stipulation making it void, not, as in this case, if the party *should commit suicide*, but if he should *die by his own hands*. There a majority of the Court held that, the assured having intentionally destroyed himself, though he was at the time incapable of distinguishing between right and wrong, the policy was void. Tindal, C.J. differed from the rest of the Court, and, at p. 668 of *Man. & Gr.*, the following passage occurs:—"The expression 'dying by his own hand' is, in fact, no more than the translation into English of the word of Latin origin 'suicide;' but if the exception had run in the terms 'shall die by suicide,' or by the hands of justice, or in consequence of a duel, surely no doubt could have arisen that a felonious suicide was intended thereby." This, though it certainly shews that Lord Chief Justice Tindal would, from the context, have interpreted the word "suicide" in this policy as he did the words "die by his own hands," in *Borradaile v. Hunter*, as referring only to cases of self-destruction, perpetrated by persons of sound mind, yet shews also that he did not think that to be the necessary or natural meaning of the word "suicide" standing alone. The distinction between felonious suicide, and suicide not felonious, taken and observed on by the Chief Justice, seems conclusively to shew, that, in his opinion, suicide did not necessarily *ex vi termini* import a criminal act, and therefore the act of a responsible moral agent; and in the same case, near the bottom of p. 688, Mr. Justice Erskine speaks of criminal suicide, shewing that he took the same view of the meaning of the word "suicide" as was taken by the Lord Chief Justice. All these authorities seem to me to favour my interpretation of this word; but after all, our decision must rest entirely on what is the ordinary meaning of the term. In my opinion, every act of self-destruction is, in common language, described by the word "suicide," provided it is the intentional act of a party, knowing the probable consequence of what he is about. This is, I think, the ordinary meaning of the word, and I see nothing in the context enabling me to give it any but its

ordinary signification. For these reasons, I think, there must be judgment for the plaintiff in error, and that a *venire de novo* must be awarded.

PATTESON, J. (5).—The sole question is, what is the true meaning of the words, "commit suicide," in the policy in question? It is argued, first, that these words have a technical meaning, and import a felony. No authority is cited for this position, no case in which the finding of a jury, that A. had "committed suicide," has been held equivalent to a finding that A. had murdered himself, or that A. was "felon of himself." I apprehend that the word "*murdravit*" was as necessary in a case of *felo de se*, as in the case of the murder of another person; and unless some records could be found, or some decisions of the courts, in which the word "suicide" has been held to have the same meaning as "self-murder," I am at a loss to know what ground there is for saying that the words "commit suicide" have any technical meaning. It is argued, secondly, that the words in their ordinary acceptance import felony. Now, the word "suicide," literally translated, means only "killing himself or herself." The circumstances attending the act manifestly cannot affect the literal meaning of the word. Reference is made to *Hale's Pleas of the Crown*, c. 31, where Lord Hale, in speaking of the different kinds of murder, speaks of suicide, *felo de se*. No doubt he does, but he is treating of criminal suicide only, and he nowhere intimates that the word "suicide" in itself imports criminal suicide. *Johnson's Dictionary* and *Richardson's Dictionary* are also referred to, but they are of very little weight, when the Court is considering what the parties to a contract mean by the words they have used. The word "commit" is said always to be used in a bad sense—be it so; but how does that prove that it communicates the quality of felonious to the word "suicide"? No suicide is good or meritorious; it must always be spoken of in a bad sense, however pitiable, or, one may hope, excusable, the circumstances of it may be. But it is argued, thirdly, which is the true question, that a felonious suicide only is pointed at by this

policy, and that this appears by the words themselves and by the context. Now, the words themselves are large enough to embrace all self-destruction, as well as self-murder; not, indeed, as was admitted in *Borradaile v. Hunter*, to embrace cases of mere accident, or of insanity extending to unconsciousness of the act done, or of its physical consequences, because such cases, although comprehended in the very words themselves, cannot be considered to have been in the contemplation of the contracting parties; but clearly embracing an act of self-destruction committed by a person who was aware of the probable consequence of the act, and intended that consequence to follow. The context in this case, as in that of *Borradaile v. Hunter*, is, "or die by duelling or the hands of justice," except that in that case the words were "die by his own hands, or by the hands of justice, or in consequence of a duel," so that the verb "die" applied to all the members of the sentence; whereas here the words "commit suicide" are complete as a sentence, without any word taken from the other part. I do not know that this makes any difference. It is true that the other two modes of death appear to be connected with felony; yet I apprehend that the actual felony is no part of the cause of exception from liability. If it were it would be competent to the plaintiffs to prove that the deceased, although dying by the hands of justice, was in truth innocent of the crime for which he suffered, in the same manner as it is, no doubt, competent to an executor to traverse an inquest of *felo de se* found upon view of the body of his testator by a coroner's jury; or that the deceased, although killed in a duel, had fired his pistol in the air, and never contemplated shooting at his opponent. Such defences would surely be excluded, for the words of the exception are express, "die by the hands of justice," whether justly or not, or "by duelling," whether it were felony or not. It seems, in truth, that the exception is not framed with reference to the commission of any felony or crime, but to guard against the time for payment of the sum insured being accelerated by the voluntary act of the party interested in the money. It is equally so accelerated by a voluntary act, if the deceased knew the consequences of his act, and intended them to follow,

(5) Coleridge, J. was absent, but it was understood that he concurred in opinion with the majority of the Judges.

whether he were sane or under some delusion as to the moral quality of the act done. That the voluntary act of the party interested, and not the felony, is the thing contemplated by the exception, is further apparent from this circumstance, that the clause in the policy goes on to do away with the exception altogether where the deceased has parted with all interest, either for himself or his family, by assigning the policy, and when the deceased has mortgaged or charged it for the benefit of creditors, to do away with the exception to the extent of the sum secured; yet felony would be committed in those cases just as much as if the policy had not been assigned. I do not inquire into the reason of this qualification of the exception in the policy, whether it has any thing to do with the removal from the deceased of temptation to destroy himself, when he has parted with his interest, or not, or whether it is inserted as an inducement to those who want to raise money to effect policies at this office, or what other reason may be conjectured. It is sufficient for my purpose that it tends to shew that the contracting parties did not regard the commission of felony as such in their contract. Upon the whole, I am of opinion that the words "commit suicide," mean only "kill himself;" and that the true question to be put to the jury is, that which was put by Mr. Justice Erskine, in *Borradaile v. Hunter*, whether the deceased knew the probable consequences of his act, and did that act voluntarily, intending such consequences to follow, and that no question should be put as to the act done being criminal or not. It follows then, in my opinion, the judgment must be reversed, and a *venire de novo* awarded.

ALDERSON, B.—I also am of opinion that there ought to be a *venire de novo* in this case; and I shall say but a very few words upon the points raised. The true principle governing cases of this sort seems to be very well laid down by Mr. Justice Maule, in *Borradaile v. Hunter*. The words in question seem to me in this case to have their proper construction, when taken as including all cases of voluntary self-destruction. They do not apply to cases in which the will is not exercised at all; as, where death results from accident or delirium; but where the self-destruction is

voluntary, although the will may be perverted. It seems to me, therefore, that the argument arising out of the peculiar use of the word "suicide," in this contract, is fallacious; and that the word is often used in its most extended sense, that, namely, which has been assigned to it on behalf of the plaintiffs in error. For instance, to take so common a book as the *Encyclopædia Britannica*, under the head of "suicide," I find this observation: "The general causes of suicide are twofold—insanity and crime." So that the word "suicide" has often, in its ordinary acceptation in the English language, that enlarged sense; and it is not, therefore, to be confined to cases of criminal intention alone. Then reliance is placed upon the words in the company of which the word "suicide" is found in the policy—"death by duelling or by the hands of justice." I doubt, however, whether that argument carries the case much further. Suppose a person insured were to die in a duel, I do not conceive it would be competent to his representatives to say that he was insane at the time. Cases may easily be suggested, in which a duel might be fatal, and yet not felonious; such as a duel in the course of war or the like. The case, however, has been so fully gone into by those learned Judges who have immediately preceded me, that I shall do no more than express my concurrence with their judgments.

PARKE, B.—The question in this case may be very shortly stated. By the terms of the policy, all the conditions and regulations indorsed are incorporated in it; and one of these (the sixth) is, that every policy effected by a person on his own life shall be void, if such person shall commit suicide, or die by duelling or the hands of justice: and there is a plea, that the intestate did commit suicide.

On the trial, my Brother Cresswell told the jury, "that, in order to find the said issue for the defendants, it was necessary that the jury should be satisfied that Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burthen of proof as to his dying by his own voluntary act was on the defendants,

but that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence. The question is, whether this direction was correct. I agree with the majority of the Judges who have preceded me, that part of the direction, viz. that as to the necessity of his being a responsible moral agent, was wrong; for I think that, according to the proper construction of this policy, if the intestate *voluntarily* killed himself, it was immaterial whether he was then sane or not. This being a written contract between the parties, the construction of it belongs to the Court; and the Court must adopt the usual rules, and construe the provisos or conditions, as well as the other parts of the instrument, according to the ordinary meaning of the language used: except that terms of art or technical words must be understood in their proper sense, unless the context controuls or alters their meaning: ancient words may be explained by contemporaneous usage; and words which have acquired a peculiar sense by usage in particular districts, occupations, or trades, must be read (the usage being found by the jury) in their acquired sense. Here, there is no occasion for any of these exceptions in construing this instrument. The two latter are inapplicable, and there is no ground for saying that the word "suicide" is a legal technical term or word of art. An inquisition stating that the deceased committed suicide would be clearly informal and bad. Nor have we a decision of any court on the meaning of these precise words, by which we should consider ourselves bound. The case of *Borradaile v. Hunter* certainly is not such; nor can the intimation of the opinion of the Lord Chief Justice Tindal, by way of illustration of his argument, as to the meaning of the expressions now under consideration, have the same effect as a decision.

The whole question resolves itself into an inquiry as to the sense of words used in the ordinary language of the present day, the instrument to be construed bearing date in the year 1836; and we are all perfectly competent to form an opinion upon such a subject, and need not refer to lexicographers, or authors, ancient or modern. If the case depended on the explanation

given by dictionaries, the result, nevertheless, would be the same. Johnson, indeed, explains the word "suicide" by "self-murder: the horrid crime of destroying oneself," which, no doubt, it includes. Webster has both "self-murder" and "the act of designedly destroying one-self," and adds, "to constitute suicide, the person must be of years of discretion," and refers to Blackstone, inaccurately; for the passage in that author applies to persons being *felo de se*. Richardson, who states them to be words of modern formation, as "the slaying of himself, or self-murder." But the question does not depend upon the opinion of such authors; for, though they are authorities, they are not conclusive; the case turns on the meaning of the vernacular language which we now use; and I must own that I feel no doubt as to the import of the expression "commit suicide." In ordinary parlance every one would so speak of one who had purposely killed himself, whether from tedium of life, or transport of grief, or in a fit of temporary insanity. "To die by his own hands," or "to commit suicide," seems to me to be all one, and to apply to all cases of voluntary self-homicide; and I do not see any reason why a different sense from the ordinary one should be attributed to these words in this instrument; on the contrary, I see very good ground for believing that they are used in their ordinary sense, in order to avoid the consequence which would have followed the adoption of such words as "committing felony of himself," or "self-murder;" as it may be well supposed that juries would, in favour of the family of the deceased, take the same lax view of the evidence as coroners' juries generally do.

I think that the judgment ought to be reversed, and a *venire de novo* awarded.

POLLOCK, C.B.—I regret that I differ from the majority of the Court who have already delivered their opinions; but as, after the fullest deliberation, I feel compelled to come to the conclusion that the direction of my Brother Cresswell to the jury at the trial, was correct in point of law, and that the plaintiff below is entitled to our judgment, it is my duty, with whatever reluctance and hesitation, to state my own view of the case, and the reasons upon which that conclusion is founded. The

question, in point of form, has been so clearly stated already, that it is unnecessary to state it again; but, in substance, it is, what is the meaning of the words "*commit suicide*" in the policy in question? Does the expression mean and include that the party was *compos mentis*? that he was a responsible being, capable of distinguishing right from wrong,—as stated by my Brother Cresswell? or, is the expression applicable to a person who *intentionally* produces his own death (that is, uses the means of destruction, with a knowledge of the effects they will produce, and with the intention of producing them), but whose understanding, judgment, or will, is so perverted by disease that he has ceased to be responsible criminally for his conduct?—in short, who is insane (possibly) upon every other point but the physical effects of using a deadly weapon, or the result of applying adequate means to produce the destruction of life? In considering the question, everything turns on the meaning of the words as ordinarily occurring in the English language and in English authorities, and especially in books written on law or morals. Now, what is the meaning of the word "*suicide*," merely as an English word, according to the best authorities? Does it mean the killing of one's-self in the same way as "*homicide*" means simply the killing of a human being—whether by accident, negligence, or in self-defence? or, does it imply a *criminal* taking away of one's own life? The word is of modern origin; it does not occur in the Bible, or in any English author before the reign of Charles II.; probably not till after the reign of Anne. As far as I have been able to trace it, it first occurs as an English word in *Hale's Pleas of the Crown*. Hale was a Judge during the Commonwealth, and died in 1676. His work was published in 1736. It is not in *Hawkins*, first published in 1716; but it is to be found in *Blackstone*. These, as legal authorities, will be adverted to presently; but I wish to notice first the authorities not legal. The meaning assigned to the word by Johnson, in his Dictionary, is, "*self-murder—the horrid crime of destroying one's self—a self-murderer*;" and he gives no other signification. In *Richardson's Dictionary* it is, "*the slayer of himself*;"

also, "*the slaying of himself, self-murder*." In the *Dictionnaire Universel* of the French language, published in 1771, it is said that the word was introduced into the French language by the Abbé Desfontaines; and a quotation is given from his works, where it is manifestly used in the sense given to it by Johnson. Desfontaines was born in 1685, and died in 1745. In the year 1644 was published, with the works of John Donne (the poet), Dean of St. Paul's, who died in 1631, his "*Βιαβάρος*, a Declaration on that Paradox or Thesis that *Self-homicide* is not so naturally Sin that it may never be otherwise." The word "*suicide*" does not occur in this work; from which it may be presumed that it was not then in general use, and perhaps was not in use at all. In 1785, Archdeacon Paley published his work on *The Principles of Moral and Political Philosophy*. The third chapter of book iv. is on "*suicide*." Throughout that chapter the word is used as denoting the act of a reasonable, moral, and responsible agent; and in no other sense. In 1790, Charles Moore, M.A., Rector of Cuxton, in Kent, published "*A full Inquiry into the subject of Suicide*; to which are added (as being closely connected with the subject) two Treatises on Duelling and Gaming." Page 4. contains the following passage:—"There are points, then, to be settled, and exceptions to be made, previous to a general charge of guilt on all who put a sudden end to their own lives. For, though every person who terminates his mortal existence by his own hand commits *suicide*, yet he does not therefore always commit murder, which alone constitutes its guilt. Some distinction is necessary in regard to a man's killing himself, as it would be had he killed another person; which latter he may do either inadvertently or legally, and therefore, in either case, innocently, and without the imputation of being the murderer of another. When a man kills himself inadvertently or involuntarily, it comes under the legal description of accidental death, or *per infortunium*; but, as to his doing it *legally*, the law allows of no such case. The only instance of innocence which it allows to the commission of voluntary suicide, is in the case of madness; when a man being deemed under no

moral guidance, can be subject to no imputation of guilt on account of his behaviour to himself or others."

In the *Encyclopædia Britannica*, the explanation of the word "suicide," is "the crime of self-murder," or "the person who commits it." There is a treatise on law, in the *Encyclopædia Metropolitana*, in which suicide is spoken of: it is in the second volume of *Pure Sciences*, 'On Offences against Self.' Speaking of the cases where society may interfere to prevent or punish, the writer says—"This observation applies to suicide, the greatest offence a man can commit against himself." These are all the lay authorities I think it necessary to refer to.

But there are legal authorities, which, if unopposed by other and greater authorities, I should deem binding and conclusive upon the subject, in a court of law. Hale, in the work already alluded to, defines *felo de se* or suicide to be "where a man of the age of discretion, and *compos mentis*, voluntarily kills himself, by stabbing, poison, or any other way." Judge Blackstone, in his *Commentaries*, first published in 1765-1768, uses the word in connexion with self-murder, and in the same sense as Hale. In *Burn's Ecclesiastical Law*, first published in 1760, it is said—"By the rubric before the burial office, persons who have laid violent hands upon themselves shall not have that office used at their interment. And the reason thereof given by the common law is, because they die in the commission of a mortal sin; and therefore this extendeth not to idiots, lunatics, or persons otherwise of insane mind, or children under the age of discretion or the like. So also not to those who do it involuntarily, as, where a man kills himself by accident; for, in such case, it is not their crime, but their very great misfortune." The 4 Geo. 2. c. 52. relates only to *felo de se*; but the editor says, "Suicides are to be buried in the churchyard at night, but no service is to be performed over them." In *Jacob's Law Dictionary*, in the edition of 1772, under title 'Suicide,' reference is made to title 'Self-murder,' where it is said that "self-murder is ranked amongst the highest crimes, being a peculiar species of felony—a felony committed on one's self. The party

must be in his senses, else it is no crime. In this, as well as all other felonies, the offender must be of the age of discretion, and *compos mentis*: and, therefore, an infant killing himself, under the age of discretion, or a lunatic during his lunacy, cannot be a *felo de se*." Blackstone says, "Self-murder, the pretended heroism, but real cowardice, of the stoic philosophers, who destroyed themselves to avoid those evils which they had not fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished, by the Athenian law, with cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it, and as the suicide is guilty of a double offence—one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for—the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has, therefore, ranked this among the highest crimes, making it a peculiar species of felony—a felony committed on one's self. A *felo de se*, therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if, in attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts, and kills himself. The party must be of years of discretion, and in his senses, else it is no crime." It should seem, therefore, that the word has never been used by law writers, except in the sense of a criminal taking away of one's own life; at least, I am not aware of any instance in any law writer of its use in any other sense.

It may be presumed that the word is of legal introduction, and was perhaps first taken from the law writers by Archdeacon Paley. It has since become a word of general use: but I am not aware of any authority by which it can be shewn that it has lost the meaning to express which it was originally framed, or adopted from some other language. And I think it is clear that, although it may possibly sometimes admit, in modern times, of a more loose and

vague interpretation, it certainly *may* mean self-destruction by a person *compos mentis*, and morally responsible for his acts; and the question is, whether *that* meaning is or is not what was intended by the parties to this contract.

Now, in this policy, I find it coupled with the word "commit;" the expression is, "commit suicide." The meaning of "commit" in *Johnson* (with reference to this use of the word) is "to *perpetrate*—to do a fault—to be guilty of a crime;" and "perpetrate" is, to *commit*, to *act*—always in an *ill* sense. There is no material difference in *Richardson*. If, therefore, it be admitted, as I think it must, that one meaning of "suicide" imports, not merely an act, but a *criminal* act, the use of the expression "commit suicide" is some, and I own I think a strong, reason for believing that the parties to this contract used the word in that sense. The sentence also in which it is found, may throw some light on the matter. It is coupled with death by duelling or by the hands of justice; and the condition is not, if the party shall *die by suicide*, but if he shall "*commit suicide*." I think this imports some deliberate criminal act, and not an act the result of insanity, which leaves him intelligence enough to know the means of death, but without any moral controul over his actions.

Again, does the nature of the instrument itself supply any argument either way? The object of such a policy is, generally, to make provision for the family of the insured; and he would naturally desire to include all risks. It is admitted, that he is protected, not only against the common chances of death by disease, but against accident, or mere negligence of the grossest kind. He may even be the immediate cause of his own death by a deadly weapon, provided he be so insane as to be utterly unconscious of what he is doing. But according to the argument for the defendants below, if he retains a glimmering of reason just enough to enable him to seek to produce death by competent means—it matters not whether he be lost to all moral sense, and for any *other* act or crime a complete madman;—his policy is forfeited. I own I cannot, from the nature of the contract, believe that this was what the parties intended. A man

anxious to provide for his family would, among the possible calamities of life that might terminate it, anticipate *madness* as one; and, whether it prostrated his intellect altogether, or produced delusion, or destroyed only a part of his faculties, would make no difference. The language used in the agreement between the parties does not *necessarily* exclude this risk. I think, therefore, as against the office, the risk ought to be included.

Examining the question upon more general principles, I am induced to come to the same conclusion. In the eye of the law, with reference to crime, a man is either *compos mentis* and responsible, or he is *non compos mentis* and irresponsible. Physiologically, no doubt, it is otherwise: and the gradations are, perhaps, imperceptible, from the highest perfection of intellect to the darkest obscuration of the mind. But, in point of law, as soon as it is ascertained that a person (to use the language of my Brother Cresswell in directing the jury) has lost his sense of right and wrong, it matters not what else of the human faculties or capacities remain; he ceases to be a responsible agent; and, in my judgment, can no more *commit suicide* than he can commit murder.

Lastly, the view taken by the defendant's counsel appears to me to be opposed to all the principles of sound philosophy which can be applied to the subject. It is admitted, of course, that the office would be liable, if death ensued from any of the ordinary casualties of life, even resulting from the act of the party insured, provided the act were not done with the intention to kill. The act of a raving madman, or of a patient under the influence of a disease, is protected by the policy, if the consequences are not foreseen and intended. So, if insanity should produce delusion, and deprive a man of the use of the ordinary senses, and the party should mistake a deadly weapon for an instrument of music, and fancy he was playing upon it, when he was destroying his own life, this would not be *committing suicide* within the proviso of the policy. But, what if the delusion, instead of applying to a pistol, or other instrument of death, applied to the man himself? Suppose he believed he was Marcus Curtius, and ought to leap into a gulf? or that he was one of

the Decii, and must sacrifice himself for the benefit of his country? or, what, if he fancied himself an apostle, and that it became his duty to die the death of a martyr? What sound philosophy is there in taking a distinction between a delusion about a pistol, and a delusion in respect of the man against whom it may be directed? or, what distinction, in point of good sense, can be taken between physical blindness, in consequence of which the party insured walks into a well, and intellectual or moral blindness, which, leaving him the use of his senses, and a knowledge of the *physical* consequences of his acts, has deprived him of all judgment which should controul and govern his acts, and of all sense to perceive their *moral* consequences? It may be said, that, when the delusion extends to the character, office, or condition of the party,—so that he mistakes his identity,—he does not mean to kill *himself*, and in such a case the office would be liable. But how far is this to be carried? Suppose, under a delusion, he believed he had committed a crime for which he ought to put himself to death, and that this was the result of insanity—is this a mistake of his identity? and how is a Judge to direct a jury so as to steer clear of the difficulties that would thus arise? In my opinion, such subtleties as these ought to find no place in the decision of such a question as the present, in which is involved (from the present extensive practice of life insurance) the peace, the happiness and security of thousands of families. Some simple, clear, and safe rule ought to be laid down as to a subject in which the public is so deeply interested. In my judgment, if death be the result of *disease*—whether by affecting the *senses* or the *reason*—the insurance office is liable under this policy. Whether the privation of reason be total or partial, whether it produce delusion of one kind or another—whether it affects sensation, apprehension, memory, judgment, or will, or any of the moral and intellectual powers which constitute our nature—if the act be not the act of a sane responsible creature, but is the result of any delusion or perversion, whether physical, intellectual, or moral, it is not the act of *the man*: and, to hold otherwise seems to me a departure from the simplicity of the law, and to be repug-

nant to sound philosophy, which is the spirit of all law, and on which all law ought to be founded. I will only add, that I have not adverted to the case of *Borradaile v. Hunter*, because the expression in that case—*shall die by his own hand*—is so different from the expression in this case—*commit suicide*—that the decision is no authority on the point arising here.

Venire de novo awarded, in accordance with the opinion of the majority of the Court.

1847. }  
Nov. 12. } *Ex parte* NESS.

*Judgment—Registration to bind Lands—Member of Banking Company.*

*The Court will not interfere to direct the senior Master to receive and register a memorandum for the purpose of binding real estate, pursuant to the provisions of 1 & 2 Vict. c. 110. s. 19.*

*The Master received such a memorandum, the object of which was to bind the lands of a member of a banking Company by a judgment recovered against the public officer.*

On the 11th of August 1847, John Ness recovered judgment in the Court of Exchequer, in an action brought against George Burdis, as one of the registered public officers of the North of England Joint Stock Banking Company, and at that time James Sanderson, of Berwick, was, as it appeared on affidavit, one of the members of the company named in the last general return made by the company to the Stamp Office, under the provisions of the 7 Geo. 4. c. 46. s. 4. Ness's attorney being desirous of charging Sanderson's real estate with this judgment, sent to the senior Master of the Court of Common Pleas a memorandum of the name, place of abode, and trade or profession of Sanderson, being the person whose estate was sought to be affected by the judgment, and of the Court and title of the cause in which the judgment had been obtained, and of the date thereof, and an account of the debt and costs thereby recovered, in order that the same might be registered by the senior



Master pursuant to the provisions of 1 & 2 Vict. c. 110. s. 19.

The Master refused to receive the memorandum without the sanction of the Court.

*Manisty* (Nov. 12) moved the Court for a direction to the senior Master to receive and register the memorandum. By the 7 Geo. 4. c. 46. s. 12. a judgment in an action at law against the public officer of a banking company renders the effects of every member of the co-partnership liable; and it is submitted that such a judgment operates as a judgment against every member. By the 1 & 2 Vict. c. 110. s. 11. the sheriff is empowered to deliver execution of lands to a judgment creditor; and by section 13. judgment is to operate as a charge on all the real estate of the party against whom it is recovered. The 19th section provides that no judgment shall affect real estate unless and until a memorandum or minute such as that which has been presented in this case, be left with the senior Master of the Court of Common Pleas, who shall forthwith enter the same particulars in a book.

[MAULE, J.—The question is, whether the officer is not bound to register the memorandum forthwith. It would be extra-judicial to intimate an opinion to the officer as to his duty.]

WILDE, C.J.—I think we can make no order on this subject, as none which we could make would operate as a justification to the Master. We cannot now intimate an opinion on a matter which may hereafter come before us in a more serious form.

*Application refused.*

The senior Master of the Court subsequently received the proposed memorandum.

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1847. }  
Nov. 19. } *Ex parte* RAYNER.

*Prohibition — County Court — Jurisdiction.*

*The Judge of a County Court, notwithstanding an admission by the plaintiff that a plea of judgment recovered in another court for the same debt was true, gave judgment for the plaintiff.*

*This Court refused to grant a rule nisi for a prohibition, the question decided being within the jurisdiction of the Judge.*

A summons was issued out of the county court for Cambridgeshire, at the suit of Toft, against Rayner, in an action for goods sold and delivered. Rayner appeared and pleaded that the plaintiff had already recovered judgment against him for the same debt in the borough court of Cambridge, and that execution had issued against his goods, and that they had been seized and sold. The pleadings in the county court being oral, the Judge asked the plaintiff whether the defendant's plea was true, and the plaintiff answered that it was true. The Judge, notwithstanding this admission, gave judgment for the plaintiff.

T. H. Naylor (Nov. 19) moved for a rule nisi for a prohibition.—The Judge of the county court had no jurisdiction. The matter was *res judicata*. Prohibition will lie after judgment—*Gould v. Gapper* (1).

[MAULE, J.—The difficulty is, that the defendant could not have moved for a prohibition as soon as the plea was pleaded.]

WILDE, C.J.—It seems to me that this was a matter within the jurisdiction of the Judge. He was obliged to decide whether the plea was a good or bad one; and we are not authorized to examine whether the judgment is good in law or not.

COLTMAN, J.—I am of the same opinion. The cases in the spiritual courts are not by any means parallel to this. The Judges there do not act according to the common law.

MAULE, J.—This would have been a case for a writ of error, if that had not been taken away by the County Courts Act.

WILLIAMS, J.—I am of the same opinion. The ground of this motion is, that a Judge having jurisdiction has decided wrong, on a point of law. I am not sure, upon the statement before us, that the Judge has made a mistake.

*Rule refused.*

(1) 5 East, 345.

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1847. }  
June 11. } RICKETTS v. BENNETT.

*Mine—Company—Liability of Co-adventurers.*

*A, one of many co-adventurers in a mine, assumed the entire management of it, and, without the direction of his co-adventurers, opened an account with a banker in the name of the adventurers, and overdrew that account to a considerable amount. In assumpsit by the bankers against B. & F, two of A.'s co-adventurers in the mine for the balance of their account,—Held, that there was no implied authority to one adventurer from his co-adventurers in a mine to pledge their credit for money borrowed by him for the purposes of the mine.*

This was an action of assumpsit, tried, before Platt, B., at the Cornwall Summer Assizes, 1846, to recover the sum of 3,618*l.*, the balance of a banking account. The declaration contained counts for money lent, for money paid, for work and labour, for commission, for interest, and on an account stated.

The defendants pleaded the general issue.

It appeared that the plaintiffs were bankers at Penzance, in Cornwall; the defendants, two of the adventurers in a mine, called the Wheal Providence Mine. A. Robinson, the manager of, and a co-adventurer in, the mine, opened an account with the bankers in September 1844, without the directions of the other shareholders, in the name of the "Wheal Providence Adventurers," and the account closed in the latter part of 1845, when the balance as above was found to be due to the plaintiffs. The mine was carried on upon the cost-book principle; it consisted of 128 shares, ninety-nine of which were purchased by one F. T. Robinson and his father A. Robinson, who thereupon took upon themselves respectively the offices of *purser* and *manager*, and kept the cost-book. The terms upon which the mining account was to be kept by the bank was discussed and agreed on by and between the plaintiffs and A. Robinson. The terms were, *that the bankers should advance money, and discount the ore notes of the Wheal Providence Mine at 4*l.* per cent., and an account was opened in*

the bankers' books headed thus:—"Dr. Messrs. the Wheal Providence Adventurers in account with Ricketts & Co., Penzance, Cornwall." Cheques were drawn from time to time upon the bankers signed thus:—"For Wheal Providence Adventurers,

"Alexander Robinson."

The money paid for most of the cheques was expended on account and for the use of the mine: part of the advances had been appropriated to the payment of general dividends; but the proceeds of some of the cheques were applied by the Robinsons to their own private purposes. On the plaintiffs pressing for their balance at the close of the year 1845, A. Robinson ceased to manage the mine, and the other adventurers, when applied to, disclaimed all knowledge of the advances, and refused to recognize their liability to the plaintiffs. The learned Judge directed the jury that the mere character of a co-adventurer did not confer authority to borrow money so as to bind the other adventurers in a mine. He also left all the facts to the jury; who found that it could not be inferred from these, that authority to A. Robinson to borrow money was given or recognized by the other adventurers, and a verdict passed for the defendants.

*Crowder* had obtained a rule for a new trial, on the grounds that the Judge misdirected the jury, and that the verdict was against the evidence.

*Butt, Kinglake, Serj., and Merivale* shewed cause.—It was contended, on moving for this rule, that a mining company is an ordinary partnership, to which the usual incidents of partnership attached, and that each partner and co-adventurer has power to borrow money so as to bind his co-adventurers. The Judge denied that proposition, when urged by the plaintiff's counsel at the trial, and directed the jury that the mere relation of co-adventurers in a mining concern is not sufficient in point of law to confer upon each co-adventurer an authority to pledge the credit of his co-adventurers; and such ruling was quite correct. He also left all the facts to the jury; who found there was no authority, express or implied, conferred by the defendants upon Robinson to borrow money from the bankers, and therefore the Court will not disturb the verdict. That mining concerns are not ordinary cases of

partnership, so as to authorize the other parties to draw bills, is established by *Dickinson v. Valpy* (1), or to borrow money, which is a much stronger exercise of authority, by *Hawtayne v. Bourne* (2), though such borrowing be for the necessary purposes of the mine. Besides, this mine was carried on on the cost-book principle, which is well understood, and it was proved before the jury that by the custom of such a mine borrowing is altogether forbidden; and the shares are transferred by a mere entry in the cost book. Such a mode of operation is very different from an ordinary partnership: it is more like a joint-stock company, and was excepted from the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 103. s. 63, because its incidents were so perfectly well known and understood. The only remaining question is as to the verdict being against the evidence. A. Robinson was called, and his evidence negatived any express authority to borrow from the defendants. A. Robinson made the agreement with the bankers, drew all the cheques, and kept all the accounts: the defendants knew nothing of the accounts, and had nothing to do with the management of the mine. Nor is there any suggestion on the evidence that the bankers, to whom the plaintiffs were unknown, trusted to anything but the individual credit of the Robinsons. The fact of the cost book and the banker's pass book being kept in the room which had been entered on one or two occasions by the shareholders, was the only evidence from which a recognized or implied authority was to be inferred. It was not, however, shewn that the cost book or the pass book had been touched or even seen by the defendants; and if they had inspected the cost book the borrowing of money would not appear therein. The case was tried by a Cornish special jury well acquainted with the usual course of mining business, and nothing was withdrawn from their consideration. The fact of the defendants having twice received a small amount of dividends (though it turns out such dividends were paid out of the borrowed money), is strong to shew that they had no knowledge of the system pursued by their co-adventurer, whose conduct

in so paying amounted to a deception, which it must be assumed they would not knowingly have sanctioned; and the very fact of receiving dividends which are represented to arise from the proceeds of the mine, negatives an implied authority to borrow for its support. The effect of the case of *Tredwen v. Bourne* (3) is, that though there may be special terms of carrying on the mine entered into between the adventurers *inter se*, such terms will not affect third parties without notice; but in that case, and also in *Hawken v. Bourne* (4), in both of which the defendant was held liable, there were letters from and acts of the defendant in evidence, shewing the interest and activity displayed by him in the management of the mine, and he was therefore held by his conduct to have authorized the directors to do what they did for his benefit; but there are no facts of that kind here, and in *Tredwen v. Bourne*, Parke, B. says: "If the case had stood merely on the fact of the defendant being a shareholder, I should have thought it was not sufficient;" and the only ground upon which this rule was granted was because the defendant was a co-adventurer. It was also proved that cheques were drawn for the private accommodation and use of the Robinsons, purporting to be for the purposes of the mine; and on that ground, even if one co-adventurer could bind the others, the defendant could not be fixed with this liability—*Lloyd v. Freshfield* (5). It was, no doubt, proved that the borrower was the manager of as well as a co-adventurer in the mine; but that relation does not, on legal principles, extend the liability of the co-adventurers for his acts, and as a question of fact it was fully and fairly laid before the jury.

*Crowder, Channell, Serj. and Smirke*, in support of the rule.—There are a great many facts admitted on both sides. That in ordinary trade partnerships, it may be presumed, that one partner may contract a loan on behalf of his co-partners; that it is usual in mining companies to open an account with a banker in the name of the firm; and that the great bulk of the money

(3) 6 Mees. & Wels. 461; a. c. 9 Law J. Rep. (N.S.) Exch. 290.

(4) 8 Ibid. 703; a. c. 10 Law J. Rep. (N.S.) Exch. 361.

(5) 2 Car. & Pay. 325.

(1) 10 B. & C. 128; s. c. 8 Law J. Rep. K.B. 51.

(2) 7 Mees. & Wels. 595; s. c. 10 Law J. Rep. (N.S.) Exch. 224.

sought to be recovered in this case was expended upon the mine, or connected therewith. There is no very distinct authority as to the power of the partners in a mining partnership to borrow money; but it is said that as it has been decided they cannot draw bills of exchange—*Dickinson v. Valpy*, and the contracting of a loan is an operation of the same nature, therefore such an act is beyond their authority. But it has been decided in *Tredwen v. Bourne* and *Hawken v. Bourne*, that a partner in a mining concern can pledge the credit of the firm for goods necessary for the purposes of the mine; and there is no substantial difference between pledging credit for goods to be supplied, and for money borrowed to pay for them.

[WILDE, C.J.—Take the case of a botomry bond, would not that be bad if money were thereby raised to pay debts, but good if raised to get supplies? You might be willing to send your servant for 10*l.* worth of goods on credit, but you might not be willing to give him 10*l.* to get certain goods: an agency to get goods on credit is not the same as an agency to borrow money.]

It is submitted that the judgment of Littledale, J. in *Dickinson v. Valpy* goes too far; he there states that a mining company is not a regular trading company. But that the rules of partnership do apply to mining companies appears from the dictum of Parke, B. in *Tredwen v. Bourne*, from *Ferday v. Wightwick* (6), and from *Crawshaw v. Maule* (7).

MAULE, J.—Those cases in Chancery shew that there is a difference in mining partnerships from other kinds of partnership: in the latter, the death of one causes a dissolution of the partnership; in the former the share survives to the executor, who is intruded *in invitum* on his co-partners. Mines are not very unlike ships: the owners there may undertake a joint adventure, or give a joint authority to a managing owner; but the mere relation of co-part-owners would not make them liable.]

In ordinary trade partnerships each partner can borrow money for the firm. *Ex parte Bland* (8) was the case of a ship,

and there the Lord Chancellor lays it down as a general proposition, that all the owners are liable, unless excluded by the terms of the contract. *Sandilands v. Marsh* (9) decides, that navy agents can borrow; and that case even goes further, and decides that a co-partner is liable on a guarantie, which is stronger than a loan. Insurance-brokers can borrow—*Ex parte Bonbonus* (10); and in *Thicknesse v. Bromilow* (11) it was assumed that one partner in a stone and slate mine could borrow and bind his co-partners. It is said that, because this is not a scrip mine, but one established on the cost-book principle, therefore the ordinary rules of partnership do not apply; but that principle does not affect this question: the cost-book is simply a book in which the accounts for and against each partner are regularly kept. It is submitted that these partnerships are like all other partnerships, the power of drawing bills of exchange excepted, and so far only is *Dickinson v. Valpy* an authority. But there are particular reasons for that exception. In all cases bills of exchange interfere with the rights of set-off, and if they get into the hands of third parties, no defence of fraud or want of consideration between the original parties can be set up; and the form of the bill was peculiar in *Dickinson v. Valpy*, making the mining company a bank of issue. There can be no kind of partnership to which the power of borrowing appears more naturally to attach than a mining partnership: their whole system is one of borrowing; they pay for everything by discounting their ore notes, as the ore cannot be realized immediately; and that is really a borrowing from, and a loan by, the discounter, on the security of such notes. The question of convenience, and the necessary state of the accounts in a mining concern, imports an authority to borrow. The learned Judge simply directed the jury that there was no authority in a co-adventurer to borrow money. The point should have been left to them as it was by Rolfe, B. in *Tredwen v. Bourne*: "If they were satisfied that the defendant was a shareholder, and knew of the concern being carried on

(6) 1 Russ. & Myl. 45.

(7) 1 Swanst. 495.

(8) 2 Rose, 91.

(9) 2 H. & Ald. 673.

(10) 8 Ves. 540.

(11) 2 Cr. & Jer. 425.

by the directors and the parties in their employ, *in the manner it was*, he was liable."

[MAULE, J.—There is no complaint of non-leaving: the complaint is, that the jury were misdirected as to the power of a co-adventurer.]

[CRESSWELL, J.—"In the manner it was," there was no evidence of that here.]

The only difference in a cost-book mine from others is, that the shares can be more easily transferred; the liabilities of shareholders to third parties is the same as in a scrip mine, or other trading partnership. Cost-book mines are exempted from the provisions of the Joint Stock Registration Act, 7 & 8 Vict. c. 110, by the 63rd section, and are excepted because the ordinary rules of partnership are applicable to them. Then, on the evidence, A. Robinson was manager, as well as co-adventurer, and this was well known to the defendants; he opened an account with the plaintiffs, and borrowed money from them, which for the most part (2,500*l.* at the least) was expended on the mine; they have had the benefit of it, and to that extent, at least, must be held liable. The manager of a mine is chosen by the body of shareholders, and they are liable for his acts.

[WILDE, C.J.—Is it or is it not necessary that the manager should have power to borrow?—that is the question.]

It must have been known to them that the mining accounts were kept by a banker; such is the usual course of trade in mines, whether they be scrip mines or on the cost-book principle.

[MAULE, J.—It may be the manager had authority to open an account. A banker is like an iron chest. But had he authority to borrow money from him?]

They had received dividends by cheques on the agents of these bankers in London; they had access to the cost book and pass book of the bankers, and whether they inspected them or not they had ample means of knowledge, and that is sufficient to render them liable. The authority to borrow should have been inferred from the ordinary course of dealing, as in *Whitehead v. Tuckett* (12); and the facts here proved are even stronger than those in *Tredwen v. Bourne*

and *Hawken v. Bourne*, wherein the defendant was held liable. The party who ordered the goods in those cases was the manager; so he is here, with the character of co-adventurer superadded. The plaintiffs are quite within the judgment of Parke, B. in that case, and that decision is very much in their favour:—"There was evidence that he was a *complete partner* with the directors in working the mines in the manner they were worked; and one *partner*, by virtue of that relation, is constituted a *general agent* for another as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities *necessary* for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged."

[MAULE, J.—The effect of that decision is to say the Judge did not misdirect the jury. The expressions of Parke B. are not to be strained to the fullest extent, but must be taken with reference to what he was then referring to.]

*Cur. adv. vult.*

WILDE, C.J. now delivered the judgment of the Court.—This was a motion for a new trial, on the ground of misdirection and of the verdict being against evidence. The facts of the case appear to be, that A. Robinson and his son were the owners of ninety-nine shares in the mine, the defendants of a small number, four or five each. A. Robinson, though not the pursuer of the mine, assumed the controul of the management, and continued doing so from the time of the purchase of his shares to the closing of the bankers' account. During this time he opened an account with the plaintiffs, who were bankers. He had a private account of his own at the bank, but he opened the account in question in the name of the adventurers. That account opens with borrowing 280*l.*, to pay the Helston bank a private account of Robinson & Son. At the time of the opening this account, he communicates with the manager of the bank that loans will be required, and that as they will be large he is only to pay 4*l.* per cent. interest upon them. It is then afterwards stated in the evidence that, because they are so large, the interest was increased to

5l. per cent. Money is advanced to Robinson to pay the dividends; but he does not at the time draw out the amount of his own dividend, but afterwards draws various sums, which he states in his evidence were for his dividend. The bank pay his cheques, and in the result the account is overdrawn to the amount claimed. The defendants received certain sums as dividends; but there was no notice to them that the payment was made out of borrowed money, nor that there was such an account as that in question at the bank: and when the fact is first communicated to them, they say that they had no notice. The plaintiffs' case was not very distinctly put at the trial, nor in the argument before us: it was not stated whether the plaintiffs insisted that the defendants were liable simply as being shareholders, or as being shareholders and partners with the manager. It is, however, material to distinguish between the two, and the only difficulty arises from the distinction not having been taken. First, then, as to the misdirection. The Judge told the jury that the defendants were not liable simply as co-adventurers, and, independently of all other circumstances, for money borrowed by a co-adventurer. This is a distinct point. The ruling, however, is not simply this, because the Judge says, "there may be an express authority, or one that is implied, arising from the other adventurer being the manager of the concern; and he then left it to the jury to say whether, by reason of Robinson being the manager, there was any implied authority. The misdirection applies only to the first part. What authority, then, is there for holding that it was a misdirection? In general trading concerns all partners are supposed to be equally in the management of the concern; and an authority to bind the co-partners to a very large extent is, therefore, implied. But is that so as to co-adventurers? By no means. It is well known that the fact is contrary, and that only certain individuals have the management. If, as a principle of law, one co-adventurer had the power, independently of management, to bind his co-adventurers, would it not be inconsistent with the carrying on of the mine? It can only be in consequence of having the management; and, if so, the authority results from the manage-

ment, and not from being a co-adventurer. Any express authority was, in the present case, negatived by the evidence of Robinson. Every case that has been decided, when examined, shews that the ruling of the Judge on the present occasion was correct. In *Dickinson v. Valpy*, the question was, whether a co-adventurer was liable upon a bill of exchange, drawn and accepted by the directors of the mining company. How did the Court treat the question? Lord Tenterden says, "I am of opinion that the mere circumstance of the defendant having become a shareholder in a mining company does not, in point of law, make him answerable for bills drawn or accepted by those who took upon themselves to manage the concern." And Bayley, J. says, "In order to establish his liability, it ought to have been made out affirmatively, on the part of the plaintiff, that this was a company in which the directors were authorized to bind the other members by drawing and accepting bills. Now upon that point the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills; or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power. There was no evidence to warrant the Judge in leaving those questions to the jury. First, there was no evidence for them that such a power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is not necessary for that purpose;" and then he says, "The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members." And Littledale, J. says, "In the case of an ordinary trading partnership the law implies that one partner has authority to bind another, by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company:" and the judgment of Parke, B. is to the same effect;—the result of the whole being, that in a partnership for the working of mines only such authority will be implied by law

in a co-adventurer as is usual and necessary for the purpose of carrying on the concern. The next case is that of *Tredwen v. Bourne*, where goods were supplied on credit for the use of the mine, by order of the directors. The Judge there left it to the jury with the direction, that if they were satisfied the defendant was a shareholder, and knew of the concern being carried on by the directors and the parties in their employ in the manner in which it was, he was liable in the action. I find there that Mr. Crowder stated, "The business of a mine is carried on quite differently from that of an ordinary trading firm: regular calls are made as money is wanted for the purpose of the partnership, which are paid down; and the directors have only authority to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders." I believe, with respect to a cost-book mine, the statement is quite correct. Parke, B. there says, "The directors have authority to do all that it is usual to do in the management of mining companies." There is nothing in that case inconsistent with the ruling now complained of; and Parke, B. in his judgment says, "If the case had merely stood on the fact of his being a shareholder, I should have thought it was not sufficient;" just what was said in this case. That case therefore is a distinct authority in favour of the present ruling. The next case of importance is *Hawtayne v. Bourne*. There a debt was incurred by the agent of the mine for the payment of wages due to the labourers in the mine, and who had obtained warrants of distress upon the materials. The consequences of such a seizure would in all probability have been, that the mine would have been filled with water, and very great expense incurred in afterwards clearing it. My Brother Maule there left it to the jury, "that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet, if it became absolutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity: and he left it to the jury to say, whether the pressure on the concern was such as to render the advance of this money a case of such neces-

sity;" and the jury found that there was such a necessity. The Court of Exchequer however granted a new trial, saying, that this was not within the ordinary authority of an agent, and that such an authority was not to be inferred. We have therefore the opinion of the Court of Exchequer, that it is not a sudden necessity which will give an agent authority to borrow money; and nothing appears in that case to sanction the doctrine, that any such authority is to be implied from the simple fact of being a co-adventurer. The next case is *Hawken v. Bourne*, where the defendant had proved the restraint and limitation as to incurring liabilities, which it was supposed, from an *obiter dictum* in *Tredwen v. Bourne*, would constitute a defence; and the case shews how much less authority is to be given to an *obiter dictum* than to a judgment on a point necessary to be determined: the Court there said, that any restriction by agreement amongst the partners does not limit the authority as to third persons, unless they know that such restriction has been made. That case also distinctly recognizes the position, that in looking to the liabilities of the members of a mining company regard must be had to what is usual. In the present case, there was no evidence of what was usual, and I do not indeed see how it could have been given. It is enough, therefore, to say that here it appeared simply that the defendants were co-adventurers with Robinson, and that Robinson, without authority from them, opened an account at the bank. The Judge rightly ruled that they were in no way liable for the acts of Robinson; and the ruling must have been the same if the conduct of Robinson had been as candid and correct, as from the facts it is open to the suspicion of fraud. I think the whole case was fully before the jury, and there was nothing to warrant them in coming to a different conclusion from that to which they arrived, and their decision appears to me to have been a correct one. The question was not so put to the jury; but I think there was a strong case that the plaintiffs dealt on the individual credit of Robinson.

*Rule discharged.*

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1847. } KING v. NORMAN.  
July 3.

*Principal and Surety—Pleading—Admission on Record of Amount of Debt—Evidence—Judgment not inter partes.*

*Debt on a joint and several bond for 500l. The condition, set out on oyer by the defendant, recited that one S. had been appointed collector of taxes, and that the plaintiff had become surety for the payment of such sums as S. should receive, that the plaintiff consented to become surety on the condition that the defendant and S. would indemnify him from all charges, &c. which he should incur as surety. Plea, that the plaintiff had not at any time since been in anywise damnified by reason of anything in the condition specified. Replication, that S. received, as collector, divers sums of money, amounting in the whole to a large sum exceeding 500l., to wit, 2,000l., that S. did not duly pay the said sums so received, nor any of them, but made default, by reason of which plaintiff afterwards was forced to pay to the receiver general a large sum, to wit, the sum of 500l., and thereby sustained damage to a large amount, to wit, 500l. Rejoinder, that the plaintiff was not forced to pay the said sum in the replication mentioned, or any part thereof. At the trial, no proof was given of the receipt of any money by S. as collector; but it was proved that S. had not paid any over to the receiver general, and that the plaintiff had been called on as a surety to pay the 500l., and, having been sued, had submitted to a judgment:—Held, that the receipt of the 500l. by S. was not admitted on the pleadings, and that the plaintiff, in default of proof of the receipt, was only entitled to nominal damages.*

*Held, also, that the defendant, having been no party to the judgment obtained against the plaintiff, the judgment was only evidence to shew that the plaintiff had been sued, or had been subjected to a bonâ fide pressure, but not evidence that he was legally liable to the extent for which the judgment was signed.*

*Debt upon a bond for 500l., bearing date October 3, 1845. The bond, which was set out on oyer by the defendant, stated that D. Strachan and J. Norman were jointly and separately held and bound unto*

*T. King in the penal sum of 500l., and the condition recited that whereas the said D. Strachan has been nominated and appointed a collector of the land, assessed, and property taxes for the second part of Conduit Ward, in the parish of St. George, Hanover Square, in the county of Middlesex; and whereas the said T. King has consented to become one of the sureties for the said D. Strachan for the due payment to the Receiver General of Taxes of all such sum or sums of money as shall come to the hands of the said D. Strachan, as such collector as aforesaid, and for the due demand by the said D. Strachan, in pursuance of the acts of parliament under or by virtue of which the said several taxes are payable, of the said several sums assessed of the respective persons from whom the same are payable; and in case of non-payment thereof, for the due enforcement of the powers of the said acts against such as shall make default; and whereas the said T. King consented to become such surety for the said D. Strachan, on condition that the said D. Strachan and J. Norman should enter into the above-written bond or obligation, subject to the condition hereafter contained: Now the condition of the above-written bond or obligation is such, that if the said D. Strachan and J. Norman, or one of them, their or one of their heirs, executors, or administrators, do and shall from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless and indemnify the said T. King, his heirs, executors, and administrators, from and against all loss, costs, charges, damages, and expenses, which he, the said T. King, his heirs, executors, or administrators, shall, or may at any time or times hereafter incur, sustain, or be put unto by reason or in consequence of the said T. King becoming such surety as aforesaid, then the above-written bond or obligation shall be void, otherwise the same shall be and remain in full force and virtue; which being read and heard, the defendant saith, that the plaintiff hath not at any time since the making of the said writing obligatory and conditions thereof hitherto been in anywise damnified by reason or means of any matter, cause, or thing in the said condition of the said writing obligatory mentioned. Verification.*

*Replication, that the said D. Strachan,*



in the said writing obligatory and in the said condition thereof named, remained and continued such collector of the land, assessed, and property taxes, for the second part of Conduit Ward, in the parish of St. George, Hanover Square, in the said county of Middlesex, as in the said condition mentioned, for a long space of time, to wit, from the day of the making of the said writing obligatory until and upon a certain other day subsequent hereto, to wit, until and upon the 5th of March A.D. 1846, and that during the said time that the said D. Strachan so remained and continued such collector as aforesaid, and after the making of the said writing obligatory and of the said condition thereof, to wit, on the 3rd of October A.D. 1845, and on divers other days and times between that day and the 5th of March A.D. 1846, there came to the hands of the said D. Strachan, as such collector as aforesaid, divers large sums of money amounting in the whole to a large sum of money, exceeding the sum of 500*l.*, to wit, the sum of 2,006*l.* 7*s.* 10*d.* And the plaintiff further says, that the said D. Strachan did not nor would duly pay to the Receiver General of Taxes the said several sums of money so by him received as aforesaid, nor any or either of them, or any part thereof, but therein wholly made default. And the plaintiff, after assigning a breach of the said condition of the said writing obligatory, according to the form of the statute in such case made, says, that by means and reason of such default and non-payment of the said D. Strachan as aforesaid, he, the plaintiff, afterwards, and before the commencement of this suit, to wit, on the 28th of May, A.D. 1846, was called upon by the said Receiver General of Taxes to pay, and was then forced and compelled and did then pay to the said Receiver General of Taxes a large sum of money, to wit, the sum of 500*l.*, parcel of the monies so received by the said D. Strachan as such collector as aforesaid; and he, the plaintiff, did thereby then incur and sustain loss and damage to a great amount, to wit, to the amount of 500*l.*, by reason and in consequence of him, the plaintiff, having become such surety as in the said condition of the said writing obligatory mentioned; yet the said D. Strachan and the defendant have not, nor hath either of them, paid the said sum of 500*l.* or any part thereof, to the

plaintiff, nor have they, nor hath either of them, otherwise well and sufficiently saved, defended, kept harmless, and indemnified the plaintiff from or against such loss and damage as aforesaid. And the said sum of 500*l.*, from thence hitherto hath been and still is wholly due and unpaid to the plaintiff. Verification.

Rejoinder, that the plaintiff was not forced or compelled to pay to the said Receiver General of Taxes the said sum of money in the replication in that behalf mentioned, or any part thereof, in manner and form as in the said replication alleged, and the plaintiff, of his own wrong, paid the same: conclusion to the country, and issue joined thereupon.

Upon the trial of the cause, no proof was given of the actual receipt of any money by Strachan as collector, but it was admitted that he had not paid any over to the Receiver General, and it was proved that the plaintiff had been called upon as surety for Strachan, to pay the sum of 500*l.* claimed to be due from Strachan as collector, and that having been sued in consequence, he had submitted to a judgment for 500*l.*, which was signed against him under a Judge's order. It was contended, on behalf of the defendant, at the trial, that in the absence of proof of any receipt of money by Strachan as collector, the plaintiff was entitled to no more than nominal damages. The learned Judge thought that the receipt of 500*l.* was admitted on the pleadings, and the damages were in consequence assessed at that amount.

A rule *nisi* for a new trial having been obtained in Michaelmas term last,—

*Montagu Chambers and Peacock* (May 27) shewed cause.—To the plea of *non damnificatus* the plaintiff has replied that while Strachan was collector there came to his hands as such collector “divers large sums of money, amounting in the whole to a large sum of money, exceeding the sum of 500*l.*,” to wit, 2,006*l.*, and the replication then says, that by reason of Strachan's default, the plaintiff was called upon to pay, and was then forced to pay, and did pay, “a large sum of money, to wit, the sum of 500*l.*” There are, therefore, two averments: first, a positive one, that the sum exceeded 500*l.*; second, an averment of the sum under a *videlicet*. Supposing the

precise amount were not originally material, the plaintiff has made it so by the direct averment, which might have been traversed. The defendant, in his rejoinder, says, that the plaintiff was not forced or obliged to pay the sum of 500*l.* claimed to be due from Strachan. In 2 *Wms. Saund.* 291, C, n. 1. it is laid down, "On the other hand, the want of a *videlicet* will, in some cases, make an averment material that would not otherwise be so;" and *Symmons v. Knox* (1) is cited as an authority for that rule. In *Cooper v. Blick* (2) the same rule is also laid down by Patteson, J., and see also *Tatem v. Perient* (3), and other cases referred to in 2 *Wms. Saund.* 206, and *Carvick v. Blagrove* (4).

[MAULE, J.—With respect to anything which the plaintiff can prove he was compelled to pay, to that extent the defendant does not deny that such a sum came into Strachan's hands. It is not only the forcing that is put in issue, but also how much the plaintiff was forced. I think the 500*l.* is only admitted by the rejoinder to the extent to which the plaintiff was forced to pay.]

Yes: whatever the plaintiff proves he was forced to pay, that sum is admitted by the rejoinder to have been received by Strachan. The plaintiff proves, that the Receiver General compelled him to pay 500*l.*, and, therefore, it is admitted on the record that a sum to that amount was received by Strachan.

*Channell, Serj.* and *Lush*, in support of the rule.—Supposing even that the rejoinder admits a default in Strachan, it only admits *some* default, and the plaintiff is bound to shew what default. If he has to go into evidence at all as to the default, he must shew to what extent there was default, and how much the plaintiff was compelled to pay.

[MAULE, J.—It seems to come very much to this: the Receiver General having recovered in an action against the plaintiff, whether, if you do not shew collusion, the judgment is not *prima facie* evidence of coercion.]

All that the plaintiff shewed was that an

action was brought on the bond for 500*l.*, and that the plaintiff submitted to the action by a Judge's order. There was no proof that Strachan had received anything. Had there been a trial, possibly the case might have been different, because the amount which Strachan had received must then have been proved; but a submission to a judgment is no stronger proof than a payment without any judgment at all. The replication says, that by means and reason of the default and non-payment of Strachan the plaintiff was forced and compelled to pay. The plaintiff says he was not forced, &c., *modo et forma, i. e.* by means and reason of the default and non-payment of Strachan. Supposing, therefore, the preceding part of the replication, as to the amount, might have been traversed, still if there is a subsequent part, which involves the preceding part, and is traversed, the preceding part is traversed also—*Dunstan v. Tresider* (5).

*Cur. adv. vult.*

COLTMAN, J. now delivered the judgment of the Court, (after stating the pleadings and facts as *ante*).—A rule *nisi* for a new trial having been granted, the question was argued before my Brothers Maule, Cresswell, and myself, and it was contended on behalf of the plaintiff, as it had been at the trial, that the receipt of 500*l.* by Strachan, as collector, was admitted, or if not, that the judgment was evidence of the amount of damage suffered by the plaintiff. It is an established rule of pleading, that by pleading over, every traversable allegation which is not traversed is admitted, as is said in *Hudson v. Jones* (6); but what is not material nor traversable is not admitted nor confessed, when it is alleged and not traversed—*The King v. the Bishop of Chester* (7). In that case, Lord Holt is reported, in *Lord Raymond*, p. 298, as regards this matter, to have said, "The case is thus, the Attorney General declares that Queen Elizabeth, 14th of February, twelfth year of her reign, was seised of this advowson in gross, and then presented Tymes, *prout* by the inrolment of the letters patent in Chancery, *nunc apud Westmonasterium remanens, plenius apparet*. Now,

(1) 3 Term Rep. 68.

(2) 2 Q.B. Rep. 915; s. c. 11 Law J. Rep. (N.S.) Q.B. 84.

(3) Yelv. 195.

(4) 1 Brod. & Bing. 531.

NEW SERIES, XVII.—C.P.

(5) 5 Term Rep. 2.

(6) 1 Salk. 90.

(7) 2 Ibid. 560.

though the defendant admits Charles the First to have been seised of this advowson in gross by descent; and, consequently, that Queen Elizabeth was seised in gross of it at some time of her reign; yet he does not admit it at the precise time of the 14th of February, twelfth year of her reign; because the alleging of the time and day when Queen Elizabeth was seised in gross, is surplusage and immaterial; for it is sufficient to allege general seisin in a *quare impedit* in the time of peace in the reign of such a king. Then, though the defendant does not deny a thing, yet he admits by it only things materially alleged, but he does not admit things immaterially alleged." In the present case, it was essential to the maintenance of the action for the plaintiff to shew that some money had been received by Strachan; but the amount he had received was not material, for whether it was 5*l.* or 500*l.*, which he had received, the bond was equally forfeited. But it was contended on behalf of the plaintiff, that there being here a direct and positive allegation, that there had come to the hands of Strachan a sum of money exceeding 500*l.*, the defendant had a right to traverse the allegation to the extent to which it was made; and to prove this the cases of *Tatem v. Perient*, *Leke's case* (8), and *Smith v. Dixon* (9), were relied on. The general rule of pleading undoubtedly is, that a party shall not be allowed to take his traverse in such a form as to make matter which is immaterial parcel of the issue—*Colborne v. Stockdale* (10), *Doctrina Placitandi*, 360, and *Goram v. Sweeting* (11). But the cases cited on behalf of the plaintiff, from *Yelverton*, *Dyer*, and *Ad. & El.* shew, that in certain cases in which the material and immaterial matters are mixed up in one combined and undivided allegation, the opposite party has been held to be entitled to traverse the whole compound allegation, in the terms in which it has been made. The present case, however, does not, we think, fall within the principle of those cases; the material part of the allegation, *videlicet*, that there came to the hands of Strachan a large sum of money, being per-

fectly distinct and separate from the immaterial part, that that sum exceeded 500*l.* If the immaterial words were struck out of this replication, the remainder would constitute a perfect allegation of everything necessary to be alleged; and the case is like that of *Moore v. Boulcott* (12), and *Thurman v. Wild* (13), in which the traverse was held bad for including immaterial matters in the issue, though they had been directly averred in the adverse pleading. It is, however, not necessary to determine whether a traverse in the terms of the allegation could have been sustained on demurrer, for no such traverse has here been taken; and the question here is, what the defendant has admitted by omitting to traverse the allegation; and according to the doctrine laid down by Lord Holt, in *The King v. the Bishop of Chester*, above referred to, he is not considered as having admitted anything but what is materially alleged. Even if the defendant had traversed the allegation in its present form, it would have been sufficient for the plaintiff to have proved the substance of the issue, upon which the substantial question would have been, whether any sum of money had come to Strachan or not; for be it more or be it less, the action would be well maintainable; and it is impossible, we think, to maintain that a party admits more by omitting to traverse an allegation than the opposite party would have been compelled to prove, in order to maintain the issue, if it had been traversed. On these grounds, we think, that there is no admission on the record, that the sum of 500*l.* had come to the hands of Strachan. It was secondly contended, that the amount of the judgment was evidence of the amount which the plaintiff had been obliged to pay through the default of Strachan. The judgment was in this case evidence that the plaintiff had been sued; and coupled with proof, or (as in this case) an admission of liability to some extent, might lead the jury to conclude that the plaintiff had been subjected to a *bond fide* pressure, by which he was forced and obliged to pay whatever he was legally liable to pay through Strachan's default: but whether he was legally liable to the

(8) *Dyer*, 365.

(9) 7 *Ad. & El.* 1; *a. c.* 6 *Law J. Rep.* (N.S.) K.B. 233.

(10) 1 *Stra.* 493.

(11) 2 *Saund.* 205.

(12) 1 *Bing. N.C.* 323; *a. c.* 4 *Law J. Rep.* (N.S.) C.P. 21.

(13) 11 *Ad. & El.* 453.

extent for which judgment was signed, is a matter which could only be collected by inference from the judgment; and for such a purpose the judgment could not be used without holding that a stranger to a judgment who has had no opportunity to cross-examine the witnesses or to dispute the conclusions to be drawn from the evidence can be bound by the verdict, where the judgment is after verdict, or can be bound by an agreement made without his privity or intervention between the parties to the judgment, where, as in the present case, it is a judgment founded on such an agreement. The law, we apprehend, is not so. The judgment cannot be used for such a purpose against one who is neither a party nor privy to it. We think, therefore, that the rule in this case ought to be made absolute.

*Rule absolute.*

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*APPEALS from the Courts of Revision, under 6 Vict. c. 18.*

1847. } TOMS, APPELLANT; LUCKETT,  
Nov. 15. } RESPONDENT.

*Parliament—Vote—Apartments in House—Landlord's Controul—Common Outer Door.*

*T. occupied rooms in a house in which the landlord also occupied a shop and parlour, but did not sleep. Each party had a key to the outer door, which stood open all day, but was shut at night. T. was held entitled to a vote for members of parliament as the tenant of "a building," under the 2 Will. 4. c. 45. s. 27.*

At a court held, before the revising barrister for the city of London, on the 20th of October 1847, W. E. Lockett objected to the name of Moses Toms being retained on the list of voters of the parish of St. Giles without Cripplegate, as entitled to a vote in the election of members of parliament for the city of London, in respect of the occupation of apartments at No. 21, Milton Street, in that parish.

It appeared that Toms occupied the first floor, consisting of two rooms, in the house, No. 21, Milton Street, in which he had

resided for the last year and three quarters, at a rent of 5s. 6d. per week. The landlord occupied a shop and parlour on the ground floor in the same house, but did not sleep there, and three other persons occupied other distinct apartments up-stairs in the house. There was but one outer door to the house, by which the landlord, in common with all the inmates, entered and went out. The landlord, Toms, and the three other inmates had each respectively a key of the outer door, and they all locked and unlocked that door when and as they pleased. The door was never barred or fastened inside at night; there was neither bolt nor chain to it; and it stood open during the day time. The landlord's shop door was inside the passage, which passage Toms had to enter and pass along to get to the staircase that led up to his apartments, and the staircase was shut off from the passage by a swing door, which had no lock to it. There was a back kitchen at the end of the passage, in which there was a cistern for water, and from which all parties in the house were supplied with water on going there for it. The outer door was opened in the morning by the party who had occasion first, and locked at night by whoever had occasion last, either to enter or to leave the house. The question raised before the revising barrister was, whether, under these circumstances, the occupation of Moses Toms was such an occupation in law as to entitle him to vote under the 2 Will. 4. c. 45. s. 27. for a member of parliament. On behalf of Toms it was contended, that, as the landlord did not reside in, but merely occupied a part of, the house, Toms having a key of the outer door as well as the landlord, and residing there, the landlord's occupation did not prevent Toms from being enfranchised, and that therefore he was entitled to be registered. It was urged, on the contrary, that Toms had no exclusive controul over the outer door, and that he was a mere lodger. The revising barrister held the objection valid, and expunged Toms's name from the register; but directed that if the Court of Common Pleas should be of opinion that the decision was erroneous, the name of Toms should be re-inserted in the list.

Toms having appealed against this decision,—

*Crompton* (15th Nov.) appeared for the appellant.—This was the “*domus mansionalis*” of Toms, and not that of the landlord. In no case has a house been held to be the *domus mansionalis* of a person who does not sleep in it. Each party had uncontrolled access to his apartments; the outer door was used only as a protection against thieves. The landlord did not stand in the relation of “*pater-familias*” to the occupiers, and it is a perversion of the meaning of the word to call them “lodgers.” This is like the case of *Wright v. the Town Clerk of Stockport* (1), where different persons occupied separate rooms in a factory, to which there was a common staircase and an outer door which was never fastened, and the occupier of each room was held to be the exclusive occupier of “a building” within the Reform Act.

[WILDE, C.J.—This case does not state an exclusive use of the apartments, or that the appellant had a key of his apartments.]

There was no limit of the enjoyment of the apartments. In *Pitts v. Smedley* (2), where the occupier had no key of the outer door, the key being kept by the landlord, the Court held the claimant to be a mere lodger not entitled to vote, on the ground that he had a limited enjoyment only, his access to his rooms being merely permissive. The exclusive possession of the key by the landlord was the ground of that decision. Here the occupier was not under the landlord's controul as to access. In *Score v. Huggett* (3), the occupier of apartments having a key, where the landlord did not reside in or occupy part of the house, was held entitled to vote. The case of *Wansey v. Perkins* (4), where the landlord resided on the premises, and the occupier of apartments having a key as well as the landlord was held not entitled to vote, was decided on the ground that the claimant was a mere lodger, Cresswell, J. referring to *Pitts v. Smedley*, and Erle, J. to *Monks v. Dykes* (5), which was a case of an ordinary lodger.

In *Kearney's case* (6) the claimant, who was held entitled to vote, occupied a front apartment as a shop. There was no door from the shop immediately opening into the street, but the passage from the shop to the street was through a hall, in which there was also a door opening to a staircase and apartments occupied by other lodgers. The street door opening from the hall was open all day, but locked at night. The claimant had one key, the landlord's brother had another. All the authorities shew that the separate apartments of different occupiers, where the landlord does not reside on the premises, are deemed in law to be the several “dwelling-houses” of the respective parties—1 *Hawkins*, P.C. book 1. c. 39. ss. 13. and 14; 4 *Black. Com.* 225; *Archbold's Crim. P.C.* tit. ‘Burglary’; *The King v. Rogers* (7), *The King v. Trapshaw* (8), *Lee v. Gansell* (9). In the case of *The Queen v. Ponsonby* (10), the occupation of apartments in a royal palace was held sufficient for rating purposes, although a portion of the palace was occupied by the Crown. The occupation of Toms, then, was a distinct occupation, sufficient to give him a vote under the act of parliament; and the fact of the landlord using a part of the premises and possessing a key makes no difference, as the tenant had uncontrolled access to his apartments.

*Groves*, for the respondent.—The claimant in this case does not occupy “as owner or tenant, any house, warehouse, counting-house, shop, or other building,” under the 27th section of 2 Will. 4. c. 45. There is nowhere any definition of “residence” which shews that the landlord in this case did not reside on the premises. In *The King v. Ditchet* (11), it was held not to be necessary to make a man the occupier of a tenement so as to gain a settlement, that he should sleep in or take his meals there. The decisions in all the cases of claims to vote depend upon the question of exclusive occupation. The only difference between this case and *Wansey v. Perkins* is, that the

(1) 5 Man. & Gr. 33; s. c. 13 Law J. Rep. (N.S.) C.P. 50.

(2) 7 Ibid. 85; s. c. 14 Law J. Rep. (N.S.) C.P. 73.

(3) Ibid. 95; s. c. 14 Law J. Rep. (N.S.) C.P. 74.

(4) Ibid. 151; s. c. 14 Law J. Rep. (N.S.) C.P. 75.

(5) 4 Mee. & Wels. 567; s. c. 8 Law J. Rep. (N.S.) Exch. 73.

(6) Alcock Reg. Ca. 22; s. c. Rogers Elec. 169, and Elliott, 152.

(7) Leach, C.C. 89.

(8) Ibid. 427.

(9) Cowp. 8.

(10) 3 Q.B. Rep. 14; s. c. 11 Law J. Rep. (N.S.) M.C. 65.

(11) 9 B. & C. 85; s. c. 7 Law J. Rep. M. C. 110.

landlord in this case did not sleep on the premises. There is no authority to shew that this is necessary to constitute residence; but, at all events, residence is not necessary under the act if there is a holding by occupation. It cannot be contended that the landlord is not entitled to vote as occupier. If he is entitled, then his occupation is exclusive, and the lodger cannot be entitled. There is not one case which shews that a party has a right to vote when the landlord has retained a right to interfere with the premises. The words of Crampton, J., in *Kearney's case*, are directly in point. He says, that it must be a full, free, and exclusive enjoyment, and the claimant must command the entrance to and exit from the premises. Can it be said that the occupier commands the entrance and exit when the landlord has a key as well?

[WILDE, C.J.—If the landlord gives the tenant a key, and cannot change the lock, how does that interfere with the tenant's command of the entrance?]

In *Wansey v. Perkins* both the landlord and the claimant had keys, and that was held not to be exclusive occupation: and if that was not, how can this be?

[WILDE, C.J.—How would it be if two occupiers had each a key, and the landlord had none?]

Each would have a vote. In the present case, the revising barrister has not found that the tenant had the exclusive occupation of his own rooms.

Crampton, in reply.—As to the form of the case: since the questions raised were with regard to the occupation, the revising barrister found the occupation in the words of the statute. The objection was taken that Toms had no exclusive controul over the outer door, and it was on this point that the revising barrister decided against him. There is here an occupation at a sufficient rent. Is it an occupation as owner or tenant? It is not as owner; but unless Toms is a mere lodger, he is tenant. It is said, that in order to make him a tenant so as to have a vote, there must be an exclusive occupation; but an exclusive occupation of his own rooms is sufficient. It cannot be meant that it is necessary that the party should have exclusive possession of the whole house, but merely that he should have the right not to be excluded

from the house. According to the proposition on the other side, a person has no exclusive use of his own rooms, unless he can keep his neighbours from them. In *Pitts v. Smedley* the landlord had power to exclude the lodger if he pleased. *Wright v. the Town Clerk of Stockport* is exactly like the present case both in the judgment and the statement. There the landlord did occupy, and the tenant's vote was allowed. In *Kearney's case* it is clear that the landlord had controul over the key. In *Wansey v. Perkins* the landlord resided in the house, and the case is, in that respect, distinguishable from the present.

WILDE, C.J.—In this case, the question referred to the Court is very limited. The case states that it was urged on behalf of the appellant, that as the landlord did not reside in the house, but merely occupied a part of it, and as the appellant resided on the premises, and had a key of the outer door as well as the landlord, the occupation by the landlord did not prevent the appellant from having a vote. The objection is, that the claimant had not the exclusive controul over the outer door, and it was upon that objection that the revising barrister decided. I am of opinion that the objection is not well founded, and that the absence of exclusive controul over the outer door does not deprive the party of his right of voting. Looking at the facts, at the objection taken, and the mode in which the question is referred, it seems to me that the intention of the revising barrister was, to ask us whether or not the absence of such controul had the effect of preventing the appellant from being a "tenant" within the act of parliament, and reduced his occupation to that of a mere lodger. The 27th section of the Reform Act enacts that a party who "shall occupy as owner or tenant any house, warehouse, counting-house, shop, or other building," of the clear yearly value of not less than 10*l.* shall be entitled to vote. Now, what was intended to be comprised within the words "house, warehouse, counting-house, or shop"? It is quite clear that all these import parts of houses used for particular purposes; and the following words "or other building" were meant to include other occupations of the same nature, where a distinct portion

of a house was in the same manner occupied separately, and were used by the legislature to prevent nice distinctions which were otherwise likely to arise. In this case, the appellant occupied a certain apartment in a house, and it must be considered another building as contradistinguished from a house, just as much as a shop, warehouse, or counting-house is another building under this act. I therefore think that the appellant occupies a description of premises which, if occupied in a certain manner, gives him a right to vote. The character of his occupation must be that of "tenant," construing that word in the sense in which the legislature intended to use it, that is to say, in its popular sense. It must be an occupation under a demise, which gives him the exclusive right to the possession of the premises. The case finds that the appellant occupied two rooms at a rent of 5s. 6d. per week, and from that fact alone it might be inferred that he had the exclusive occupation; but looking at all the facts, it is quite clear that the appellant was deemed to have the exclusive right to his part of the house. Where then is anything shewn in the case to cut down his qualification? A man may occupy rooms in a house to the possession of which he may have the exclusive right; and yet there may be some one having such superior mastership and dominion over the house, as to prevent him from having the character of tenant under the act of parliament. The Court has been called upon in some cases to say, whether under certain circumstances, a party's interest in the occupation of premises has been cut down, as where the landlord has resided in part of the premises, and retained the key of the outer door, in which case the Court has considered that the landlord had such mastership as to prevent the occupier from being a tenant under the act, their opinion being founded on the facts of residence on the premises and the retention of the key. This they have held also even when the occupier himself had a key. In this case, the landlord did not reside, but merely occupied a certain part of the house. If he had resided day and night in the premises, it would not have so necessarily followed that the contract of tenancy should give the tenant an absolute right to enter at all times. If the landlord

is not on the spot at all times to exercise dominion over the outer door, who is to have the right to enjoy the use of that door? Is the tenant to have it at some times, and not at others? There certainly is no such qualification of the right. Whatever may be the just inference where the landlord resides on the premises, retaining entire dominion over them, except so far as he has personally parted with it, the same inference would not be warranted by the mere fact that the landlord had a key of the outer door if he did not reside on the premises. I cannot see why the fact of the tenant not having exclusive controul over the outer door is to destroy his right to vote. It may be one circumstance from which to infer that he is not a tenant, but unless coupled with other matters, it would not have that effect of itself. I am therefore of opinion, that the appellant had sufficient controul over the premises to prevent the fact of the landlord having a key from qualifying his interest. As this is the only question raised in the case, I think the revising barrister was wrong, and the appellant's name ought to be restored to the list of voters.

COLTMAN, J.—I also am of opinion that the revising barrister was wrong. The case gives no distinct statement as to the interest of the occupier in the rooms; but as it nowhere points to any other person as having a right to enter those rooms, the stipulation between him and the landlord must be taken to be, that he should have the use of the rooms, and no one else. Then, if the party had such exclusive use of the rooms on the payment of rent, that *prima facie* imports a tenancy. In the case of *Wansey v. Perkins*, the Court thought that such an inference might be rebutted by the fact that the landlord resided with his family on the premises. In this case, however, it appears to me that there is nothing to shew that the party ought not to be considered a tenant entitled to vote. There is one other point, namely, whether the holder of one portion of a house can be considered a tenant within the act. I think such an occupation properly falls within the words "other building," words which are quite consistent with its being a portion of another building in the same manner as a shop, counting-house, or warehouse.

MAULE, J.—I think the appellant is right in this case. The case seems to me to raise a question not relating so much to the nature of the thing occupied, as to the nature and quality of the occupation. The point seems to be, whether this is an occupation as tenant, entitling the claimant to vote under the 27th section of the statute, or the occupation of a lodger, considered as different from that of a tenant. I think that the distinction between these cases is this, that where the owner of a house takes some person into his house, who occupies a room, and has the right of ingress and egress, yet if the owner retains his general character of master of the house, that person so occupying is a lodger, and not a tenant within the 27th section of the act. I do not think that the case is varied by the person having a key to let himself in and out; nor do I think, that if other persons have a key, that will affect his exclusive occupation. The right of way of others does not interfere with his right. The distinction between lodger and tenant depends upon the owner living in the house in the manner and quality of master of the house, retaining some degree of controul over that part of the house where the lodger lives. The relation of master of the house does not necessarily follow from that of landlord. If the landlord does not live in the house, and is not what in ordinary language is called "master of the house," he does not generally keep any controul over the part let. If he wishes to do so, he must expressly reserve such controul, and it will not be inferred that, because he is landlord, he has the controul. In the present case, the owner occupies a shop and parlour, not the house. I think, that the claimant, taking the apartment and having constant access at all times without leave of the landlord, no person having controul over his occupation, is entitled to vote; and I, therefore, think, that the decision of the revising barister ought to be reversed.

WILLIAMS, J.—I concur in the opinions expressed by my learned Brothers; but I confess that my mind is not altogether free from a doubt which has arisen in the course of the argument. The 27th section of the act gives a right to vote to any person who shall occupy as tenant or owner any house, warehouse, counting-house, shop, or other

building. I have considered that the claimant ought to be in a condition to maintain trespass in respect of some such tenement as is mentioned in the statute. I have felt a difficulty as to whether the claimant has occupied a house under the statute, and notwithstanding the case of *Wright v. the Town Clerk of Stockport*, whether the tenement which he occupied comes under the description of "other building," in the act. My doubts, however, are not sufficient to induce me to differ from my learned Brothers.

*Judgment for the appellant.*

1847. } DOWNING, APPELLANT; LUCKETT,  
Nov. 15. } RESPONDENT.

*Parliament—Vote—Occupation as Tenant  
—Part of House—Outer Door.*

*A party claiming to vote, occupied a counting-house in a house in which the landlord and others had counting-houses. There were a wooden gate and a door at the outer entrance, which were open all day, but shut by night. A clerk of the landlord's lived on the premises to protect them, and kept the keys of the gate and door, which could be locked and unlocked only on the inside. It was the clerk's duty to open the gate and door to any of the occupiers, if required to do so, none of them having keys:—Held, that this was an occupation as tenant by the claimant, which entitled him to a vote.*

At a court held before the revising barister for the city of London, on the 20th of October 1847, W. E. Luckett objected to the name of H. B. Downing being retained on the list of voters of the parish of Allhallows Staining, as entitled to vote in the election of members of parliament for the city of London, in respect of the occupation of a counting-house, No. 11, Mark Lane, in the said parish. The case stated the following facts:—"H. B. Downing, the claimant, occupied a counting-house, at No. 11, Mark Lane, and had done so for three years at a rent of 20l. a year. Six other parties, besides the landlord, respectively occupied counting-houses in the same house. There was but one outer entrance to the house, and at that outer entrance



there was a small swing-gate, which was kept sometimes open, and sometimes shut, during the day, but was never locked. There was also a large wooden gate, and likewise a door at the outer entrance, both of which were kept open during the daytime, but they were shut and locked inside every night by A. W. Enever, one of the landlord's clerks, who resided in the upper part of the house with his family, and who kept the keys. Enever unlocked and opened the outer door and the large gate, every morning. The landlord required him to reside there, for the protection of the premises and the accommodation of those who occupied the counting-houses. Neither the large gate nor the outer door had a key-hole outside; therefore, they could only be locked and unlocked inside. Enever paid no rent in money for his apartments, but considered that he paid it in services. After entering at the outer entrance, which was common to the landlord and all his tenants, and proceeding along a short passage, ascending some steps, and turning a short way to the right, Mr. Downing passed the door of the landlord's counting-house, and then went through folding-doors into a passage, which led to the door of his own counting-house. There was a water-closet near the landlord's counting-house door, common to all the inmates. The claimant paid Enever a small yearly sum, in consideration of his servant's sweeping the passage between his own and the landlord's counting-house. He had no key of the outer gate or of the outer door, and if he wished to gain admittance after the large gate and the door at the outer entrance were shut at night, or before they were opened in the morning, he could only do so by ringing a bell, and getting it answered by Enever. Mr. Downing handed to the revising barrister a letter from Enever, in which he stated that the outside gates were locked at night by him, or his servant, and that, of course, Mr. Downing, or any of his servants, would be admitted at any hour of the night. It was objected, before the revising barrister, that Mr. Downing was not entitled to a vote, because he had no key or independent power of access to the premises; and the revising barrister, sustaining the objection, expunged Mr. Downing's name from the register; but directed its re-insertion, if the

Court should be of opinion that his decision was erroneous.

The argument, in this case, was heard immediately after that in the last case, *Toms v. Luckett*, and no additional authorities were cited.

WILDE, C.J.—We are all agreed that this case is without difficulty. The landlord here retained nothing of his interest as landlord, with regard to the counting-house in question. The case finds that Enever occupied the apartments in the house, for the protection of the premises. That surely cannot mean protection against the occupiers. Then, is there anything in the case to limit the interest of the tenant? It seems to me that the case is exactly like that of chambers in the Albany, or shops in the Burlington Arcade, where there is a common entrance, and a porter who attends to open the gate or door to occupiers, and to protect the premises. It is quite clear that the appellant occupied as tenant, and there is nothing in the case to warrant the inference that his interest was limited.

COLTMAN, J.—This case is not at all analogous to the cases where part of the landlord's family resides upon the premises.

MAULE, J.—There is, in this case, a total absence of all circumstances shewing any controul over the right of the occupier, so as to reduce the occupation to something less than an occupation as tenant. The object of having the outside doors, and the keys in Enever's hands, is to prevent people other than the occupiers from getting in; and the locks are inside to prevent burglary. Enever's duty is to let the occupiers in at their pleasure. It appears that the claimant has as exclusive a controul over his counting-house as a person can have.

WILLIAMS, J. concurred.

*Judgment for the appellant.*

1847. } BIRCH, APPELLANT; EDWARDS,  
Nov. 15. } RESPONDENT.

*Parliament—Voter—Notice of Objection—Service—Duplicate.*

*A notice of objection to a voter sent by post, under 6 & 7 Vict. c. 18. s. 100, should have an address on the outside as well as in the inside.*

*Where the notice sent by post had directions both on the outside and in the inside, and the paper produced as a duplicate to prove the service, contained the direction in the inside but none on the outside, the Court held that the paper was not a duplicate, and that the service was not proved.*

The following case was granted by the revising barrister for the county of Monmouth:—

At a court held, before me, T. C. S. K., revising barrister for the county of Monmouth, on Monday the 4th of October 1847, at Pontypool, for the revision of the list of voters for the parish of Trevechin, in the said county, James Birch objected to the name of Francis Brittain, of Garndiffaith, being retained on the list of voters for the said parish.

To prove a service of notice of objection on the said Francis Brittain, an alleged duplicate notice, bearing the post-mark "Pontypool, August 24, 1847," was produced, but on inspection it appeared that though posted in due time, and correctly drawn according to the form No. 5, Schedule A, 6 Vict. c. 18, it was not duly directed to the said Francis Brittain, unless, as was contended, the words on the face and at the top of the notice "To Mr. Francis Brittain, Garndiffaith," could be considered as a direction.

It was proved that on the back of the notice which was delivered to and retained by the postmaster at Pontypool, to be forwarded by post to the said Francis Brittain, the words "To Mr. Francis Brittain, Garndiffaith" were written so as to form, when the paper was folded into the shape of a letter, an external direction to him.

Under these circumstances, it was contended, on the part of the said Francis Brittain, that the service of notice of objection on him was not duly proved, inasmuch as the two papers were not duplicates; and I being of that opinion retained his name upon the list of voters. But in order to give the objector an opportunity of availing himself of his notice of objection, in case the Court of Common Pleas should be of a contrary opinion, the said Francis Brittain was called and failed to establish his qualification.

If the Court should think the service of notice of objection duly proved, notwith-

standing the absence of external direction on the alleged duplicate thereof, the register is to be altered by expunging the name of the said Francis Brittain with those of the other persons hereafter named from the list; otherwise the register is to remain unaltered.

The case then stated that forty-nine other persons mentioned in a schedule annexed were objected to by notices similarly served, and that the revising barrister decided on their cases upon the same point of law, directing the appeals against his decision to be consolidated.

*Keating* (Nov. 15,) for the appellant.—The 100th section of the statute 6 & 7 Vict. c. 18. (1) only requires that the notice shall be directed, and it is immaterial on what part of the paper the direction is placed. If it is contained in the inside it is really not necessary to repeat it by indorsement. No particular form is required by the statute. It might be partly printed and partly written, or it might be written or printed on a card. The present notice might have been so folded as to shew the address on the outside. The reasonable construction of the 100th section is, that inasmuch as the postmaster, before stamping the notice, must ascertain that the document is in a proper state for transmission, if he finds that it has an address which enables him to forward it, nothing more is requisite. The notice is

(1) That section enacts, "Whenever any persons shall be desirous of sending any such notice of objection by the post, he shall deliver the same duly directed, open and in duplicate, to the postmaster of any post-office where money orders are received and paid within such hours as shall have previously been given notice of in such post-office, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed 2d. over and above the ordinary rate of postage) as shall from time to time be made by the Postmaster General in that behalf; and in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and on being satisfied that they are alike in their address and their contents, shall forward one of them to its address by the post and shall return the other to the party bringing the same duly stamped with the stamp of the said office, and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate, on the day on which such notice would by the ordinary course of post have been delivered at such place."

precisely in the form given in Schedule A. No. 5. of the act. The papers require to be duplicates only in essential particulars. That being so, and the two documents agreeing in all essential particulars, the case contains abundant evidence that the claimant did not prove his qualification.

*Byles, Serj.* for the respondent.—This document is not sufficient under the statute. The notice, at all events, if in the form of a letter, as it is here, ought to have an address on the back. The meaning of the act must be, that the notice shall be directed in the way in which letters usually are directed. "Direction" is not the only word used. The act speaks of "address" also, which must apply to an external address. It speaks also of "contents" as something different from "address." These papers are not duplicates, although they might have been so had they both been directed inside only. To be "duplicates" the two documents ought to be identical—*Toms v. Cuming* (2).

*Keating*, in reply.—At all events there is sufficient proof of the service, by posting the paper addressed to the party objected to.

[*MAULE, J.*—But for the provision in the act, there must have been other evidence. The postmaster is directed to forward one of the papers to its address by the post. That must mean an address on the outside of it. A thing is not the duplicate of another if it differs from it in any essential particular. If it is essential that the address should be on the outside, then these documents are not duplicates. The actual thing to which the postmaster or postman was to look for the transmission of the paper was not in duplicate.]

It would be introducing fresh provisions into the statute if the Court were to hold that there ought to be an external address, and that the notice should be in the form of a letter.

*WILDE, C.J.*—It appears to me that the document relied upon to prove the service of the notice of objection, cannot be considered a duplicate of that which was forwarded by post. It might lead to very serious inconveniences if we were to hold it sufficient. One of the most important points to be ascertained is, the direction which was

given to the post-office with regard to the transmission of the notice. Here, there was a matter on the outside of the notice which was intended to be given for that purpose, and on the document produced that matter appears only on the face of it. When I find that the legislature expressly mentions "address" and "contents," I cannot think that because you may fold the paper so as to make the name appear outside, it is therefore to be deemed a duplicate of the other. I see no inconvenience in coming to this conclusion.

*COLTMAN, J.*—I am of the same opinion.—I think that when the statute says that the notice shall be duly directed, it refers to that which is to be transmitted by post, and means a direction on the outside. I do not think that the variance between the two papers is immaterial.

*MAULE, J.*—I also think that the statute has not been complied with in a material provision necessary to make this document evidence of the delivery of the notice. The notice had in the inside an address for the holder, and another, on the outside, for the use of the post-office to tell them to whom they were to deliver it. The most essential part of the proof is to shew what it is that the post-office authorities were desired by the party who left the notice to do with it. The postmaster was directed to deliver to the address on the outside of the paper. The other paper omits to state what the person sending the notice desired the postmaster to do.

*WILLIAMS, J.*—I also am of the same opinion, inasmuch as it appears to me that the documents are not duplicates within the statute. The form of the notice is that which is given in the schedule, however it was served; but it is necessary that it should have a cumulative direction, one in the inside, and another on the outside.

*Judgment for the respondent, with costs.*

1847. }  
Nov. 11. } *SHELDON v. FLATCHER.*

*Parliament—6 & 7 Vict. c. 18. s. 17.—Notice of Objection.*

*A notice of objection to a voter for a borough was in the following form:—"To*

(2) 7 Man. & Gr. 94; s. c. 14 Law J. Rep. (N.A.) C.P. 67.

*Mr. C. S. 1, Olney Place. Take notice, I object to your name being retained on the list of voters for the borough of Cheltenham. (Signed) J. F. of No. 5, Sherborne Street, on the list of voters for the parish of Cheltenham*":—Held, that the description of the objector's place of abode, No. 5, Sherborne Street, meant Sherborne Street, Cheltenham, and was a compliance with the requirements of the 17th section of the Registration Act.

*Whether a notice of objection designates on the face of it an objector's place of abode, is a question of law. Whether such designation is sufficiently particular, is a question of fact.*

At a court held before the revising barrister of Cheltenham, for revising the list of voters for the said borough of Cheltenham. John Fletcher objected to the name of Charles Sheldon being retained on the list of voters for the said borough. The notice of objection was in the following form:—"To Mr. Charles Sheldon, 1, Olney Place. I hereby give you notice, that I object to your name being retained on the list of persons entitled to vote in the election of a member for the borough of Cheltenham. Dated this 21st day of August 1847. (Signed) John Fletcher, of 5, Sherborne Street, on the list of voters for the parish of Cheltenham." It was contended, on behalf of the person objected to, that the notice of objection was defective in that it did not shew in what town or parish Sherborne Street was situate, there being other parishes within the distance of seven miles, containing streets, though it was not shewn that there was any other Sherborne Street than that in the parish of Cheltenham. The borough of Cheltenham consists of the parish of Cheltenham only, and the names of the whole of the voters for the borough are comprehended in one list, viz., those entitled to vote in respect of property situate within the parish of Cheltenham. The name of John Fletcher, the objector, appeared in the list of voters, and his place of abode, and the local description of his qualification was therein described, precisely in the same words as in the notice of objection, viz., "5, Sherborne Street." It was not suggested, that in fact there was any other place called Sherborne Street, within the borough of Cheltenham, or that

it was not perfectly well known, or that any practical inconvenience followed from the omission of the name of the town or parish. The revising barrister thought the notice of objection sufficient; and the person objected to having failed to prove his right to have his name retained in the list of voters, he expunged it therefrom. The case of twenty-six other persons objected to by the said J. Fletcher upon similar notices, and whose names the revising barrister expunged from the list, were consolidated with the principal case. If the Court of Common Pleas should be of opinion that the notice of objection was sufficient, the register was to remain unaltered; if they should be of a contrary opinion, the names of the parties so expunged were to be restored to the register.

*Byles, Serj.*, for the appellant.—The notice of objection is bad. No. 5, Sherborne Street may be in York or in Exeter. The objector need not be residing within the borough at the time of the service of the notice, and therefore he should have added Cheltenham to the description of his residence in the notice. The case finds there is a plurality of parishes and streets wherein voters may reside, and it is not improbable that there may be more than one Sherborne Street among them. The case of *Woollett v. Davis* (1) is in point. It will be said that that was the case of a county voter, and that this is a town voter, but that makes no difference in the particularity required by the Registration Act in a notice of this kind. The voter has no occasion to look at the list of voters to ascertain who the objector is: the notice must speak for itself; and in this case, without reference to the list, it does not appear in what parish or county Sherborne Street is situate. The form of notice here does not comply with that given in 6 & 7 Vict. c. 18, Schedule (B), No. 11; and by the 17th section of that act an objector must give a notice to the person objected to according to that form: the objector's place of abode should be fully stated in the body of the notice; and it is obviously incomplete without the addition of the parish or place, "Cheltenham." A letter directed to John Fletcher,

(1) 4 Com. B. 115; s. c. 16 Law J. Rep. (n.s.) C.P. 185.

No. 5, Sherborne Street, and posted in London, would not be likely to reach him.

*Keating*, for the respondent.—The case of *Woollett v. Davis* is not in point. That decision amounts to this: the description in a notice of a place of abode of an objector insufficient in itself, and so found by the revising barrister, cannot have its deficiencies supplied by reference to another document. The sufficiency of the statement of the place of abode must vary according to the circumstances of each particular place; and the way in which that case was reserved for the opinion of this Court shews that the revising barrister thought the description in the notice *per se* insufficient:—"The question for the Court of Common Pleas was, whether coupling together the notice of objection and list of voters for the parish of St. Woollos, it did not sufficiently appear that the place called *The Oaks* was the place of abode of the objector, and that it was situate in the parish of St. Woollos;" and it is there said in the judgment, by Wilde, C.J., "It was held, by the barrister, that the notice, admitted to be insufficient in itself, might be made valid by being coupled with the register, &c., and we think that this decision is wrong." The barrister here has found the fact which was the foundation of that judgment in a different way: the notice here is sufficient in itself, and therefore his decision is correct; and *Woollett v. Davis* is an authority in favour of the respondent.

[MAULE, J.—A good deal of the case sent to us may be struck out: the mere negation of no other street of the same name, the existence of a register, &c., and it then comes to this:—Is the description of the objector taken by itself sufficient? or, rather, is it necessarily insufficient? The statement of the immaterial facts leads us to fancy that, but for their existence, the barrister might not perhaps have found as he has done; but those facts should not have influenced his judgment.]

It has never been decided, as a matter of law, that it is necessary to give the name of the parish, in describing the place of the objector's abode, in a notice of objection: it is rather a question of fact to be decided in each case by the revising barrister. Thus *King Street*, with nothing more, in a London notice, would probably be held an insuffi-

cient—*King Street*, with nothing more in a Huntingdon notice, a sufficient description of an objector's place of residence. The Court will not lay down an inflexible rule of what is necessary to be stated in each case. In *Knowles v. Brooking* (2), the Court decided, that in a notice of objection it was sufficient to state the objector's present place of abode, because the word "of," in form No. 11 (signed) A. B., "*of*," was intended to give all necessary information to the person objected to. As then the place of abode is not matter of description, but matter of information, it is necessarily a question of fact. In this case the barrister has given his decision; and by the 65th section of 6 & 7 Vict. c. 18. it cannot be impeached.

[MAULE, J.—This is a consolidated appeal. If the decision went upon that ground, the revising barrister ought to have inquired into the means of knowledge of each party objected to.]

He has found, as a fact, that the information given in the notice was sufficient for everybody, that, according to the 101st section, "the person is denominated in the notice so as to be *commonly understood*."

[WILLIAMS, J.—That section would not authorize omissions, but admits the use of equivalents, as St. Kitts for St. Christopher.]

The judgment of Tindal, C.J., in *Gadsby v. Warburton* (3), shews that a place of abode is not necessarily to be described as in a parish, and that if there be any inconvenience to the party objected to, in consequence of a want of particularity in the notice, such inconvenience should have been proved.

*Byles, Serj.*, in reply.—The sufficiency of this notice is a question of law, and not a question of fact; it was so left by the barrister, and so decided by this Court in *Gadsby v. Warburton* and *Woollett v. Davis*. At any rate it is a question of law to some extent, as appears from *Walter v. Haynes* (4), where Lord Tenterden decided that the sufficiency of the direction on a letter was matter of law.

(2) 2 Com. B. 226; a. c. 15 Law J. Rep. (N.S.) C.P. 197.

(3) 7 Man. & Gr. 11; s. c. 14 Law J. Rep. (N.S.) C.P. 41.

(4) Ry. & Moo. 149.

[WILDE, C.J.—I understand that case as a decision on a matter of fact. The Judge decided, the direction on this letter "Mr. Haynes, Bristol," is so general, that it furnishes no evidence of the fact that the notice of dishonour of a bill contained in the letter has ever reached Mr. Haynes.]

It cannot be collected from this case what the barrister would have found upon the notice itself; he finds many facts, and coupling them together with the notice decides that the notice is sufficient. In *Woollett v. Davis* the Court rejected the register which had been, as it were, annexed to the notice to establish its validity; and the Court will reject the facts which have here been used for its support. The decision of the barrister was reversed in that case, and it must be also reversed in this.

[WILLIAMS, J.—The statement here may fairly mean, I thought the notice sufficient, but should not have done so had it been shewn there was another Sherborne Street.]

WILDE, C.J.—It is required by the 17th section of the 6 & 7 Vict. c. 18. that an objector must adopt the form of notice of objection No. 11 in Schedule (B) to that act, which form requires the objector's signature to be given, and also a statement of his place of abode. The first question is, does that statement involve a matter of fact or a matter of law? It appears to me to involve both. When the stated place of abode names a particular locality, and the statement is so vague that by means of it such locality could not be found, the question as to the sufficiency or insufficiency of such statement would then be matter of law. Suppose an objector in London were to describe himself of King Street simply, that would be a description of his place of abode from its extreme generality so manifestly insufficient, that a decision upon it might be reviewed by this Court as a matter of law. But if the description were so particular and defined as to be as generally understood as the one supposed would be likely to be misunderstood, then the question would be for the barrister; and his decision upon it could not be inquired into by this Court, because his decision would in such case be pronounced on a matter of fact. In *Woollett v. Davis* the Court held the decision of the barrister

wrong, because he had coupled two things together (the register and the notice), which as a matter of law ought not to have been coupled together, and without such junction the notice of objection was insufficient; the revising barrister found it was insufficient, we adopted his opinion, and therefore reversed his decision. In *Gadsby v. Warburton* the barrister thought that the description of the place of abode of the objector, "Poplar Grove, Didsbury," was sufficient in fact, but that something ought to have been added to the description as matter of law, such as "near Manchester" or "Lancashire," and therefore he decided against the validity of the notice: the Court, however, thought that it was not necessary as matter of law to add anything to the description, and so reversed his decision; but there was no suggestion in that case that the notice was insufficient, as the barrister had decided it to be in *Woollett v. Davis*, and this shews the perfect agreement of those two cases. In this case the objector states his place of abode to be No. 5, Sherborne Street. The question is, where is Sherborne Street? What am I, the voter objected to, to understand by Sherborne Street? Why, what are the parties inquiring or corresponding about? The subject is a vote for the borough of Cheltenham, the person addressed resides at Cheltenham, he is a voter of Cheltenham, and the notice being applicable to a vote for the borough of Cheltenham, can anybody doubt that No. 5, Sherborne Street means in the borough of Cheltenham? Then, taking this notice as applicable to the borough of Cheltenham, is it not a reasonable and sufficient description of a person's residence, when you are referring to such a place as Cheltenham to say, he lives at No. 5, Sherborne Street? I think the description was *prima facie* sufficient. The barrister has decided as a matter of fact that it was sufficient, and his decision must be affirmed.

COLTMAN, J.—I am disposed to think that this notice was sufficient to give the information to the voter objected to which the act of parliament requires. It may be doubtful whether such a notice would be sufficient to give information to all persons. But we should, I think, take into our consideration, when we look at this notice, that it relates to the register of voters for a

borough on which the name of the voter was, that is, the borough of Cheltenham; and though it is not necessary that the objector must reside in Cheltenham, still when parties are talking and referring to the borough of Cheltenham, the mention of the name of Sherborne Street must and would naturally be taken with reference to, and in connexion with, that borough, and the description therefore means Sherborne Street, Cheltenham. The statement of the place of abode must be the true statement; and when it is contended by the appellant, that on this notice the objector might say, I meant Sherborne Street, York, the answer is, that then the notice is bad, because the statement in it of your place of abode is untrue; "Sherborne Street" in this notice, means Sherborne Street, Cheltenham, and cannot mean anywhere else. As a matter of fact the barrister has found the description to be sufficiently particular; the facts stated in the first part of the case do not necessarily qualify his opinion, nor does he state that those facts were the foundation of his opinion. It is not necessary for the barrister to give his reasons, but if we saw enough on the face of the document to shew that the statement was not reasonably sufficient, we should say as a matter of law that his decision was wrong.

MAULE, J.—I am of the same opinion. I doubted at first whether the barrister had not founded his opinion of the sufficiency of the notice upon the facts stated in the case; but, on consideration, I am satisfied that he did not do so. It is to be observed, that the notice is directed—

"To Mr. Charles Sheldon, No. 1, Olney Place.

"Take notice, that I object to your name being retained on the list of voters for the borough of Cheltenham.

(Signed) "John Fletcher,  
No. 5, Sherborne Street, on the register of voters for the parish of Cheltenham."

The notice then is from a Cheltenham man to a Cheltenham man, and the subject before and between them is a vote for Cheltenham. There is no fuller description of Olney Place than there is of Sherborne Street. Does Mr. Charles Sheldon know, upon receiving this notice, where Olney Place is? if so, why should he not know where Sherborne Street is? Does he suppose, or could any person

suppose, that Olney Place and Sherborne Street, mentioned in this notice, are in York or in Gloucester? No person out of a court of justice could doubt (reference being had to the matter of inquiry,) that these places are both in Cheltenham; and I do not think that because we are in a court of justice such a doubt should be entertained. Then, as upon the proper construction of this notice, a sufficient description of the place of abode has been given in point of law, and as the barrister has decided that the description for all practical purposes is sufficient in point of fact, his decision must be affirmed.

WILLIAMS, J.—Upon the face of this document, No. 5, "Sherborne Street," must mean Sherborne Street, Cheltenham: that is sufficient in point of law. The question of particularity was for the barrister, and he has decided that it was sufficient.

*Decision affirmed.*

1847. }  
May 8. } WONTNER v. SHAIRP.\*

*Railway—Action for Return of Deposit—Committee of Management—Misrepresentation by Subscription Deed.*

*In an action for money had and received brought by a depositor against one of the committee of management of a projected railway company, it appeared from the prospectus that the capital was to have been 3,000,000*l.*, in 120,000 shares, deposit 1*l.* 7*s.* 6*d.* per share. The plaintiff requested an allotment of sixty shares, stating "I undertake to accept the same, subject to the regulations of the company, and to sign the legal documents, and to pay, when required, the deposit." To this the following answer (in substance) was sent: "Not transferable. The L. and E. R. Company, capital 3,000,000*l.*, in 120,000 shares of 25*l.* each, &c.—Sir,—The committee have, at your request, allotted you sixty shares, upon condition that the deposit be paid on or before the 18th of October, in default of which such allotment will be forfeited." Before the day so appointed for the payment*

\* The report of this case has been unavoidably delayed.

of the deposit, the committee of management issued an advertisement, stating that they had completed the allotment of shares, and apologizing to disappointed applicants. There was evidence that the plaintiff saw this advertisement; within a day or two he paid his deposit, and he afterwards executed the subscription deed, which gave authority to the committee to pay expenses out of the m<sup>o</sup> subscribed. The committee allotted only 58,000 shares, though they had had the opportunity of allotting the whole 120,000. The deposits had been expended, and there were no funds to make the deposit required by the House of Commons. The plaintiff, with a knowledge of the last two circumstances, attended a meeting which was called of the shareholders, and moved that the deposits should be returned, but was outvoted. Afterwards the scheme was abandoned:—Held, first, that the application for and the allotment of the shares did not, at the time when the plaintiff paid the deposit, constitute a contract binding upon the plaintiff to take and pay for shares in a concern consisting of 58,000 shares only.

Secondly, that the application being unconditional, and the form of the allotment conditional, the contract was not, upon that account, binding upon the plaintiff.

Thirdly, that the jury were warranted in saying that the advertisement, stating that the committee had completed the allotment of shares, was a fraudulent misrepresentation, and a material inducement to the plaintiff to pay his money; and that the plaintiff was therefore entitled to recover it back in an action for money had and received.

Fourthly, that the payment of the deposit having been obtained from the plaintiff by misrepresentation, the deed executed by him under the same belief formed no answer to the action.

Fifthly, that the plaintiff's subsequent attendance at the meeting did not preclude him from bringing the action.

Assumpsit for money had and received by the defendant for the use of the plaintiff, and upon an account stated.

Plea—Non assumpsit.

The cause was tried, before Erle, J. and a special jury, at the sittings in Middlesex, after last Trinity term, when it appeared that the action was brought to recover a

sum of money paid by the plaintiff to the directors of the Direct London and Exeter Railway Company, as the deposit upon sixty shares allotted to him in that concern. The defendant was one of the directors of the company. On the 24th of May 1845, the company was formed and provisionally registered, and the following prospectus (so far as it is material) was issued: "Direct London and Exeter Railway Company (with extensions to Falmouth and Penzance). Capital, 3,000,000*l.*, in 120,000 shares of 25*l.* each. Deposit, 1*l.* 7*s.* 6*d.* per share (a further deposit of 1*l.* 5*s.* per share to be paid after the bill has passed the House of Commons), with power to raise 1,000,000*l.* more, if necessary (provisionally registered pursuant to 7 & 8 Vict. c. 110)." Then followed the list of the provisional committee, and a list of the committee of management (in both of which the defendant's name appeared). The prospectus then set forth the various advantages of the line, and then stated: "The entire line has been partially surveyed. The plans, sections, and books of reference will be ready within the time prescribed by the Standing Orders of Parliament, and application will be made for a bill to incorporate the company early in the next session. In case Parliament should not sanction the present undertaking, which every active means will be taken to secure, the money deposited, deducting the necessary expenses attending the project, will be returned to the shareholders. The deposit of 1*l.* 7*s.* 6*d.* will be sufficient to comply with the Standing Orders of the House of Commons, and after the bill has passed the Commons a further deposit of 1*l.* 5*s.* will be made in order to comply with the regulations of the House of Lords. The committee are unwilling to require the whole deposit earlier than is absolutely necessary. Prospectuses and plans of the line, with forms of application for shares may be had at the offices of the company."

The form of application for shares, as set out at the foot of the prospectus, was as follows:—

"To the provisional committee of management of the Direct London and Exeter Railway Company.

"Gentlemen,—I request you will allot me        shares of 25*l.* each in the above



railway; and I undertake to accept the same, or such less number as you may appropriate to me, subject to the regulations of the company, and also to pay the necessary deposit of 1*l.* 7*s.* 6*d.* per share, and to sign the parliamentary contract and subscribers' agreement when required."

On the 25th of September the plaintiff sent a written application for thirty shares in the company, signed and in the form prescribed, substituting only the words "necessary legal documents" for "parliamentary contract and subscribers' agreement," and gave as his referee the name R. This paper was produced, and there appeared written upon it "Perfectly good for thirty shares. R." The plaintiff afterwards, and before the scrip was issued, applied to increase the number to sixty shares. To these applications, the following answer was sent to the plaintiff, signed by the secretary, on the 13th of October:—

"Not transferable. The Direct London and Exeter Railway Company, with extensions to Falmouth and Penzance, provisionally registered. Capital 3,000,000*l.*, in 120,000 shares of 25*l.* each, deposit 1*l.* 7*s.* 6*d.* per share. Number of shares sixty.

"Sir,—The committee have, at your request, allotted to you sixty shares of 25*l.* each in this undertaking, on condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon be paid on or before the 18th of October instant, in default of which this allotment will be forfeited, and the shares disposed of to other applicants. The bankers will give a receipt in exchange for this letter, which must be left with them. I beg also to inform you that the scrip for shares will be delivered to you in exchange for the bankers' receipt, on your executing the parliamentary contract and subscribers' agreement, of which due notice will be given. Be pleased to observe that the bankers' receipt must be produced when you attend to execute the deed."

The following advertisements were inserted in the *Times* newspaper of the 15th and 17th of October, respectively:—

"The Direct London and Exeter Railway. —The managing committee of management of this company hereby give notice that the allotment of shares is completed, and that

the letters will be issued to the public, if possible, this day.

"E. S. Blundell, Hon. Sec.

"October 13, 1845."

"The Direct London and Exeter Railway. —The committee of management are happy to announce that the surveys are being carried on with the utmost activity, under the superintendence of Mr. Braithwaite and his assistant engineer, and that they have no doubt of being able to comply with the Standing Orders even before the time fixed by parliament. The second deposit of 5*l.* per cent., in addition to the 1*l.* 5*s.* per share, required by the House of Commons, need not be called for under the Standing Orders of the House of Lords, until the bill shall have passed the House of Commons.

"By order of the committee,

"E. S. Blundell, Hon. Sec.

"6, Great Winchester Street, Oct. 13, 1845."

"*Times*, 17th October 1845.

"The direct London and Exeter Railway, (with extensions to Falmouth and Penzance). —The committee of management hereby give notice, that they have completed the allotment of shares, and that the usual letters are this day issued. In the arduous duty of deciding on claims unprecedented, it is believed, in their number and respectability, the committee have been obliged to give a preference to applicants locally interested, or likely to bring to bear for the company a large share of legitimate influence. The numerous persons with undoubted claims on the score of wealth and social standing, whose applications have either been passed over or cut down, are requested to accept this reason as the committee's apology. The committee desire to add, that while attestations of public support are daily reaching them from the most influential quarters, the engineering preparations, under Mr. Braithwaite, are so far advanced that the project cannot fail to be placed before parliament in a manner the most satisfactory to the shareholders.

"J. S. Blundell, Hon. Sec."

The plaintiff did not pay the deposit upon his allotment of shares until the 21st of October, four days after the date of the last advertisement, and there was some evidence to shew that he had previously seen the advertisement. Only 58,000 of the 120,000 shares were ever allotted. Upon the 4th

of November the plaintiff executed the railway deed. It was in the usual form, and contained a clause empowering the committee to pay the expenses which had been or might be incurred, out of the deposits. The company were not in a condition to go before parliament; the paid-up capital was not sufficient, and the regular notices had not been given.

Upon the 15th of December a meeting was held of the shareholders, and the plaintiff then first learned that only 58,000 shares had been allotted. Resolutions of confidence, &c. in the directors and in the project were put at the meeting, and the plaintiff proposed, as an amendment, that the deposits be returned: the chairman, however, did not put the amendment, and the original resolutions were carried, the plaintiff voting against them. Shortly afterwards the project was entirely abandoned, but no part of the deposits was returned, the money having been expended in the surveys and other matters.

At the trial the Judge left it to the jury to say whether there had been a fraudulent misrepresentation; and whether, if so, it was material to induce the plaintiff to pay the deposit. He also asked them whether the deed was executed by the plaintiff under the same belief he was under when he paid the deposit, and whether the consideration had failed. The jury having answered these questions in the affirmative, the Judge ordered a verdict to be entered for the plaintiff, without stating whether the application for the shares and the allotment constituted a binding contract or not.

A rule *nisi* having been obtained in Michaelmas term for a nonsuit or a new trial—

*Knowles and J. Brown* now shewed cause. —The plaintiff is entitled to keep his verdict. First, the money in question was paid in consequence of a fraudulent misrepresentation, untrue to the knowledge of the defendant; and, if so, it may be recovered back in an action for money had and received—*Pope v. Wray* (1). There is no doubt of a false statement having been made by the directors, because the advertisement, inserted in the newspapers by them, contained the statement that they had completed the allotment of the shares. It will be argued that

(1) 4 Mee. & Wels. 451.

the advertisement was only directed to disappointed allottees; but that argument is disproved by the concluding part of the advertisement, which shews it to have been directed to the shareholders also. Even if it was not issued with the object of inducing shareholders to pay the deposits, if it was calculated to have that effect it constitutes fraud in law—*Polhill v. Walter* (2); here the jury have found that it was a misrepresentation. It will be argued that the plaintiff was bound by his contract to pay the deposit before the fraudulent advertisement in question was issued. The answer is, there never was any such contract. The plaintiff made a proposal, asking for shares “in the above railway,” *i. e.* shares in a railway in which the whole number of shares would be allotted. The answer to that proposal, which was the allotment, contained the new term, the deposit “to be paid on or before the 18th of October instant.” The allotment was, therefore, conditional—*Greaves v. Ashlin* (3), *Martindale v. Smith* (4). The condition also was not complied with, because the payment was not made by the plaintiff until the 21st of October. There was no contract, therefore, until that date; and, before that date, the fraudulent advertisement had been issued. To constitute a binding contract there ought to have been a simple acceptance of the proposal, without the introduction of any new term—*Holland v. Eyre* (5), *Routledge v. Grant* (6), *Smith v. Surman* (7), *Sugden on Vendors and Purchasers*, p. 116. Again, the letter of allotment is headed, “not transferable;” but the act of parliament does not make them not transferable—*Young v. Smith* (8), *Lawton v. Hickman* (9); and it has been the practice to sell letters of allotment before the scrip was issued—*Mitchell v. Newhall* (10). But for those words, therefore, the plaintiff might have

(2) 3 B. & Ad. 114; *a. c.* 1 Law J. Rep. (N.S.) K.B. 92.

(3) 3 Campb. 426.

(4) 1 Q.B. Rep. 389; *a. c.* 10 Law J. Rep. (N.S.) Q.B. 155.

(5) 2 Sim. & Stu. 194.

(6) 4 Bing. 653; *a. c.* 6 Law J. Rep. C.P. 166.

(7) 9 B. & C. 561; *a. c.* 7 Law J. Rep. K.B. 296.

(8) 15 Mee. & Wels. 121; *a. c.* 15 Law J. Rep. (N.S.) Exch. 81.

(9) 16 Law J. Rep. (N.S.) Q.B. 20.

(10) 15 Mee. & Wels. 308; *a. c.* 15 Law J. Rep. (N.S.) Exch. 292.

sold his prospective right to the shares—*Hibblewhite v. M'Morine* (11), *Mortimer v. M'Callan* (12). Even if a valid contract had been entered into by the plaintiff to take the shares, no action could have been maintained against him for breach of the contract, because the plaintiff's answer would have been, "you do not give me what I contracted for." He was not bound to enter into a concern with smaller capital and fewer shares. All the shares must first have been allotted—*Fox v. Clifton* (13), *Pitchford v. Davis* (14). It will be said that the defendant waived his right to repudiate the shares by attending the meeting of the 15th of December. [The Court intimated that it was not necessary to argue this point.] Then with respect to the execution of the deed, the jury have found that the plaintiff executed the deed under the same belief as when he paid the money. This puts an end to any question which might arise with respect to the deed. The deed is only applicable to the event of the company being duly formed. Nothing had occurred at the time of the execution of the deed to shew the plaintiff that fewer shares had been disposed of. The deed is distinct from the prospectus, and not in pursuance of it: it is part of the fraud that it varies from the prospectus; and it was executed by the plaintiff under the misrepresentation. The general rule, as laid down in *Nockells v. Crosby* (15) and *Walstab v. Spottiswoode* (16) is, that when parties pay money in respect of a scheme which turns out entirely abortive, the expense of it ought to fall upon the projectors. The defendant, also, cannot take advantage of the deed, under the plea of non assumpsit—see *Filmer v. Burnby* (17.)

*Sir F. Kelly, Channell, Serj., and Fitzherbert*, in support of the rule.—When the plaintiff has requested to have an allotment of shares, and has undertaken to accept an allotment which is to be subject to the regu-

lations of the company, the only reasonable construction is, that the allotment is to be subject to such conditions and stipulations concerning the shares as the company may reasonably think proper to impose. The allotment is notified by a letter, which says that scrip will be delivered upon executing the parliamentary contract; and the plaintiff's letter in answer completes the contract, and makes it binding on the defendants. It must then be seen what the plaintiff has done in pursuance of that contract. Part of it is that he is to sign a parliamentary contract; and by the deed executed by him on the 4th of November he contracts with new parties as to the deposit. Thus the money was paid by the plaintiff under a contract, which not only contained within itself certain terms, but under which a deed was executed by which the committee is authorized to incur various expenses; and if the plaintiff is entitled to recover back his deposit, it can only be subject to those expenses which the committee have incurred. As soon as expenses are shewn to have been incurred the onus is on the plaintiff of shewing that there is a surplus after paying all those expenses. An account must be taken of the expenses. The 23rd section of the 7 & 8 Vict. c. 110. enacts, that it shall be lawful for the promoters to receive such further sum above 10s. per cent. as may be required by the Standing Orders of either house of parliament to be deposited before the obtaining of an act of parliament. As the committee have only received 5s. per cent. to deposit in compliance with the then Standing Orders, they must be presumed to have kept it in their hands for that purpose, and the time for making the deposit never having arrived, they are to hold it according to the contract that has been entered into between the parties. It is not a contract such as there was in *Fox v. Clifton* and *Pitchford v. Davis*. Those cases are not applicable to this question. The liability for an act which a company can only perform when formed is different from the liability for acts necessary for the formation of it. Goods were supplied in those cases as to a company that had been formed. Therefore, if the case be put upon the undertaking having failed, the answer is, "you have made this deposit upon a special contract; you have made it upon an undertaking that you shall

(11) 5 Mee. & Wels. 462; a. c. 8 Law J. Rep. (n.s.) Exch. 271.

(12) 6 Ibid. 58; s. c. 9 Law J. Rep. (n.s.) Exch. 73.

(13) 6 Bing. 776; s. c. 9 Law J. Rep. C.P. 257.

(14) 5 Mee. & Wels. 2; a. c. 8 Law J. Rep. (n.s.) Exch. 157.

(15) 3 B. & C. 814.

(16) 15 Mee. & Wels. 501; s. c. 15 Law J. Rep. (n.s.) Exch. 193.

(17) 2 Man. & Gr. 529.

only have it back after payment of the expenses, and until an account has been taken as to how much they amount to, and what should be borne by each person, you cannot maintain an action to recover it back." A fraudulent misrepresentation (if there was one) is only collateral to the contract, and will not entitle the plaintiff to rescind it. Then, as to the effect of the misrepresentation, and how far the learned Judge's charge is to be supported. The learned Judge left it to the jury to say, whether, supposing the representation to be false, it was material to induce the plaintiff to pay the money. In insurance law if a party make a representation upon anything which is material, or suppress a fact which is material, it avoids the policy; but that doctrine is peculiar to cases of insurance, and is not applicable to general cases of false representation. In these the law is, that the representation must be false and knowingly false, and the party must thereby be induced to pay, and must pay the money, in consequence of the false representation. In *Moens v. Heyworth* (13) the law is so laid down by Parke, B. p. 157. It is submitted that justice will not be done in this case, unless the question be submitted in a less ambiguous form to another jury. Further, the plaintiff attends the meeting of the 5th of December, at which a full and candid statement is made, and he is then informed of the untruth of the advertisement. He ought then to have said, I hold myself bound as a shareholder no longer; but, on the contrary, resolutions are come to at that meeting, of which the plaintiff suffers himself to form a part, implying that the company still has existence. Has the plaintiff a right to say, on the 5th of December, I am a shareholder, and to oppose the resolutions and propose an amendment consistently with such right; and to say now I am not a shareholder, and to demand the return of his deposit? It was a question of fact also for the jury, whether there had not been an acceptance of the contract before the 17th. The plaintiff's sending an answer amounted to an acceptance of the contract—*Richardson v. Dunn* (14). This question was not left to the jury. Again, it should have been

left to the jury to say, whether the representation was made with a fraudulent intention or not—*Langridge v. Levy* (15). They then cited on the question of the false representation *Shrewsbury v. Blount* (16), *Taylor v. Ashton* (17). If the alleged falsehood was after the contract was completed, it does not invalidate the contract—*Stone v. Grubham* (18), *Mason v. Ditchburn* (19); and it was not decided at the trial by the Judge, whether the contract was or was not completed. On the alleged misdirection they cited *Foster v. Charles* (20), *Vernon v. Keys* (21), *Barley v. Walford* (22); and that the defence, in consequence of the deed, was open to the defendant under non assumpsit, *Edwards v. Bates* (23).

*Cur. adv. vult.*

WILDE, C.J. now delivered the judgment of the Court (24).—This was an action of assumpsit for money had and received to the use of the plaintiff. The plea was non assumpsit. The action was brought by the plaintiff against the defendant, as one of the committee of management of a projected railway company, to recover the sum of 82*l.* 10*s.*, paid by the plaintiff, as a deposit on sixty shares which had been allotted to him in that concern. The case was tried, before Erle, J., at Guildhall, after last Trinity term, when it appeared in evidence, that in the year 1845, a prospectus was issued in the following form:—that prospectus purported to be of a plan for making a railway, called the "Direct London and Exeter Railway, with extensions to Falmouth and Penzance, capital 3,000,000*l.*, in 120,000 shares of 25*l.* each, deposit 1*l.* 7*s.* 6*d.* per share; a further deposit of 1*l.* 5*s.* per share to be paid after the bill has passed the House of Commons, with power to raise 1,000,000*l.* more, if necessary." It then proceeds to give the names of the provisional committee, and the

(15) 2 Mee. & Wels. 519; a. c. 6 Law J. Rep. (n.s.) Exch. 137; a. c. in error, 4 Mee. & Wels. 337.

(16) 2 Man. & Gr. 475.

(17) 11 Mee. & Wels. 401; a. c. 12 Law J. Rep. (n.s.) Exch. 363.

(18) 2 Bulstr. 226.

(19) 2 Cr. M. & R. 720. n.

(20) 6 Bing. 396; a. c. 8 Law J. Rep. C.P. 118.

(21) 12 East, 632.

(22) 15 Law J. Rep. (n.s.) Q.B. 369.

(23) 7 Man. & Gr. 590; a. c. 13 Law J. Rep. (n.s.) C.P. 156.

(24) The judgment was not delivered in writing,

(13) 10 Mee. & Wels. 147; a. c. 10 Law J. Rep. (n.s.) Exch. 177.

(14) 2 Q.B. Rep. 218; a. c. 10 Law J. Rep. (n.s.) Q.B. 282.

committee of management, and contains various observations not material to this case, in regard to the plans; the defendant's name being inserted as one of the committee of management. It then states, "that the plans, sections, and books of reference would be ready within the time prescribed by the Standing Orders of Parliament, and that application would be made for a bill to incorporate the company early in the next session. That in case Parliament should not sanction the present undertaking, which every active means will be taken to secure, the money deposited, deducting the necessary expenses attending the project, would be returned to the shareholders. The deposit of 1*l.* 7*s.* 6*d.* per share will be sufficient to comply with the Standing Orders of the House of Commons, and after the bill has passed the Commons, a further deposit of 1*l.* 5*s.* will be made in order to comply with the regulations of the House of Lords. The committee are unwilling to require the whole deposit earlier than is absolutely necessary. Prospectuses and plans of the lines, with forms of applications for shares, may be had at the office of the company." It then contains a form of application for shares, directed to the provisional committee of management in the "Direct London and Exeter Railway Company,"—"Gentlemen,—I request you will allot me        shares of 25*l.* each, in the above railway, and I undertake to accept the same, or such less number as you may appropriate to me, subject to the regulations of the company, and also to sign the necessary legal documents, and to pay when required the deposit thereon of 1*l.* 7*s.* 6*d.* per share." On the 25th of September 1845, the plaintiff sent in an application for shares in the form prescribed, which was to the following effect:—"To the provisional committee of management of the Direct London and Exeter Railway Company: Gentlemen,—I request you will allot me thirty shares of 25*l.* each, in the above railway, and I undertake to accept the same, or such less number as you may appropriate to me, subject to the regulations of the company, and also to sign the necessary legal documents and to pay when required the deposit thereon of 1*l.* 7*s.* 6*d.* per share. Thomas Wontner, solicitor, Skinner Street, Snow Hill. Reference, W. R., Esq., No. 6, South Square, Gray's Inn, 25th of September

1845," signed by the plaintiff; and there is a note upon that paper: "Perfectly good for thirty shares. W. R."

It appears afterwards the plaintiff made an application to have the number of shares allotted to him increased from thirty to sixty. To this application the following answer was sent:—"Not transferable. The Direct London and Exeter Railway Company, with extensions to Falmouth and Penzance. Provisionally registered. Capital 3,000,000*l.* in 120,000 shares of 25*l.* each. Deposit, 1*l.* 7*s.* 6*d.* per share. Number of shares, sixty.—Sir,—The committee have, at your request, allotted you sixty shares of 25*l.* each in this undertaking, upon condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon be paid on or before Saturday, the 18th of October instant; in default of which, such allotment will be forfeited, and the shares disposed of to other applicants. The bankers will give a receipt for the deposit in exchange for this letter, which must be left with them. I beg also to inform you that the scrip for shares will be delivered to you in exchange for the bankers' receipt, on your executing the parliamentary contract and subscribers' agreement, of which due notice shall be given. Be pleased to observe, the bankers' receipt must be produced when you attend to execute the deed." Signed by the secretary and directed to the plaintiff. In this letter, as well as in the prospectus, the concern is described as one which was to have a capital of 3,000,000*l.* in 120,000 shares. Before the day appointed for the payment of the deposit, an advertisement was published by the managing committee, stating that the allotment of shares had been completed, in the following form, and dated the 17th of October 1845:—"The Direct London and Exeter Railway Company, with extensions to Falmouth and Penzance.—The committee of management hereby give notice, that they have completed the allotment of shares, and that the usual letters are this day issued. In the arduous duty of deciding on claims unprecedented in their number and respectability, the committee have been obliged to give a preference to applicants locally interested, or likely to bring to bear for the company a large share of legitimate influence. The numerous persons with undoubted claims, on the score of wealth and social standing, whose appli-

cations have been either passed over or cut down, are requested to accept this reason as the committee's apology. The committee desire to add that while attestations of public support are daily reaching them from the most influential quarters, the engineering preparations, under Mr. Braithwaite, are so far advanced, that the project cannot fail to be placed before parliament in a manner the most satisfactory to the shareholders." Signed by the secretary. Some evidence was given upon the trial, from which it might be inferred that the plaintiff saw this advertisement, and on the 23rd of October he paid 82*l.* 10*s.* as a deposit on shares allotted to him. At that time the committee had, in fact, allotted no more than 58,000 shares, although application had been made by responsible persons for more than 120,000. On the 4th of November, the plaintiff executed the subscription contract under seal, which gave power to the committee to pay expenses which had then or might thereafter be incurred, out of the sum thereby subscribed.

The plans and sections deposited in the Parliamentary Office on the 30th of November were imperfect; the whole of the deposit, except 400*l.*, had been expended, and the committee had no funds for making the deposit required by the Standing Orders of the House of Commons. On the 15th of December, a meeting of shareholders was called, at which the plaintiff attended, and resolutions of confidence in the concern and in the committee of management, and that a further allotment of shares should be made to raise the sum required for the deposit was then proposed. The plaintiff moved an amendment, that as 58,000 shares only had been allotted, the deposits already received should be returned to the parties who had paid them. The chairman did not put the amendment, but did put the original resolution, which was carried by a large majority. A few days afterwards, the committee found it was impossible to proceed with the undertaking, and on the 6th of January 1846 this action was commenced. On this state of facts it was contended, on the part of the plaintiff, that the advertisement stating that the allotment of shares had been completed, was false to the knowledge of the defendant, and was a fraudulent misrepresentation; that the plaintiff having been thereby induced to

pay his money was entitled to recover it in this action; that the deed was executed by the plaintiff under the influence of the same misrepresentation, and therefore did not affect his rights. For the defendant it was contended, that the written application for shares and the letter of allotment constituted a valid contract, by which the plaintiff was bound to pay the deposit on or before the 18th of October, and therefore that he could not be permitted to ascribe the payment which he made to the advertisement, and further, whatever might have been the result had the case rested on the prospectus and letters only, the deed expressly authorized the application of deposits to the payment of expenses incurred in preparing for parliament. The learned Judge, before whom the case was tried, without declaring his opinion whether the letters of application and allotment constituted a binding contract or not, left it to the jury to say, whether the defendant had made a fraudulent misrepresentation, which was a material inducement to the plaintiff to pay his money; whether the consideration had failed, the company being at an end; and whether the deed executed by the plaintiff was so executed under the same belief which operated on his mind when he paid his money. The jury having answered these questions in the affirmative, the learned Judge said, that this finding would entitle the plaintiff to a verdict for 82*l.* 10*s.*, which was accordingly entered in his favour. In Michaelmas term a rule *nisi* was obtained for entering a nonsuit or verdict for the defendant, or for a new trial on the ground of misdirection. The case was recently argued before us, when it was contended as at the trial, on behalf of the defendant, that the letters constituted a binding contract; that the payment by the plaintiff must be ascribed to his legal liability and not to the advertisement; that the advertisement contained no misrepresentation, for that it did not import that the whole number of shares had been allotted, or if it did, the representation was manifestly addressed to disappointed applicants, and not to allottees, and therefore had no reference to the plaintiff; and that if the money was not obtained by fraud, the deed which the plaintiff had executed expressly authorized the application of it to the payment of expenses; but it was admitted, that if the payment

was obtained from the plaintiff by fraud, the deed would be no answer to the action.

It was further contended that the plaintiff, by attending the meeting on the 15th of December, and there acting and voting as a shareholder after he knew that only 58,000 shares had been allotted, had thereby precluded himself from claiming a return of his depositon that ground, for which *Campbell v. Fleming* (25) was cited as an authority. Upon the first of these points, we are of opinion that there was no contract binding on the plaintiff to part with his money at the time when he paid the deposit; he had applied for sixty shares in a concern which was to have a capital of 3,000,000*l.* raised by the issue of 120,000 shares. The committee allotted to him a very different thing, but professed to allot him that which he had asked for, and the letter of allotment as well as the prospectus described the capital as 3,000,000*l.*, the number of shares 120,000. Now, it might be reasonable to expect that such an undertaking would succeed with a capital of 3,000,000*l.*, but absurd to suppose it could be accomplished for less than half the sum. The plaintiff therefore, having asked for shares in a practicable scheme, received shares in one which was impracticable, and which was rendered so by the act of the committee in refusing to allot more than 58,000 shares, although more than the 120,000 had been applied for by responsible persons: that which was allotted not being in truth that which the plaintiff asked for, he was not bound to take it. Again, the allotment was not absolute, but conditional only; and on that ground, also, we think the letters of application and allotment do not constitute a valid contract—the letter of allotment not being a simple acceptance of the plaintiff's proposal. Such being our opinion as to the alleged contract, we must inquire whether there was any evidence that the plaintiff was induced to pay his money by any fraudulent representation; if there was not, the plaintiff ought to have been nonsuited or a verdict found for the defendant, but we think there was ample evidence of such misrepresentation.

If we are to construe the advertisement, we think it means that all the shares had been allotted; the advertisement was a public advertisement, or at least it must be taken

(25) 1 Ad. & El. 40; s. c. 3 Law J. Rep. (N.S.) K.B. 136.

to have been addressed to all who were interested in the subject-matter of it, of whom the plaintiff undoubtedly was one. To him it represents that he had got what he had asked for, that is, sixty shares out of 120,000 shares in the proposed adventure; the jury were therefore well warranted in finding the representation so made was a material inducement to the plaintiff to pay his money. If the meaning of the advertisement was for the jury, they appear to have construed it as we do: either way, there was ample evidence to be left to the jury on this point, and upon this point there is no ground for either a nonsuit or a verdict for the defendant. The next point made for the defendant was, that the plaintiff by attending and acting as a shareholder at the meeting of the 15th of December, when he knew only 58,000 shares had been allotted, had precluded himself from making any claim to his deposit on that ground; but this is disposed of by the evidence. The only act done by the plaintiff at that meeting was to propose that, in consequence of the allotment of only 58,000 shares, all the deposits should be returned; and the argument comes to this, that having tried to induce others to join him in claiming the deposit, and failing in that attempt, he shall not be permitted to do so by himself. No such doctrine as that is to be found in *Campbell v. Fleming*, or any other decided case that we are aware of. The plaintiff did no act at that meeting or afterwards, shewing his assent to be treated as a holder of sixty shares, and we think, notwithstanding his attendance at that meeting, he is in a condition to maintain the present action; the motion, therefore, for a nonsuit or to enter the verdict for the defendant on this point wholly fails. But it was further contended by Mr. Fitzherbert that the defendant was entitled to a new trial because the learned Judge did not tell the jury whether the letter of application and allotment did or did not constitute a binding contract. It is impossible to make that a ground for a new trial. Whether they constituted a contract or not, is a question of law for the Court, and not of fact for the jury; and if a new trial were granted, the same questions that the learned Judge submitted to the jury must be again submitted to them. However, it appears that after taking their opinion upon the question of fraudulent misrepresentation, the

Judge said that the plaintiff was entitled to a verdict, which must be taken as a direction to the jury to find such a verdict. If in order to give that direction it was necessary to decide that the letters did not constitute a contract, the learned Judge in giving that direction must be taken to have so decided; and if we had considered those letters did constitute a contract, we must have treated that direction as incorrect, and made the rule absolute for a new trial. Inasmuch as we think the direction right, the rule obtained by the defendant fails on this as well as on the other points, and must therefore be discharged. My Brother Williams having been consulted when at the bar in this case, has taken no part in the consideration of this question.

*Rule discharged.*

1847. }  
Nov. 22. } MOLLETT v. WACKERBARTH  
AND OTHERS.

*Contract, Alteration of, material—Plea—Variance.*

*A material alteration of a sold note by the buyer, without the privity of the seller, avoids the contract.*

*An alteration in a material part of a written contract, without the consent of both parties, is a material alteration which avoids the contract, although it may not have altered the duty of the party sought to be charged.*

*A plea stated that a material alteration had been made in the contract declared on, and proceeded to specify the alteration under a videlicet; and at the trial, a different alteration, which was also material, was proved, and no objection was taken on the ground of variance:—Held, that the plaintiff could not take advantage of the variance in shewing cause against a rule nisi for leave to enter a verdict for the defendants.*

*Semle—That it was not necessary under such a plea to prove the specific alteration alleged; and that, at all events, the Judge could have amended the plea at the trial.*

*Assumpsit for non-delivery of goods.* The declaration stated, that the plaintiff agreed to buy, and the defendants to sell, a large quantity, (to wit) 100 tons of crushed sugar, as per sample, in hogsheads, at 40l.

per ton, free on board, to be shipped within the prompt, and paid for on delivery in cash, the sellers allowing discount, at the rate of 4l. per centum per annum, for the unexpired term of two months. Breach, that although the prompt (meaning two calendar months) had expired, the defendants had not delivered the sugar according to the agreement.

To this declaration the defendants pleaded five pleas, of which the last and only material one was as follows:—"That the said agreement in the declaration mentioned was made and entered into by the defendants, in and by a certain written agreement or instrument in writing, duly signed by one Joseph Dodson, the agent lawfully authorized of them, the defendants, in that behalf, and not otherwise; and the defendants further say, that the agreement was a contract for the sale of goods, wares, and merchandise for the price of upwards of 10l. within the true intent and meaning of the statute made and passed in the 29th year of the reign of his Majesty King Charles the Second, intituled 'An act for the prevention of frauds and perjuries;' and that the buyer of the said goods, wares, and merchandise, (to wit) the plaintiff, hath not accepted part of the goods sold, or given anything in earnest to bind the bargain, or in part payment; and the defendants further say, that after the said agreement had been made as in the declaration mentioned, and after the said agreement or instrument in writing had been so signed by the said agent of the defendants as aforesaid, and after the defendants had promised as in the declaration mentioned, and before the commencement of this suit, (to wit) on the 7th day of July, A.D. 1845, the said plaintiff, without the knowledge or consent of the defendants, caused the said agreement or instrument in writing to be, and the same was then, altered in a certain material particular, (that is to say), by inserting in the said agreement or instrument in writing certain words to the purport and effect, that the sugars mentioned in the said agreement or instrument in writing were to be of the manufacture of them, the defendants; and the defendants further say, that the said agreement contained in the said instrument in writing so signed by the said agent of them, the defendants, as aforesaid,



became and was by such alteration materially altered and changed as regards the mode of performing the same by them, the defendants; and that by reason of the premises in this plea mentioned, the said agreement in the declaration mentioned became and was from the time of the said alteration void and of none effect."

Replication to the fifth plea, that the agreement or instrument in writing, in the last plea mentioned, was not altered in any material particular in manner and form as in the last-mentioned plea alleged.

At the trial, before Erle, J., at Guildhall (6th of July 1847), it appeared in evidence that in July 1845, the plaintiff employed Dodson, as broker, to purchase 100 tons of crushed sugar, and that Dodson employed another broker, named Plaxton, who entered into the contract with the defendants. On the 7th of July Plaxton delivered the following sold note to the defendants:—

"London, 7th July 1845.

"To my principal.—Sold for Messrs. Wackerbarths & Coling, 100 tons of crushed sugar (as per sample) in hogsheads, at 40*l.* per ton, free on board, to be shipped within the prompt, and paid for on delivery, in cash, the sellers allowing discount at the rate of 4*l.* per cent. per annum for the unexpired term of two months."

The bought note was not delivered to the plaintiff till after the defendants had received the sold note. No samples were produced at the time of the contract, but the plaintiff had seen one previously, and saw others subsequently. Those samples were all of the manufacture of the defendants, but other houses manufactured sugars not distinguishable from those of the defendants; and at the time of the contract there were Dutch sugars in the market. After the receipt of the bought note, which corresponded exactly with the sold note, the plaintiff, without the privity of the defendants, wrote the words "of their own manufacture" at the bottom of it, making marks of reference, in order to introduce these words after the words "as per sample," in the body of the note, and within the parenthesis. The Judge, holding this alteration to be immaterial, on the ground that it did not alter the legal effect of the instrument, directed the jury to find a verdict for the plaintiff; leave being reserved

to the defendants to move to enter a verdict for them.

*Talfourd, Serj.* having obtained a rule nisi, pursuant to the leave reserved,—

*Channell, Serj. and Peacock* (22nd November) shewed cause. The plea is founded on the case of *Powell v. Divett* (1), in which it was held that a material alteration in a sale note, without the consent of the purchaser, annuls the instrument. The principle on which that case was decided is recognized in *Cumming v. Roebuck* (2), *Grant v. Fletcher* (3), and *Davidson v. Cooper* (4).

[*WILLIAMS, J.*—The old rule laid down in *Pigot's case* (5) is, that when an alteration has been made in a deed by a stranger, the question is, whether that alteration is material or not, but where it has been made by one of the parties, it avoids the instrument whether material or not. The law is similarly laid down in *Shep. Touch.* 68, 69, and in *Swiney v. Barry* (6).]

It is submitted that the defendants were bound to shew that the alteration had been made, that it was a material alteration, and that it was to the effect described in the record. First, there was no alteration of the contract. The words "of their own manufacture," were a mere memorandum to remind the broker that the samples were of the manufacture of the defendants. If it had been intended to alter the contract, the sold note would have been altered as well as the bought note. The defendants held in their hands the sold note, which was part of the contract, and they had not by that note agreed to sell sugars of their own manufacture. Secondly, if there was an alteration, it was not material. The sale was made by sample, the sample being of Messrs. Wackerbarths' manufacture. That does not mean that the goods so to be delivered must be of their manufacture. At the trial it was proved, by a sugar-broker, that he would not have known the Messrs. Wackerbarths' sugar from others. If there was any custom of trade as to selling by sample, the

(1) 15 East, 29.

(2) Holt, N.P.C. 172.

(3) 5 B. & C. 486.

(4) 11 Mee. & Wels. 778 (in error 13 Mee. & Wels. 343); s. c. 12 Law J. Rep. (n.s.) Exch. 467; 13 Law J. Rep. (n.s.) Exch. 276.

(5) 11 Rep. 27.

(6) 1 Jones, 109.

question should have been left to the jury. In the case of a simple contract, an immaterial alteration, even by a party to the contract, does not render it void—*Sanderson v. Symonds* (7). Thirdly, even if there was a material alteration, it was not such a one as is described in the plea; the note, when produced, shewing a contract to sell by sample, which was of the defendants' manufacture, and the allegation being that the alteration made it a contract to sell goods of the defendants' own manufacture.

*Talfourd, Serj.* and *Cleasby*, in support of the rule.—The rule laid down in *Pigot's case* and in *Shep. Touch.* is precisely in point. Any alteration by the plaintiff, or by a stranger at his request, without the privity of the defendants, would render the contract void. In *Langhorn v. Cologan* (8), the alteration of a policy, by inserting a specific description of the subject insured, which was assented to by some of the underwriters, was held to avoid the policy as to those who did not assent. *Campbell v. Christie* (9) was a similar case. The case of *Sanderson v. Symonds*, cited on the other side, is the only case in which an alteration of a contract has not been held to vitiate it, and it differs materially from the present. The Lord Chief Justice there says, "The words interlined were no more than a proposed alteration adopted by those who subscribed their initials, and refused by those who did not." In *Davidson v. Cooper* the act of alteration was far from being so strong against the defendant as the present one is. There the language was not altered at all; there was only the addition of a seal to the agreement. The question comes to be, whether the words written at the bottom of the sold note were only a memorandum to assist the memory of the party as to the sample. If the intention of the plaintiff was to make an alteration, that alteration must be a material one, and must also have been made in the sense of the allegation in the plea. If it had relation to the subject-matter, and if it was intended to convey the slightest meaning as to the subject-matter, it must be material. It appeared at the trial, that at the time the contract was entered into, there were Dutch sugars in the market, and

the plaintiff may, upon that account, have wished, by introducing the words in question, to insure himself sugars of the defendants' manufacture.

*WILDE, C.J.*—I am of opinion that the substance of this plea was proved; that is to say, that an alteration had been made in that which was originally proposed to be the contract between the parties; that alteration being effected by the words "of their own manufacture," written at the bottom of the bought note, and marks of reference shewing that these words were to be introduced into the body of the note. On reading the note a question may arise, whether the words so introduced were intended to refer to the bulk which was to be delivered or to the sample. It appears to me, that whatever may have been the intention in this respect, the words have an equal effect in avoiding the contract. I confess I should be inclined to read the words introduced as applicable to the bulk, but I am content to take them as applicable to the sample only. The learned Judge, at the trial, expressed his opinion that the alteration was not material, because it did not alter the duty of the seller, nor impose upon him the duty of delivering other goods than those which would have been supplied according to the contract; but supposing that it does apply to the sample, and that it does not alter the duty of the seller, yet it may affect the rights of the parties. The Court does not know but that it may put the defendants in a different situation with regard to the trade, and the plaintiff might have had a reasonable ground of complaint if the sample turned out not to be of the Wackerbarths' manufacture, although the bulk, which was offered to be delivered, was equal in quality. Might not the purchaser have had an action, if that which was represented to be Wackerbarths' was not so? The seller, then, had two duties to perform: the one, to see that the sample was Wackerbarths'; and the other that the bulk was as good as the sample. It seems to me, therefore, that the alteration was material, and so avoided the contract. But it is said that the plea sets out an alteration of a particular import, which has not been established. If it was necessary to shew that the specific alteration mentioned had been made, the objection should have been taken at *Nisi Prius*. But there the only

(7) 1 Brod. & Bing. 426.

(8) 4 Taunt. 330.

(9) 2 Stark. N.P.C. 64.

matter discussed was the materiality of the alteration. I think, therefore, that the rule for entering a verdict for the defendants should be made absolute.

COLTMAN, J.—I am of the same opinion. The question has arisen, whether the words introduced by the plaintiff are to be referred to the description of the bulk, or of the sample; and, I think, on looking at the note, those words must refer to the words "as per sample," which latter words are within a parenthesis, and the mark of reference to the words at the bottom is also within the parenthesis; and I also think, that, according to the ordinary grammatical construction, the reference is to "sample" as the last antecedent. It is true, that speculating on probabilities it must be supposed that the party intended to refer to the bulk; but I do not think that we should admit a speculation of that sort when called upon to judge of a written instrument. The alteration made there is a statement, that the sample was of the Wackerbarths' own manufacture. It is true that the duty of the defendant may not be altered by that circumstance, because it might have been sufficient to deliver articles of the same quality; but still the representation is altered: we cannot say that that might not have been material under some circumstances which might have arisen. The plea was then proved, except that part which relates to the specific alteration; but although the variance appeared at the trial, no objection was taken on that account, but only that there was no material alteration. The parties, therefore, entered into a contract to be bound by the question of material alteration.

MAULE, J.—I also think that this is a material alteration; and I agree with the Lord Chief Justice that it is not necessary to say whether it applies to the sample or to the bulk. I am rather inclined to agree with my Brother Coltman, that the mark of reference ought to lead us to incorporate the words at the bottom of the note with those within the parenthesis, and that it would have been more natural to put the words before the parenthesis, if it was intended that they should apply to the bulk. This, then, is a material alteration supporting the plea. I think an alteration is material when it is made in a material part. If a written instrument is altered in a material

part, it is avoided; and it is no answer to say that it is not altered in respect of a matter which varies the duty of one party to the contract. I think that a state of circumstances may be easily conceived where the plaintiff would be very differently situated if the words which are there were not there. Suppose a party to have occasion to sue or be sued in respect of the contract, it might be most material for him that this sample sugar was represented to be sugar manufactured by the defendants; and it cannot be said that the alteration is not material, because a state of circumstances has here arisen in which the alteration does not affect the rights of the parties. With respect to the variance between the declaration and the plea, I think that the *videlicet* in the plea introduces something which need not be proved, and I am therefore disposed to think that the plea would be proved by shewing any material alteration; but I also concur in what has been said with regard to application not having been made at the trial. At all events, that this was a case for amendment, if necessary, cannot admit of a doubt. It is just the case which the law of amendment expressly provides for. I therefore think that there has been a material alteration, sustaining the plea, which vitiates the contract. The verdict should therefore be entered for the defendants.

WILLIAMS, J.—I also am of the same opinion. The doctrine in *Pigot's case* has been extended to all instruments evidencing contracts, and it establishes that any alteration in a material part of an instrument avoids it.

*Rule absolute.*

1847. }  
Nov. 8. } BENHAM v. GRAY.

*Trespass—Partnership at Will.*

*The plaintiff and the defendant carried on business as partners on the plaintiff's premises: the duration and terms of the partnership were not definitely settled. On the 26th of December, the plaintiff served the defendant with a notice of dissolution. On the 2nd of January, the defendant broke and entered the shop, &c. of the plaintiff, where the partnership concerns were carried on and the books kept, for which entry the*

*plaintiff declared in trespass, and the defendant pleaded not possessed:—Held, that the plaintiff was entitled to recover.*

*A partnership at will exists between A. & B, the business being carried on on the premises of A. Such partnership is put an end to by a notice of dissolution, and A. can maintain trespass for a subsequent entry by B. on that part of his premises where the partnership business had been transacted.*

This was an action tried, before Williams, J., at the Sittings for Middlesex, after Trinity term last. The declaration was in trespass for breaking and entering two rooms in the dwelling-house of the plaintiff, and making a disturbance therein.

The defendant pleaded, first, not guilty; secondly, that the rooms in which, &c. were not nor was either of them the room of the plaintiff; lastly, leave and licence. Replication, to the last plea, *de injuriâ*.

It appeared, at the trial, that the plaintiff was a house-agent, auctioneer, &c., and tenant for a term of years of the dwelling-house mentioned in the declaration; that in 1846, negotiations took place between the plaintiff and the defendant for a partnership in the business, and for a lease of the upper part of the house to the defendant, at a yearly rent of 40*l*. The draft of the lease was prepared, but never agreed upon. In September 1846, a partnership (the terms of which were never settled) commenced; the joint names of the plaintiff and the defendant were placed over the door of the shop, which contained property of the partners, and they entered into contracts with third persons, as partners. On the 26th of December 1846, the plaintiff served the defendant with the following notice:—

“To Mr. William Samuel Gray:—

“I hereby dissolve the partnership which has existed between us, and been carried on at No. 1, High Street, Camden Town, under the style or firm of Benham & Gray. December 25, 1846.

(Signed) “J. H. Benham.

“Witness, G. Benham.”

The lower part of the house consisted of the shop and counting-house, where the business of the auctioneers, &c. was carried on. The defendant went to the house on the 2nd of January 1847, and finding the doors of the shop and counting-house

locked, he broke them open and entered, asserting that he had a right to enter the partnership premises; for this entry the action was brought. Upon these facts, the learned Judge directed a verdict for the plaintiff, damages 1*s.*, with leave to the defendant to move to enter a nonsuit.

*Petersdorff* now moved accordingly.—The plaintiff, in this action of trespass, undertakes to shew that he is solely seised and entitled to the rooms in the declaration mentioned: that fact is put in issue by the second plea, but he failed to shew that he was the exclusive owner of the premises, as no such right can exist in rooms used for the purposes of the partnership. A plea of a right to joint occupancy would be a bad plea; and the case of the defendant as it appeared by the facts proved, entitled him to a verdict.

[MAULE, J.—Is not the right to carry on the business as a partner in the shop, &c., a mere easement?]

The books lay down no rules as to the relative rights of partners *inter se*, when no definite terms are agreed upon between them; but it is submitted, that the notice of the 26th of December did not operate so as to extinguish the rights of the defendant who was entitled (at least) to enter for the purpose of seeing the books, which were the property of, and the contracts which related to, and were entered into by, the firm, of which firm the defendant had been (if he did not still continue to be) a member.

WILDE, C.J.—This rule is moved for on the general ground, that a partnership exists or had existed between the plaintiff and the defendant, which gives the defendant a right to enter the premises at any time on which the partnership business was being carried on, or, if the partnership were put an end to, gave him such right for an indefinite time, and so long as any contracts entered into by the partnership were not completed. The parties had certainly some partnership dealings on the premises of the plaintiff for about three months; but no agreement was entered into and no terms of partnership were ever arranged: it was, therefore, a partnership at will, and was put an end to by the plaintiff. Whatever rights previously existed were extinguished by the notice of the 25th of December, upon the service of which the sole right of possession reverted

to the plaintiff. The defence set up under the second plea entirely fails; and there is no ground for the rule.

COLTMAN, J., MAULE, J., and WILLIAMS, J. concurred.

*Rule refused.*

1847. } RODGERS AND OTHERS v. NOWILL  
Nov. 2. } AND ANOTHER.

*Action on the Case—Fraudulent Use of Trade Mark—Arrest of Judgment.*

*Case.* The declaration stated that the plaintiffs, manufacturers of cutlery, were accustomed to mark their knives with certain marks denoting their manufacture, and that the defendants, intending to injure the plaintiffs, did fraudulently impose similar marks on knives made by the defendants, to induce the public to believe that the knives made by the defendants were manufactured by the plaintiffs, &c.:—*Held*, that it was properly left to the jury to consider, whether there was such a resemblance between the defendants' marks and those used by the plaintiffs, as was calculated to deceive the public; and whether the defendants used the marks with an intention to deceive.

No person has a right to sell his own goods as and for goods manufactured by another person.

That the damage is too generally stated in the declaration, is no ground for arresting the judgment.

Action on the case. The declaration stated that the plaintiffs for a long space of time before, and at the time of the committing of the grievances thereafter mentioned were, and thence hitherto had been and still were, cutlery manufacturers, and before and at the time of the committing of the grievances hereinafter mentioned, exercised and carried on, and still exercise and carry on the business of cutlery manufacturers at, to wit, the town of Sheffield, in the county of York, and in the way of their said business did during and at the time aforesaid, prepare, manufacture, make, and sell, and still do prepare, manufacture, make, and sell amongst other articles of cutlery divers large quantities of pen-knives and pocket-knives, and during and at the time aforesaid the plaintiffs were accustomed to make and still were accustomed to make

divers large quantities of such pen-knives and pocket-knives with a certain stamp or mark, consisting, to wit, of the figure of a crown placed between the capital letters V and R, with the words "J. Rodgers & Sons" in letters thereunder in manner following, that is to say. [Here a fac-simile of the mark was set out.] And the plaintiffs aver that the said pen-knives and pocket-knives were so marked by the plaintiffs as aforesaid, in order to denote that they were articles of cutlery prepared, manufactured, and made by the plaintiffs, and to distinguish them from articles of cutlery of the same description manufactured or made by other persons; and the said pen-knives and pocket-knives so prepared, manufactured, and made by the plaintiffs as aforesaid, and so marked by them as aforesaid, long before and at the time of the committing of the grievances hereinafter mentioned, had been, and were, and still were held in very high estimation by dealers in cutlery on account of their good quality, manufacture, getting up and finish, and as such had been, and were during all the time aforesaid, and still were in great request, and sold and still were selling to a great extent as well in the United Kingdom of Great Britain and Ireland as in parts beyond the seas, that is to say, on the continents in Europe and America, and in the East and West Indies and elsewhere; and the plaintiffs during all the time aforesaid had thereby gained and acquired, and still thereby gain and acquire great reputation with the public, on account of the said good quality, manufacture, getting up and finish of the said pen-knives and pocket-knives so prepared and manufactured, and made and marked respectively by the plaintiffs as aforesaid, and had made, and were still then making great gains by the sale of the same: yet that the defendants, well knowing the premises, and contriving and wrongfully intending to injure the plaintiffs in the sale of the said pen-knives and pocket-knives, and to deprive them of the great gains which they might and otherwise would have made by preparing, manufacturing, making, and marking, and selling such pen-knives and pocket-knives as aforesaid, theretofore, to wit, on the 1st day of January in the year of our Lord 1843, and on divers other days and times between that day

and the 9th day of August last aforesaid, did wrongfully, knowingly and fraudulently, and against the will and without the licence, consent, or knowledge of the plaintiffs, prepare, manufacture, and make for sale, and cause to be prepared, manufactured, and made for sale divers quantities, to wit, 100,000 pen-knives and 100,000 pocket-knives in imitation of those prepared and manufactured, and made by the plaintiffs as aforesaid, and marked such pen-knives and pocket-knives so prepared, manufactured, and made for sale by the defendants as aforesaid with a certain stamp or mark, that is to say, a stamp or mark consisting of, to wit, the figure of a crown placed between the capital letters V and R, with the words "J. Rodgers & Sons, Sheffield," in letters thereunder in the manner and form following, that is to say—[Here a fac-simile of the defendants' mark was set out]—in imitation of the said thereunder-mentioned stamp or mark of the plaintiffs, and of a form, letters, signification, and appearance very much resembling the form, letters, signification, and appearance of the said plaintiffs' said stamp or mark; and which said pen-knives and pocket-knives so prepared, manufactured, and made by the defendants as aforesaid, and stamped and marked by the defendants as aforesaid, were so stamped and marked by the said defendants as aforesaid, in order to denote that the said pen-knives and pocket-knives so prepared, manufactured, and made by them as aforesaid, were prepared, manufactured, and made by the plaintiffs, and to enable the defendants, and divers other persons in collusion with them, to sell, or cause to be sold, such pen-knives and pocket-knives so prepared, manufactured and made by the defendants, and so stamped and marked as aforesaid, by them, as and for penknives and pocket-knives of the genuine manufacture of the plaintiffs; and the defendants did, on the several times aforesaid, knowingly, wrongfully, and fraudulently, and against the will, and without the licence or consent of the plaintiffs, sell and cause to be sold for their own lucre and gain and profits, the said pen-knives and, pocket-knives, so by them prepared, manufactured, and made and marked as aforesaid, as and for and under the false colour and pretence that the same were respectively pen-knives and pocket-knives of the plaintiffs, and so re-

spectively prepared, manufactured, and made by them, the plaintiffs; whereas in truth and in fact the plaintiffs had never prepared, manufactured, or made the said pen-knives and pocket-knives, or any or either of them, or any part thereof; and whereas in truth and in fact the plaintiffs had never marked the said pen-knives or pocket-knives, or any or either of them, with the said stamps or marks, or any or either of them, and did not mark them, or any of them, with any stamp or mark at all: by means of which said several premises the plaintiffs were wrongfully and unjustly hindered and prevented by the defendants from selling and disposing of divers large quantities, to wit, 1,000,000 pen-knives, and 1,000,000 pocket-knives, so prepared, manufactured and made by the plaintiffs as aforesaid, marked with the stamps and marks as aforesaid, of great value, to wit, of the value of 30,000*l.*, which the plaintiffs would otherwise have sold and disposed of; and the plaintiffs were deprived of divers great gains and profits, which would otherwise have accrued to them from the sale thereof, and were otherwise greatly injured in the selling of their said pen-knives and pocket-knives, and their reputation and good fame, and credit of manufacturing and selling pen-knives and pocket-knives of the said good quality, manufacture, getting-up, and finish as aforesaid, to the damage of the plaintiffs, &c.

The defendants pleaded, first, not guilty. Secondly, that the plaintiffs were not cutlery manufacturers, nor did the plaintiffs exercise or carry on the business of cutlery manufacturers, nor did they in the way of their said business prepare, manufacture, make, and sell such quantities of pen-knives and pocket-knives as in the declaration mentioned, in manner and form, &c. Thirdly, that the plaintiffs were not accustomed to mark such quantities as in the said declaration mentioned of the said pen-knives and pocket-knives with the said stamp or mark, in the said declaration in that behalf mentioned, in manner and form, &c. Lastly, that the said pen-knives and pocket-knives were not, nor were any of them, so marked by the defendants as in the said declaration mentioned, in order to denote that they were articles of cutlery prepared, manufactured, and made by the plaintiffs, and to distinguish them from

articles of cutlery of the same description prepared, manufactured, and made by other persons, in manner and form, &c. ; on which pleas issues were joined.

At the latter end of the year 1843 a suit in equity was commenced by the plaintiffs against the defendants, praying that they might be restrained from manufacturing or causing to be manufactured or sold any knives, &c., marked with marks [specifying them] in imitation of those used by the plaintiffs. On the 22nd of July 1846 an order was made in the said suit by Vice Chancellor Wigram, "enabling the plaintiffs, within one year from the date of the order, to proceed at law, touching the *matters in question in the said suit*," and this action was accordingly commenced in November 1846. The trial took place, before Williams, J., at the sittings for Middlesex, after Trinity term last, when it appeared that the plaintiffs were large manufacturers of knives and all kinds of cutlery, at Sheffield, where the business had been carried on for a great number of years under the name of J. Rodgers and Sons; that goods manufactured by the firm were marked with a crown between the initials of the reigning sovereign (now) V. R., and with the name of the firm, "J. Rodgers & Sons," underneath, and with the name of Rodgers in fifteen other modes; that the firm sent out their goods in a paper wrapper, on which was printed a notice, by way of caution to the public, that no articles except those marked as above described were the genuine manufacture of the plaintiffs; that the knives of the plaintiffs were in great repute; that their trade was increasing, and had extended considerably within the last four years; that the defendant Nowill was also a manufacturer of cutlery at Sheffield, and in 1843 he received from John Lord & Co. (merchants), an order for "forty-eight dozen stag-horn handle single-blade pen-knives, named Rodgers & Sons, highly polished" (and other articles); that Nowill provided the materials for, and employed the other defendant, W. Rodgers, a knife-blade grinder, to make forty-eight dozen knives; and to mark the blades with the name J. Rodgers & Sons and the other marks used by the plaintiffs; that the man so employed had a father named J. Rodgers, who was a knife-blade forger; that the knives, when finished,

were sent, with a bill of parcels, to Nowill, headed thus: "Bought of John Rodgers & Sons." The amount of the bill was 27*l.* 2*s.* 6*d.*; and was signed thus: "Settled, William Rodgers." These knives were transmitted by Nowill to John Lord & Co., according to their order. Upon these facts being proved, the learned Judge directed the jury to consider, first, "whether there was such a resemblance to the plaintiffs' marks, in the marks put on the knives made by the defendants, as was calculated to make an ordinary person believe that the marks were the marks of the plaintiffs, denoting that the knives were the knives of the plaintiffs." Secondly, "did the defendants, with an intention to deceive, sell these knives, representing them to be the manufacture of the plaintiffs." The learned Judge also directed the jury that "no man had a right to sell his own goods under the false representation that they were the goods of another person; that the action was brought for a violation of that right, and that the amount of damages was immaterial."

*Montagu Chambers* now moved for a rule to shew cause why there should not be a new trial on the ground of misdirection, or to arrest the judgment.—There are three necessary ingredients which must be proved in order to sustain this action: there must be an unauthorized use of the plaintiffs' marks by the defendants; there must be an intention to deceive others by the use of these marks; and there must be a damage to the plaintiffs resulting from their use. The existence of any two of these ingredients is not sufficient; they must all appear in combination. If there be fraud without damage, or damage without fraud, the action fails. There can be no such exclusive right to certain marks as the plaintiffs here contend for.

[WILDE, C.J.—The exclusive right the plaintiffs have is to use these marks for their goods, and to prevent others from using them for the purpose of palming off their goods as goods of the plaintiffs.]

The case, as it was proved, was a deceit practised on a third party, John Lord & Co., and that gives no right of action to the plaintiffs. The learned Judge also withdrew the question of damage from the jury. The action cannot be maintained without proof of damage beyond that which was proved in this case. There was no damage

shewn at the trial; nothing calculated to inflict any on the plaintiffs, whose trade had increased and was increasing. The plaintiffs claim an exclusive right to use certain marks, which they allege the defendants have usurped; but if it be so, they must shew an actual loss sustained, as well as a right invaded. In *Blanchard v. Hill* (1), Lord Hardwicke says, "It is not the single act of making use of the mark that is sufficient to maintain the action; it must be done with a fraudulent design to put off bad clothes by such means, or to draw away customers from the clothier." He also cited and commented on the following cases in the course of his argument—*Comyns's Dig.* (2), *Bac. Abr.* (3), *Pasley v. Freeman* (4), *Baily v. Merrell* (5), *Crawshay v. Thompson* (6), *Southern v. How* (7), *Blofield v. Payne* (8), *Marzetti v. Williams* (9). Then, in arrest of judgment, the damage is not alleged with sufficient precision. The terms used in the declaration are far too general; there is nothing stated as to the goods sold by the defendants being inferior goods; nor is the marking and sale of the goods alleged to be with an intent to withdraw the plaintiffs' customers, which Lord Hardwicke says is necessary. The damage in *Crawshay v. Thompson* was more minutely set forth in the declaration than it is here.

[WILDE, C.J.—A want of particularity cannot be urged in arrest of judgment.]

If the defective allegation be sufficient after verdict, still the kind of damage necessary to support this action cannot be inferred from the preliminary statements in the declaration.

WILDE, C.J.—I can see no ground for granting a rule. The action arises out of circumstances of an ordinary character, and from the facts proved in this case no action were maintainable it would be a reproach to the law. The real question is, will the law protect a trader and secure to him the use of certain marks, which he has

adopted and used to describe goods made by him? Will it prevent others using the same marks with the intention to represent goods to be manufactured by him, which in truth are not so manufactured? The declaration does not claim an abstract right to the use of certain marks, but says that the plaintiffs (knife-makers) had adopted certain marks (describing them) to denote that knives marked therewith were prepared and made by them, and that the defendants being aware of the fact, and intending to injure the plaintiffs, did fraudulently impose similar marks on knives made by the defendants, in order to mislead the public, and to induce them to believe that the knives so made and marked by the defendants were prepared and manufactured by the plaintiffs, and that they so acted under circumstances which deprived the plaintiffs of divers great gains and profits. It appears that the defendant Nowill received an order from John Lord & Co. for some knives, marked in a certain way; they were to be "48 doz. stag-horn handle single-blade pen-knives, named *Rodgers and Sons*, highly polished" (and some dozens of other knives not material now to mention), that is to say, for pen-knives manufactured and known to the public as the knives of Rodgers & Sons,—for that must be the meaning of the expressions in the order. After receipt of this order Nowill procures the knives to be made and marked by the defendant Rodgers, with the marks denoting the plaintiffs' manufacture, and receives them from Rodgers, with a bill of parcels invoiced as from Rodgers & Sons; this invoice would substantiate the mark on the knives, and guarantee the goods when sent to Lord & Co., as being the genuine manufacture of Rodgers & Sons. An action is brought by the plaintiffs, and the order, the execution of it, and the delivery of the goods being proved, the counsel for the defendants addresses the argument to the jury, that this is a vexatious action, brought against a respectable tradesman for the profit arising from the sale of goods, the gross value of which was only 27*l.*; and in order to counteract the effect which such an argument might have upon the minds of the jury, the learned Judge says, in his summing up, the parties do not come here for the purpose of obtaining damages, but to see whether the defendants may make use of their mark to their prejudice, and the action

(1) 2 Atk. 484.

(2) 'Action on the Case for Deceit,' (A, 1.)

(3) 'Action on the Case,' edit. 1832, vol. 1, p. 93.

(4) 3 Term Rep. 51.

(5) 3 Bulstr. 95.

(6) 4 Man. & Gr. 357; s. c. 11 Law J. Rep. (N.S.) C.P. 301.

(7) Popham, 144.

(8) 4 B. & Ad. 410; s. c. 2 Law J. Rep. (N.S.) K.B. 68.

(9) 1 Ibid. 415; s. c. 9 Law J. Rep. K.B. 42.



is therefore in fact brought to try a right; and in that view of the case it is not material to prove the amount of damages sustained. The learned Judge proposed two questions for the consideration of the jury: first, is there such a resemblance between the plaintiffs' marks and those used by the defendants as is calculated to impose upon an ordinary person, and to lead him to think that the marks were the marks of the plaintiffs, denoting their manufacture? If that were satisfactorily made out by the plaintiffs, the jury were then to inquire, secondly, whether the defendants did falsely represent, by means of this similarity, that the knives they sold were of the plaintiffs' manufacture, and was it done with the intention to deceive? That is in effect this, Was the act done? Was it done in a fraudulent way? Was it done in a way likely to deceive? and was it done with that intention? It appears to me that the mode adopted by the learned Judge at the trial, was the correct mode of putting the case to the jury.

As to the proof of damage, it is sufficient in actions of this kind to shew that such acts have been done as were here proved, and that they were done with the intention, and that the natural result of them was to prejudice the plaintiffs. If the defendants adopted these marks, knowing they were calculated to induce persons to believe the goods they made and sold were goods manufactured by the plaintiffs, that is sufficient proof of damage. The defendants receive an order for the knives of Rodgers & Sons; they execute it themselves without making any application for the knives to that firm. Do not the plaintiffs thereby sustain a substantial damage? Suppose the jury had said, We cannot say that Lord & Co. would have gone to Messrs. Rodgers for the knives if the defendants had not supplied them; still, if the reasonable intendment be the other way, the jury would be well justified in finding it, as they have done here, and that would be a good and reasonable verdict. If the jury had found for the defendants because there was no sufficient evidence of damage, the case would have been sent down to them again. The last ground of motion is to arrest the judgment, because the particular damage is not sufficiently alleged in the declaration. It is sufficient to say on this point that a general allegation of damage may be ground for special

demurrer, but cannot be urged in arrest of judgment. After verdict the Court looks only at the record, and if it states any damage which might have been proved at the trial, we must take it that such damage was proved.

COLTMAN, J.—I fully agree with the opinion of the Chief Justice, and with the law as stated by my Brother Williams at the trial. No man has a right to sell his own goods as for goods manufactured by another person. I, at first, hesitated whether the question of damage was not withdrawn from the jury, but I am now satisfied that it was not withdrawn from their consideration. After the jury had found that Lord & Co. wanted the knives of Rodgers & Sons, and that the goods supplied them by the defendants were so marked, the damage necessarily results from those facts; and if the jury had not so found, the verdict would have been an inconsistent verdict.

MAULE, J.—I am of the same opinion. The declaration is in the ordinary form. The proof given was similar to that usually adduced in cases of this nature. The direction of the learned Judge was quite right, and in accordance with previous decisions. A manufacturer of and dealer in certain articles can maintain an action against another person who sells similar articles, purporting to be, and by him falsely represented to be articles manufactured by such dealer: such a state of facts necessarily imports some damage; but in this case there was strong evidence of actual damage. The order of "Lord & Co.," in a legal sense, means, "Send me the knives of Rodgers & Sons," and the defendants, instead of going to Rodgers & Sons for them, supply the knives themselves. The law could not have been more clearly or more correctly stated than it was stated by the learned Judge to the jury; and the proposition to them of two separate and distinct questions was not unfavourable to the defendants. It appears to me that the verdict of the jury was a just verdict and the only verdict they could have reasonably returned. That the damage in the declaration is not alleged with sufficient distinctness, is no ground for arresting the judgment. I think the terms used in this declaration to state the damage are sufficient, and that they do comply with the view of Lord Hardwicke in the case quoted.

WILLIAMS, J. concurred.

*Rule refused.*

1847. }  
Nov. 8, 16. } HERAUD v. LEAF.

*Contract—Principal and Agent—Partnership—Work and Labour.*

*A Review was established by an association of shareholders, who passed certain written resolutions for its management and regulation. A committee of shareholders was appointed "to assist the editor in promoting the prosperity and circulation of the Review, and to obtain, as far as possible without expense, literary contributions, and to aid the editor as he might require in all matters connected with his department."—Held, that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the Review.*

Assumpsit for work and labour and on an account stated.

Plea, the general issue.

This was an action brought to recover the sum of 45*l.*, for literary articles supplied to and published in the New Quarterly Foreign and Colonial Review. It appeared at the trial, before Coltman, J., at the last Summer Assizes for the county of Surrey, that the defendant was one of the proprietors of the Review, which was established in 1843, of which Dr. Worthington was the editor; and that the plaintiff had contributed articles which were published in the Review, from the time of its institution down to the commencement of 1847. A prospectus of, and rules for carrying on the Review, were drawn up by the promoters, among which the following are material: Fourth, "That the financial department of the Review be conducted by a committee of six persons (naming them), three of them being the defendant, Mr. Powell, and Dr. Worthington (the editor), and that the accounts be annually submitted to a general meeting of shareholders." Fifth, "That the editorial department be confined to the Rev. D. Worthington, D.D., of Trinity College, Cambridge, with all the authority usually vested in an editor of accepting, rejecting, or modifying such articles as should be submitted to him." Sixth, "That all articles intended for insertion in the Review, when

accepted by the editor, be paid for, if required, at the rate of 8*l.* per sheet, of sixteen octavo pages, and that such pay be made within fifteen days from the publication." Seventh, "That the committee of six (the same as managed the financial department) above named should assist the editor in promoting the prosperity and circulation of the Review, in obtaining, as far as possible without expense, literary contributions, and in all such matters connected with the Review as the editor might require, aid in, but not interfere with, the editorial department." The first articles contributed by the plaintiff were delivered by him to the editor, and he was paid for them by the defendant. In 1845 the plaintiff supplied a philosophical article, which was rejected by the editor, who then expressed his determination to admit no more of the plaintiff's articles in the Review. Since this rejection the plaintiff had contributed three articles which were delivered to the editor through Powell, who concealed the name of their author; and these three last-named articles were altered and published in the Review by Dr. Worthington, who did not know who wrote them, and who thought they were supplied gratuitously by Powell. It was for the remuneration alleged to be due from the defendant in respect of these three articles that the action was brought. The learned Judge told the jury, "That he thought Powell acted as the plaintiff's agent, and if Powell concealed the name of the author from the editor, that was a fraud, and the plaintiff could not recover;" and upon being asked by the jury, "Whether one proprietor of shares had authority to employ persons to write for the Review?" he answered that a proprietor had no such authority. He also directed them to consider several questions on the facts of the case; and they found a verdict for the defendant.

*Shee, Serj.* now moved for a new trial upon the ground of misdirection, and that the verdict was against the evidence (the argument on the latter point is omitted).—The words of the seventh resolution empowered Powell to employ the plaintiff to write for the Review; the words of it are express:—"The committee (of which Powell was one) are to get articles, free of expense if possi-

ble." Thus, Powell was constituted an agent for the purpose of getting articles; and the resolution means he is to get them *if he can* gratuitously, and if not then he is to get them with expense.

[WILDE, C.J.—If that be so, then all the committee have the same right.]

The plaintiff ought not to be damnified by the concealment of Powell. The demand is only for the articles which were accepted and inserted in the Review; the proprietors have had the benefit of and ought to pay for them.

*Cur. adv. vult.*

WILDE, C.J.—This was an action brought to recover compensation for literary articles supplied to a Quarterly Review. It appeared that the Review was established by certain persons who held shares in it: one person was by the general body appointed editor with certain powers, and others were appointed to assist the editor and to procure voluntary contributions of matter for publication in it. The questions of fact were left to the jury; and we are of opinion that their verdict was clearly warranted by the evidence, and upon that ground there can be no rule. It was, however, contended by the plaintiff that there was a misdirection, inasmuch as the terms of the seventh resolution of the shareholders authorized Powell to employ the plaintiff to write articles for the Review. It was argued that he had contracted with Powell, who had authority to bind the shareholders; that the plaintiff's articles were furnished to Powell, and were subsequently accepted and published by the editor of the Review, and that the remuneration for those articles could not be legally withheld. Powell's authority depended upon the terms of a written instrument, the construction of which was for the Judge at the trial; and he was of opinion that that document conferred on Powell no authority as an individual shareholder or member of the committee to contract for or bind the other shareholders. We think that such opinion was correct; that there was no misdirection, and therefore no rule can be granted.

*Rule refused.*

1847. }  
Nov. 3. } RUSHBROOK v. HOOD.

*Deed—Stamp—12 Anne, c. 9. s. 24.—*  
55 Geo. 3. c. 184.

*The indenture mentioned in the first count of the declaration was of four parts, between and executed by the vendors, a trustee, the plaintiff, and the defendant. It recited the title of the vendors to certain copyholds, an agreement for sale to the defendant, that he had taken possession and built a house thereon, an agreement by the plaintiff with the defendant to lend him some money by way of mortgage, and that for the purpose of carrying the agreements for mortgage and purchase simultaneously into effect, a surrender was to be made of the copyholds by the vendors, to a trustee, to secure the money advanced by the plaintiff. The vendors then covenanted with the plaintiff, his heirs, &c., and separately with the defendant, his heirs, &c., that they had a good title, &c., for quiet enjoyment, &c.; and the defendant also thereby covenanted to pay to the plaintiff the sum advanced, with interest.*

*The indenture mentioned in the second count was between and executed by the plaintiff and the defendant; it recited the former deed, default in payment of the sum thereby secured, a further loan by the plaintiff; and the defendant thereby covenanted to pay the whole sum, with interest, and that the copyholds should remain further charged with the entire sum.*

*Held, that the indenture in the first count was single in its nature and object, though treating of several matters; that it was not within the statute of 12 Anne, c. 9. s. 24. and, therefore, liable only to the single stamp duty of 35s.*

*Held, that the indenture in the second count was a deed constituting a further charge, and liable only to the ad valorem stamp duty of 80s. under 55 Geo. 3. c. 184.*

This was an action of debt tried, before Patteson, J., at the last Assizes for Suffolk in which the plaintiff had a verdict for 515 18s. 7d., with leave to move to enter nonsuit if the Court should be of opinion that both the indentures on which the action was brought were inadmissible in evidence from

being improperly stamped, or to reduce the verdict to 103*l.* 3*s.* 7*d.*, in the event of the deed mentioned in the first count being held inadmissible, or to 412*l.* 15*s.*, in the event of the deed mentioned in the second count being held inadmissible.

The first count stated that, on the 30th of April 1842, by indenture made between J. C, G. C, C. C. the younger, T. C, and A. C, of the first part; C. C. the elder, of the second part; the defendant of the third part; and the plaintiff of the fourth part, the defendant covenanted with the plaintiff to pay him 400*l.*, and interest at 5*l.* per cent. per annum, on the 30th of April 1842, and breach in payment. The second count stated, that on the 29th of April 1843, by indenture made between the defendant of the one part and the plaintiff of the other part, the defendant covenanted with the plaintiff to pay him 100*l.*, with interest at 5*l.* per cent. per annum, on the 29th of October 1843, and breach of payment. The defendant pleaded, to each count, *non est factum*, and to the whole of the declaration a set-off for money received to his use by the plaintiff.

The first indenture was produced at the trial, stamped with a 35*s.* stamp, with proper followers. The defendant contended that there should have been two stamps for 35*s.* each. This indenture was dated and made between the parties as stated in the first count; and, after reciting the admission of one John Clarke, on the 24th of November 1795, to certain copyhold lands in the county of Suffolk; his devise to the parties of the first part, with a direction for sale and division of the proceeds between them, on A. C. attaining the age of twenty-one; of John Clarke's death leaving C. C. the elder his customary heir; that on the 28th of November 1829, C. C. was admitted; that Ann C. attained the age of twenty-one on the 14th of April 1838; that in September 1841 the parties of the first part contracted with the defendant for the sale of the copyholds to him, and that he was let into possession and had built thereon six messuages; that an agreement had been entered into between the defendant and the plaintiff for mortgage for 400*l.*; and that, pursuant to arrangement between the parties, and for the purpose of carrying the agreements for mortgage and

*purchase simultaneously into effect*, certain surrenders of the copyholds to a trustee had been passed by the parties of the first and second parts: the one by direction of the defendant to such uses as the plaintiff should appoint, and in default of appointment to the use of him and his heirs; the other to the use of the defendant and his heirs, subject to the surrender in favour of the plaintiff. The indenture then witnessed that, in pursuance of the agreements, and in consideration of the premises, each and every of the parties of the first and second parts, in respect of their respective undivided shares, did grant, covenant, promise, and agree with the plaintiff, his heirs and assigns, and *also separately with the defendant*, his heirs and assigns, that they had right to convey; for quiet enjoyment, free from incumbrances; and for further assurance. It further witnessed, that in further pursuance of the said agreements, and in consideration of the premises, the defendant covenanted with the plaintiff for payment of 400*l.* and interest, as set out by the declaration, and to insure; there was also a power of sale after three months' notice, and a proviso for quiet enjoyment by the defendant until default, and a declaration that the trustee in whom the copyholds were vested should stand seised, in trust for the plaintiff, his heirs, executors, and assigns, for securing payment of principal and interest, and subject thereto for the defendant, his heirs and assigns.

The indenture mentioned in the second count was dated, and made between the parties stated in that count, and after reciting the first indenture, default in payment of principal and interest, and an application by the defendant to the plaintiff for, and agreement by the plaintiff to lend him, the further sum of 100*l.*, and its advance by the plaintiff, the defendant covenanted with the plaintiff, his heirs, &c., that the copyholds should remain further charged with the 100*l.* and interest; that the defendant should pay the plaintiff this further sum of 100*l.* and interest as set out in the second count, and that plaintiff should hold the estate as security for the whole sum of 500*l.* It was stamped with a 30*s.* stamp, which the defendant contended should have been a stamp for 35*s.*

Rouse now moved accordingly.—The

first indenture should have had two stamps of 35s.; it operates as two distinct deeds and carries out two separate contracts—the contract between the vendors and the defendant, and the contract between the plaintiff and the defendant. It comes within the provisions of 12 Anne, stat. 2. c. 9. s. 24, which enacts, “that where more than one of the matters or things (*i. e.* indentures, leases, bonds, or deeds) thereby charged with any stamp duty should be engrossed on one piece of vellum, &c., the duties should be charged on every one of such matters.” The parties themselves have by their recitals in this deed treated the contracts as separate; and by allowing such separate matters to be covered by one stamp, the revenue would be defrauded.

[MAULE, J.—The whole deed relates to one matter, the sale of an estate: it states the terms upon which the purchase-money is borrowed; that does not make it two indentures.]

As to the second indenture, instead of the 30s. mortgage stamp, the 35s. deed stamp should have been impressed thereon: the deed does not operate as a mortgage or further charge within the meaning of the Stamp Act, 55 Geo. 3. c. 184. If the advance of the 100*l.* were meant to operate by way of further charge, such intention should have been effected (no admission having been taken under the previous conditional surrender) by a further conditional surrender. This deed merely operates as a covenant or as a declaration of trust under the previous surrender, and therefore comes within the principle of *Haywood v. Bibby* (1), and ought therefore to have been stamped with a 35s. stamp. There had been no admission under either of the surrenders mentioned in the first indenture. The legal estate therefore was not vested in the defendant. The words “further charge” mean a “legal charge,” and the defendant could not create that. If then this deed (dealing as it does with an equitable interest merely) operates as a covenant, a 35s. stamp is requisite, and it was improperly received at *Nisi Prius*.

WILDE, C.J. — I am of opinion that neither of the objections can be supported,

(1) 11 Mea. & Wels. 812; s. c. 12 Law J. Rep. (N.S.) Exch. 404.

for in order to impose a stamp duty on any document the clear language of a statute embracing and designating such document is absolutely required. With regard to the first objection, the party who becomes the purchaser agrees with the vendors that a surrender shall be passed to uses in favour of a party appointed by the purchaser, which declares, that he who advances the money shall hold the estate by way of security. The whole object of the deed is to carry out the contract of purchase, by raising the money on the security of the thing purchased to pay for it; and thus the matters carried out by this deed are not separate and distinct matters, but they all form part of one and the same transaction. The words of the statute of Anne refer to several indentures on the same parchment, which it makes subject to separate stamps; and the single question is, is this one indenture, or more than one? It appears to me to be one indenture, framed for the purpose of carrying out one single object. It does not come within the words or the meaning of the statute of Anne; and, therefore, the objection fails. I had some doubt about the second deed. Its object is to give the mortgagee a lien on the estate for the further sum of 100*l.* lent to the defendant, in addition to the 400*l.* mentioned in the former deed, and to enable him to hold the estate as security for the re-payment of the whole sum. I understand the word “mortgage,” as used in the Stamp Act, to mean an instrument which operates as a security upon land for the payment of money. This deed recites a former transaction, by which the sum of 400*l.* is already charged on the estate, and says, *this shall be a charge on the same estate for the further sum of 100*l.* now advanced.* It gives no further security for the sum previously due, upon which the stamp duty had been previously paid. It is within the express terms of the Stamp Act: it creates a further charge, and was properly marked with a stamp of 30s.

COLTMAN, J.—I am of the same opinion. The provisions of the statute of Anne do not furnish an objection to the state of things which exist in this case. That statute refers to different deeds, having different objects inserted in the same parchment. As to the second indenture, that is clearly a

deed of further charge; and therefore within the exception in the schedule of the 55 Geo. 3. c. 184.

MAULE, J. and WILLIAMS, J. concurred.

*Rule refused.*

1847. }  
April 27; } TILT v. DIXON.  
June 12. }

*Practice.—Second Application.*

*Where a rule obtained in the name of the plaintiff to set aside an order had been discharged on an affidavit of the plaintiff that the application was made without his authority or consent, the Court allowed a second application to be made on the same affidavits in the name of the party on whose behalf the action was brought.*

On the 16th of October 1846 an order was made by Cresswell, J. setting aside the final judgment signed in this cause, and all subsequent proceedings, on the ground that the judgment had been signed without the consent of the plaintiff. The action had been brought in the name of the plaintiff, with his authority and consent, but for the benefit and on the behalf of H. W. Hemsworth, upon a bill of exchange drawn by the plaintiff upon and accepted by the defendant. In Hilary term, 1847, a rule was obtained to set aside the above-mentioned order, on the ground that the summons on which it was founded had been improperly altered by defendant's attorney. This rule purported to have been obtained upon the application of the plaintiff, but on shewing cause an affidavit of the plaintiff was produced, that he had not authorized the application for the rule, and praying that it might be discharged, which was thereupon done by the Court. On the last day of the same term,

Lush, on behalf of H. W. Hemsworth, obtained a rule, to the same effect as that of Hilary term, 1847, against which—

Telford, Serj. now shewed cause.—The present application is in substance to the same effect as the former, omitting the charge against the attorney. That was made by Hemsworth in the name of the plaintiff, and he now comes and repeats the application as on his own behalf, and in his own name. It is an invariable rule that

the Courts will not hear a second application upon the same matter. If a party fails through a defect in the form of the application, he cannot bring the same matter in substance before the Court again—*The Queen v. the Manchester and Leeds Railway Company* (1). This application is made upon precisely the same affidavits as the former. The last case on the subject is *Dixon v. Oliphant* (2). There the application was upon new matter arising since the former application. The rule had at first been refused on the ground of defective service, and leave was given to make a fresh service and a fresh application thereon—*Levi v. Coyle* (3), *Ex parte Hasleham* (4). Nothing is more important than that a party should make his application in the proper name.

Channell, Serj., and Lush, in support of the rule.—The rule is, that where the motion fails on the merits you cannot move again.

[CRESSWELL, J.—No, not on the merits. There are cases in which the application has been discharged on technical grounds.]

The rule does not apply except where the application is made nominally on behalf of the same individual as well as really. No case has been decided in which, the party to make the application having been misconceived, it has been held that he cannot come again in the right name. This rule was not moved for till two or three days after the other rule was discharged. The attention of the Court was then called to the rule, and it was granted with full knowledge that the matter had been discussed before, and that the application was made on the same affidavits. This is not within the class of cases referred to. The Court cannot look out of the present rule, and say that it is moved on behalf of the same person as the former one. It is in the discretion of the Court to grant the second application; and this rule having been granted upon a full statement of all the circumstances, the Court will not allow the objection to be taken now. In *Shaw*

(1) 8 Ad. & El. 413; s.c. 8 Law J. Rep. (N.S.) Q.B. 66.

(2) 15 Meo. & Wels. 152; s.c. 16 Law J. Rep. (N.S.) Exch. 106.

(3) 2 Dowl. N.S. 932; s.c. 12 Law J. Rep. (N.S.) Q.B. 294.

(4) 1 Ibid. 792.

v. *Perkin* (5) a second application was allowed, and in *Jeyes v. Hay* (6) a second rule was granted for the same thing, only with costs.

[WILDE, C.J.—It is an important question, and one of general application. The Court will hear the motion on the merits, and consider afterwards whether the case falls within the rule.]

*Cur. ado. vult.*

WILDE, C.J.—In this case an action had been brought in the name of the plaintiff by one Hemsworth, who had signed judgment; and, on summons, an application was made to set the judgment aside on the ground that Hemsworth had not the plaintiff's authority, which application was successful. The summons issued called on the plaintiff's attorney, but was altered by the defendant's attorney to a summons calling on the plaintiff; and the Court was asked to set aside the order on the ground of the improper alteration of the summons. The Court thought it was improperly altered, and the rule was drawn up in favour of the plaintiff. The Court came to this decision on the merits, but an affidavit of the plaintiff that he had not authorized the application to the Court being produced, and the rule being drawn up in his name and as on his application, it was eventually discharged. Another rule to the same effect has been obtained in the name of Hemsworth, and the question now is whether such rule can be made absolute. A multiplicity of rules on the same subject is not allowed; and the question is, whether the present rule is so far the same as and identical with the former as to offend against that well-known rule of practice. We have looked into the cases, and think that the rule may be made absolute in this case without interfering with any of the decided cases. The merits are with the plaintiff; and, therefore, as the present application is made by Hemsworth, who has a right to make it, the rule will be absolute.

*Rule absolute.*

(5) 1 Dowl. N.S. 306; s. c. 11 Law J. Rep. (N.S.) Q.B. 52.

(6) 1 Man. & Gr. 390.

1847. }  
Nov. 15, 22. } CATTLIN v. BARKER.

*Trial—Recalling Witness.*

*A witness on cross-examination answered a question put to him by the defendant's counsel, and went on to make a further statement, which was not legal evidence. The plaintiff's counsel in reply remarked upon this further statement; he was stopped by the jury, who understood the witness to have said the direct contrary to that attributed to him by the plaintiff's counsel, who then wished to recall the witness, but the Judge refused to allow this to be done:—Held, that the witness having volunteered a statement which was not evidence, it was the duty of the Judge not to notice it; and that he was right in refusing to recall the witness to correct the mistake of the jury as to what the statement was.*

This was an action of assumpsit on an attorney's bill, tried, before Cresswell, J., at the last Sittings for Middlesex.

Plea—Non assumpsit.

The defendant had a verdict.

It appeared that the defendant was an advertising agent, and a creditor to the extent of 1,000*l.* of the Northern and Eastern Junction Railway Company; on applying for the amount due to him at the company's office, the secretary of the company introduced him to the plaintiff, who brought two actions in the defendant's name against two of the provisional committee of the railway company for the money due to the defendant. There was evidence to shew that the object of the actions was to enforce a general contribution from the directors to pay the engagements of the company. Both actions failed; the bill of costs was now demanded, and the only question at the trial was, whether the plaintiff had been retained to bring these actions by the defendant, or by the secretary to the company? The clerk to the secretary of the railway company was called as a witness for the plaintiff in the present action, and was asked, on cross-examination, "whether the plaintiff had not been called as a witness in one of the former actions at Maidstone?" To this the witness answered, "Yes;" and added, that the "*plaintiff said, on that occasion, he had not been retained by the company to bring the action.*"

The counsel for the plaintiff was commenting on this statement, in his reply to the jury, when he was interrupted by the foreman, who, it appeared, had taken down the statement exactly contrary to that made by the witness. Upon this the counsel begged that the witness might be recalled to correct the mistake of the foreman; but the learned Judge refused to recall him, and said, "The further statement was not evidence; I took no note of it; and the witness's answer now would not be evidence." In his summing up he told the jury not to take the statement into their consideration.

*E. James* now moved for a new trial.—The foreman of the jury was mistaken in the expressions used by the witness; and it was a miscarriage on the part of the learned Judge not to allow the witness to be recalled to correct the mistake. The statement was one which must have influenced the minds of the jury, and it was the duty of the Judge to correct that influence and prejudice, which a mistake on the part of the jury had occasioned.

[*MAULE, J.*—You cannot call a witness to prove what a witness said before the jury; it does not alter the principle because the witness you propose to call is the witness himself.]

He also moved on the ground that the verdict was against the evidence.

*Cur. adv. vult.*

*WILDE, C.J.* now (Nov. 22) said—This was a rule for a new trial, on two grounds: first, miscarriage or misdirection of the Judge; and secondly, because the verdict was against the evidence. The action was on an attorney's bill, and the question in the cause was, whether the defendant, or another person, had retained the plaintiff. The defendant contended, that the plaintiff had been retained by the secretary of a railway company, to bring two actions against some of the provisional committee-men, to sue in his (the defendant's) name, to oblige them to pay their share in order to liquidate the debts of the railway company. It appeared that a clerk of the railway secretary was called as a witness at the trial. The defendant's counsel asked him on cross-examination whether the plaintiff had been examined at the trial of one of the former

actions. The witness said that "the plaintiff was then examined," and chose to add "the plaintiff, in his evidence on that occasion, stated that he *had not been retained by the company* to bring that action." That statement was foisted upon the Court, and did not arise from the question of the counsel. The learned Judge did not put upon his notes this additional answer given by the witness. Mr. James adverted to this statement at the latter part of the case, and one of the jurymen then interfered and remarked, that the witness said that "the plaintiff had stated that at the former trial *he was retained by the company*;" upon which Mr. James requested the Judge to recall the witness to ask him what he had said; but the Judge refused to do so, and told the jury that the statement of the witness was not to be taken into their consideration at all in deciding the case. When a forward witness volunteers a statement which is not in answer to any question put to him, it would be most mischievous to allow it to become evidence in the cause; and we think the Judge was quite right in refusing to recall a witness to re-state that which he had not been asked for, and which was not evidence. It is said that the jury might have been influenced by what their foreman said he had heard, and acted contrary to their duty; but the learned Judge, as far as he could, excluded the statement altogether from their consideration, and there is no reason for saying that they were influenced by it, and if they were, we cannot, under these circumstances, interfere. As to the verdict being against the evidence, the Judge was satisfied with the verdict, and thinks the verdict a proper verdict, consistent with the evidence, and just.

*Rule refused.*

1847. }  
Nov. 9, 22. } *CAMPBELL v. SMART.*

*Process—Alteration of Writ of Summons—Statute of Limitations.*

*The plaintiff applied for a rule to alter the date in the first and alias writ of summons from the day on which they were respectively issued to a later date, in order that a pluries writ might issue within a month after the date of the alias as amended for the purpose of saving the Statute of Limitations:*

I •



—*Held, that the Court will not authorize any alteration in the date of a writ of summons ; though without such alteration the Statute of Limitations will be a bar to the action.*

It appeared, upon the affidavits in this case, that the last day on which a writ could have issued to save the operation of the Statute of Limitations was on the 14th of January 1847. On the 11th of January a writ issued, which was duly returned *non est inventus* and filed ; and on the 9th of June an *alias* writ was sued out, which expired on the 8th of October. A *pluries* writ ought to have issued on the 7th of November, which happened on a Sunday, and on the attorney for the plaintiff applying for the writ on the morning of the 8th of November, he ascertained that the writ could not be regularly entered on the roll.

*Dowling, Serj.* (Nov. 9,) moved for leave to alter the date of the teste of the original writ from the 11th of January to the 13th of January, and to alter the date of the teste of the *alias* writ from the 9th to the 11th of June, so that the *pluries* writ might regularly issue, and be entered on the roll as of the 8th of November, the day on which the plaintiff's attorney applied for it.

[WILDE, C.J.—By the 12th section of 2 Will. 4. c. 39. it is expressly enacted, that every writ shall be tested of the day it is actually issued.]

The 10th section enacts, " That no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ." Notwithstanding these enactments, the late cases shew that the alterations now required may be made in a writ. In *Eccles v. Cole* (1) the

Court allowed a writ to be altered from *debt* to *assumpsit* more than six months after it had issued, on an affidavit, stating that the Statute of Limitations would be a complete bar to a fresh action. In *Williams v. Williams* (2), the Court allowed additions to be made to the writs by inserting therein memorandums of the return thereto, &c. The addition of the name of a plaintiff was allowed in *Lakin v. Watson* (3), and also in *Brown v. Fullerton* (4).

[MAULE, J.—When a person has issued his writ in proper time within the statute of Will. 4, but in improper form, then the Court has allowed alterations to be made which indirectly save the Statute of Limitations ; but here you have no writ issued within the statute.]

[WILDE, C.J.—In the cases you cite some things were allowed to be added which had been accidentally omitted, and the additions were truths : in this case you ask to be allowed to make an alteration which will falsify that which is now true, and to do something which is against the enactments of a statute.]

*Mavor v. Spalding* (5), and *Culverwell v. Nugee* (6) are two of the latest authorities on the subject, and in both of them amendments were allowed. It is also contended that the amendment is one which can be made without referring at all to the statute of Will. 4. The Court has power, by the common law, over its own records, and will assist a plaintiff who has merits to prevent an abuse of the Statute of Limitations. If the original writ were altered, as asked for by this application, there would be something to amend by, and the subsequent writs could then be made regular, both in form and in time. The defendant can traverse the fact if he pleases.

[WILDE, C.J.—Then granting this rule will not benefit the plaintiff. Besides, the motion is for a rule absolute in the first instance, as the defendant cannot be served ; in the cases cited there was only a rule nisi.]

(2) 10 Mees. & Wels. 476 ; s. c. 12 Law J. Rep. (N.S.) Exch. 128.

(3) 2 Cr. & M. 685 ; s. c. as *Lakin v. Massie*, 3 Law J. Rep. (N.S.) Exch. 203.

(4) 13 Mees. & Wels. 456 ; s. c. 14 Law J. Rep. (N.S.) Exch. 79.

(5) 1 Dowl. & L. P.C. 878 ; s. c. 13 Law J. Rep. (N.S.) Q.B. 185.

(6) 4 Ibid. 30 ; s. c. 15 Law J. Rep. (N.S.) Exch. 308.

(1) 8 Mees. & Wels. 537 ; s. c. 10 Law J. Rep. (N.S.) Exch. 475.

The plaintiff is willing to take the rule, believing that it will be beneficial to him—*M'Keller v. Riddie* (7).

[WILDE, C.J.—It appears to me that we are not authorized to do what is asked for, namely, to make an amendment in a writ, the effect of which will be to state in it that which the statute says shall not be stated; for we are requested to make it appear that things were done on certain days, and within a certain time, whereas in truth they were not so done. A great many cases have been cited, in which amendments in writs have been sanctioned, but the present case seems to go beyond any of them: the Court, however, will look through the cases referred to, before deciding upon this application.]  
*Cur. adv. vult.*

WILDE, C.J. now (Nov. 22) said,—This was an application for leave to alter the dates and indorsements in two writs of summons, by substituting some other day for the day on which those writs actually issued, the object being to exclude the defendant from the benefit of the Statute of Limitations, which would otherwise be a defence to the action. It appeared to the Court, at the time of the argument, that the application could not be granted; but as numerous cases of amendments were cited we took time to consider our judgment. I have looked carefully through all the cases, and have submitted them to my learned Brothers; and we all agree that in all of them the amendments were made for reasons inapplicable to the present case. "The Uniformity of Process Act requires the true date to be stated upon the writ; we are asked to insert another and later, and, consequently, a date contrary to the express terms of the statute, which requires a correct date. What is the ground on which the Court is asked to amend? Why, that the defendant may be excluded from having the benefit of the Statute of Limitations. But the act intended that a defendant, under these circumstances, should have the benefit of this defence; and we are required, without hearing the defendant, to deprive him of a defence conferred by statute. It is enough to say, that the statute, having expressed

that the true date should appear, the Court cannot interfere, because, by an alteration, the party would be deprived of a legal defence. The Court cannot enter into the question of merits; and there is neither principle nor authority to warrant us in ordering the alterations required. The Court does not *prohibit* the plaintiff from entering the *pluries* writ as of the 8th of November, if he think fit so to do, making the alterations *valeant quantum*.

*Rule refused.*

*Dowling, Serj.* expressed his intention to adopt that course.

APPEALS from the Courts of Revision, under 6 Vict. c. 18.

1847. }  
Nov. 11, 13. } PALMER v. ALLEN.

Parliament — Practice — 6 Vict. c. 18. s. 60.—*Paper Books.*

*An application was made to deliver the paper books nunc pro tunc in an appeal under the Registration Act. By the practice of the Court the paper books should have been delivered four days before the hearing:—Held, that the Court will enforce the established practice, unless a sufficient reason be given in excuse of a departure therefrom.*

This was the first day appointed by the Court under the 64th section of the 6 Vict. c. 18, for hearing appeals against the decisions of revising barristers; and on behalf of the appellants in this and two other cases,

*Gray* applied to be allowed to deliver the paper books *nunc pro tunc*, the attorney for the appellants having omitted to deliver them four days before the day of hearing. He stated, in answer to an inquiry from the Court, that he had no satisfactory excuse for the omission.

WILDE, C.J.—The Court cannot consent to depart from its established practice without some sufficient ground to excuse compliance therewith, and it is necessary and advisable that in these cases a departure from recognized forms without a good reason should not be allowed. The 60th

section of the Registration Act, which is here our guide, refers to and directs parties to follow the well-known rules and practice of this Court, with respect to special cases, which rules and practice are to be observed before appeals from the decisions of revising barristers are to be prosecuted, heard, and determined, in and by Her Majesty's Court of Common Pleas. Now, in special cases, the paper books (as is well known) must be delivered four days before the hearing; and though the section above referred to gave the Court power to make rules to regulate the practice in these cases, we have not thought it necessary to do so, and, therefore, the known rules applicable to special cases govern these cases also. Why are we to depart from that established and well-known practice? No reason has been given. We are of opinion that the practice is of great importance; and after considering the matter fully in all its bearings, the Court thinks this application cannot be entertained.

On a subsequent day (Nov. 13,) and before the cases had been reached in their order,—

*Wheateley* renewed the application, and produced affidavits which stated that the attorney in the country, who had conducted the case for the appellants and served all the notices, &c. up to the 2nd of November, the first day of term, had, on that day, placed the case in the hands of his London agent (who was then first appointed in the place of his former agent); that the attorney in the country expected that his London agent would have delivered the paper books and done everything after the 2nd of November which was necessary to be done before the hearing, whereas the London agent relied upon the country attorney who had pre-

viously acted in the matter, and thought that he had delivered the paper books.

WILDE, C.J.—We think that you have shewn sufficient excuse. Allowance may be made for the confusion attendant upon a change of agents, and the paper books may be now delivered.

1847. }  
Nov. 11. } BURTON v. GERY.

*Parliament*—6 Vict. c. 18. s. 73.—*Occupation*—*New Claim*.

*A voter's qualification in a county register was described in the third and fourth columns respectively, as "Land above 50l." "Own occupation." Within the twelve months next before the 31st of July, he changed his occupation, and took the adjoining land, which was sufficiently designated by the description in the old register, and he did not send in any new claim:—Held, that the name of the voter must be erased from the register.*

*When the right to vote depends upon the occupation of premises in immediate succession, the whole of the subject-matter composing the qualification must be fully described in the register.*

*A county voter who claims under section 73. of 6 Vict. c. 18, must always send in a new claim to vote.*

At a court held by the revising barrister, for revising the list of voters for the southern division of the county of Northampton, James Burton (the appellant) objected to the name of David Attfield being retained on the list of voters for the parish of Cold Ashby. The name "David Attfield" stood thus on the register:—

David Attfield.	Cold Ashby.	Occupier of land above £50.	Own Occupation.
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It appeared that the above David Attfield had held a farm at Cold Ashby, of a Mr. Loveday, of sufficient value to give a vote, up to Lady-day, 1847, when he left it. At Michaelmas 1846, he took another farm of a Dr. Walker, also of sufficient value, in the same parish, which he still continued to hold and occupy. He had not made any

new claim. The question for the consideration of the revising barrister was, whether David Attfield's qualification already on the register was sufficiently described to entitle him to vote in respect of successive occupation. The barrister was of opinion that the qualification of the said David Attfield was sufficiently described in the said list, there

having been no hiatus between the said occupations, and that it was not necessary for him to send in a new claim; and the barrister accordingly retained the name of the said D. Attfield on the list of voters for the said county.

*Humphrey*, for the appellant. — A person has been (for several years) on the register of county voters, as entitled to vote in respect of a certain qualification described in that register, and in this case the question for the Court is, whether such person, who has ceased to retain that qualification, and has not sent to the overseers a new claim, is entitled to retain his name upon the register, if the qualification therein described may be considered to designate correctly the qualification he has recently acquired. The case of *Bartlett v. Gibbs* (1) is very much the same as this: that was the case of a borough voter, whose qualification consisted of the occupation of two houses in succession, for which he was entitled to be registered under the 28th section of 2 Will. 4. c. 45. This is the case of a county voter entitled to be registered for the occupation of two farms, under the 73rd section of the 6 Vict. c. 18. The fact of the two farms, which, together compose the qualification of the voter, being situated in the same place and the same description applying to both, can make no difference in the principle established in *Bartlett v. Gibbs*. If the two houses there had been both in East Street, the cases would have been exactly the same, and the judgment there shews that then both the houses must have been described in the register: so here, the voter should have described his qualification in the third column as "two farms in succession." By the 4th section of 6 Vict. c. 18, all persons are directed to send in new claims who do not retain the same qualification as described in the previous register. That applies to the voter David Attfield. The qualification named in the register does not allude to his present holding; the description was placed there before he occupied his present farm; and though such description chances to be applicable by name, it is in fact altogether inapplicable to the identity. As the

qualification now stands, it describes one occupation, whereas, in truth, it consists of two occupations; and further, if David Attfield had sent in a fresh claim, as he should have done under the 4th section, his name would have appeared in a different list (the list of claimants), and thus notice of his change of qualification would have been given, and opportunity of inquiry as to the value of the premises, &c. would have been afforded to the other voters who are interested in maintaining the correctness and purity of the register.

*Hayes*, for the respondent. — The case of *Bartlett v. Gibbs* does not govern the present; the Court there decided that the 40th section of 6 Vict. c. 18, authorizing the revising barrister to make certain amendments in the list of voters, did not empower the alteration to be made which was there necessary to describe the qualification. The description of the qualification there was, "House, East Street;" and it was decided that he could not add to it "House, John Street." In this case, the description as it stands is comprehensive enough to embrace both holdings: no larger word than "land" can be used, and it correctly applies to the premises now occupied by David Attfield.

[MAULE, J. — The question is, does he retain the same qualification?]

The words of the 4th section are, "who shall not retain the same qualification as described in such register." If that description comprises the voter's present occupation, it is sufficient.

[WILDE, C.J. — Does "land in my occupation" in the register, mean Loveday's farm or Walker's farm?]

It means both.

[WILLIAMS, J. — How can that be? It was inserted before he ever held Walker's land; and being objected to, he must prove he was possessed of the same qualification as that described in the list.]

The proviso at the end of the 40th section enables the revising barrister to retain the name of a person objected to who has changed his place of abode, without having sent in a fresh claim.

[MAULE, J. — Read to the conclusion of the clause, and I think it will conclude your argument. "Provided such person shall prove that he possessed on the last day of July the same qualification, in respect of

(1) 5 Mas. & Gr. 81; s. c. 13 Law J. Rep. (s.a.) C.P. 40.

which his name has been inserted in such list."]

WILDE, C.J.—I entertain no doubt in this case, either upon the words of the statute or the reason of its enactments. The 4th section, 6 Vict. c. 18, expressly enacts, "that all persons entitled to vote in the election of a knight or knights of the shire to serve in parliament, &c., who shall not be upon the register of voters then in force, and also all persons, &c., who being upon such register shall not retain the same qualification" (by which I understand the same property, not the same kind of qualification), "and who are desirous to have their names inserted in the register about to be made,"—the section then goes on to direct how both those classes of persons are to proceed, that is to say, "shall give or send to the overseers an original notice of their claim to vote, or a new claim in the form given in the Schedule to the act. Now, David Attfield does not retain the same property which is described as his qualification in the register, and therefore, according to the words of the act, he should have sent in a fresh claim. There is good reason for the course directed by the act. When a person has been once upon the register, it may be taken that his qualification therein described has undergone the ordeal of a public scrutiny: attention has been called to it; its value inquired into, and it has been found to comply with all the requirements the statute enjoins. When that person changes his property, his qualification is entirely changed; there is the same reason for his sending in a new claim as there is for an original claim when his name had not appeared on the register before. The same scrutiny is required to establish the propriety of the new, as was required to test the validity of the original qualification, and the act therefore requires a new claim to be sent in, that the voter's name may appear in a different list, and the public attention be invited and called to investigate that register in the correctness of which the public are interested. If this were not so, no person would know of the change of the qualification. The very ambiguity which occurs in the present case shews the use of the provisions in the 4th section, for if no notice be taken of the change of property, and the same description

applies to both holdings, the property really described on the register may be a good qualification, yet the property to which that description may happen to apply may be insufficient to confer the franchise, and those who are interested in the matter would consider that the original qualification, which they know was a good one, was still occupied by the voter. The decision of the revising barrister cannot be sustained.

COLTMAN, J., MAULE, J., and WILLIAMS, J., concurred.

*Decision reversed.*

1847. }  
Nov. 18. } WATSON v. COTTON.

*Parliament—2 & 3 Will. 4. c. 45. s. 27.—Building.*

*A shed described by the revising barrister as standing against a wooden paling, but not fastened thereto; six posts put into the ground, support a tarpauling which forms the roof, one of the sides is boarded up with boards nailed to the posts; the shed is used to put barrows, posts, &c. into, and wharfage is paid for the use of it:—Held, that the shed so described is a "warehouse" or "other building" within the 27th section of the Reform Act.*

*The decision of the revising barrister will be affirmed, if it do not appear from the facts stated in the case reserved, that his decision was wrong.*

#### CASE.

At the Court held before me, the revising barrister for the borough of Bewdly, Charles Watson, of Bridge Street, in Stourport, within the said borough, objected to the name of William Cotton being retained on the list of persons entitled to vote in the election of a member to serve in parliament for the said borough, in respect of a wharf and building in Bridge Street, in the hamlet of Lower Mitton, within the said borough. The facts of the case were as follows:—William Cotton occupied a wharf and shed in Bridge Street: the shed stands against a wooden paling, the boundary of the wharf, but is not fastened to it. Six posts put into the ground support a tarpaulin or tar-cloth, which forms the roof. One of the sides of the shed is boarded up with boards,

fastened to the posts by nails. The shed is used for purposes connected with the occupation of the wharf. William Cotton put into it his barrows, shovels and coal-baskets; and one Marks, who rented a part of the wharf from William Cotton for the purpose of making hoops, was allowed to put hoops and poles into the shed during six months, paying wharfage for the use of it. I decided that this was a building within the meaning of section 27. of 2 & 3 Will. 4. c. 45, and therefore retained the name of William Cotton on the list of voters for the said borough. If the Court shall be opinion that this was not a building within the meaning of sec. 27. of stat. 2 & 3 Will. 4. c. 45, then the name of the said William Cotton is to be expunged from the list. But if the Court shall be of opinion that this was a building within the meaning of sect. 27. of stat. 2 & 3 Will. 4. c. 45, then the name of the said William Cotton is to be retained on the said list. (Signed by the revising barrister.)

I appeal against this decision.

Charles Watson.

Gray, for the appellant.—The shed as described in this case is not a sufficient building to confer a vote. It is neither house, warehouse, counting-house, shop, or other building within the 27th section of 2 & 3 Will. 4. c. 45. Land is not sufficient of itself, and the building must be something stable, solid, and substantial. It is not every building that is sufficient—*Whitmore v. the Town Clerk of Wenlock* (1).

[MAULE, J.—We are only told in this case what two of the sides of the shed are made of. How many sides has it? It cannot have less than three sides, the other side or sides may be enormously thick, and built of stone. If our opinion is required, we should be told the facts upon which it is to be formed.]

If the case be not sufficiently stated, the Court will exercise its power under the 65th section of the 6 & 7 Vict. c. 18, and remit the case to the revising barrister to supply all the deficiencies.

[WILDE, C.J.—We shall not encourage any proceeding of that kind, and must take

it that the revising barrister finds that it is a building, but the appellant wants to know whether the facts stated in the case prevent it from being a building within the act.]

It must be assumed that everything that composes the building has been described by the revising barrister: *de non existentibus et non apparentibus eadem est ratio*. The Court will not assume that anything exists which is not specifically set forth; and then the question is, is the building described such an one as comes within the terms of the Reform Act?

WILDE, C.J.—The revising barrister has found this to be a building, and unless we are satisfied from the description which he gives that it is not a building, his decision must stand. He calls it a shed covered over at the top, and closed in on two sides: that may well be a building. The act uses the word "warehouse," and though it is not stated how many sides this shed has, it cannot have less than three sides, and they may be all closed, but if they were all open it might be none the less a warehouse on that account. It appears that the shed is used for putting poles and tools in, and that the person who uses it for that purpose pays rent for it: is not that a user of the shed in the nature of a warehouse? Whether it be a warehouse does not at all depend upon the nature of the materials placed within it, but on its capacity to hold and protect the materials which are placed within it for convenient custody. We must take it to be a building, unless there are facts stated in the case which prevent it from being a building. I must be satisfied that it cannot be a building before the decision is reversed, and there is nothing stated here from which I am led irresistibly to the conclusion that this is not a building within the 27th section of the Reform Act.

COLTMAN, J.—The question here is more one of fact than of law. The revising barrister states that it is a building; and unless we see facts stated which prevent its being a building, we cannot interfere to alter his decision.

MAULE, J.—It cannot be said that this is not a building; the only question then is, is it such a building as the Reform Act contemplates? There is nothing in the case to shew it cannot be such a building; and

(1) 13 Law J. Rep. (N.S.) C.P. 55; s. c. *Whitmore v. Bedford*, 5 Man. & Gr. 9.

when you once shew it is a building of some sort, then the next thing to be decided is, is it put, or can it be put to any of the uses mentioned in the act of parliament? I cannot conceive that anything else is necessary to make it a building within the act. If a shed had been built with great solidity, open at two of its sides, which was capable of being used, and was used as this is used, viz., to put such things into as are required to be kept in it, such description of building would satisfy the terms of the 27th section of the Reform Act, and the shed would still be a building within the act of parliament, though it were not so strongly built as the shed described may have been for anything that appears to the contrary in the case now before us.

WILLIAMS, J.—I cannot say, that from the facts stated in this case the decision of the revising barrister was wrong.

*Decision affirmed.*

1847. }  
Nov. 18. } ONIONS v. BOWDLER.

*Parliament—6 & 7 Vict. c. 18. s. 40.—  
Barrister's Power of Amendment.*

*The qualification of a voter for a borough,*

*who was duly objected to, was described in the overseers' list in the third column as "House in succession," in the fourth column as "Butcher Row." It was proved before the revising barrister that the voter had occupied two houses during the twelve months next previous to the 31st of July, one in Coleham, the other in Butcher Row, and he then applied to the barrister to amend the description of his qualification by altering the word "house" in the third column to houses, and by adding "Coleham" in the fourth column, which the revising barrister refused to do:—Held, that the revising barrister has no power under the 40th section of 6 & 7 Vict. c. 18. to amend in such manner as to add to the subject-matter of the qualification described in the list.*

#### CASE.

At a court held, before the revising barrister, on the 7th day of October 1847, at the Guildhall, in the borough of Shrewsbury, for revising the lists of voters for the said borough, John Bowdler, the respondent in this appeal, objected to the name of Henry Onions being retained on the list of 10l. occupiers for the parish of Saint Alkmond, in the said borough. The name of Onions was thus inserted in the list:—

Christian Name and Surname of each Voter.	Place of Abode.	Nature of Qualification.	Street, Lane, or other Place in this Parish, where the property is situate; and number of the House (if any), when the right of voting depends on Property.
Henry Onions, Baker.	Butcher Row.	House in Succession.	Butcher Row.

Henry Onions occupied two houses in immediate succession. It was proved, that he had removed from Coleham, in the parish of St. Julian, to Butcher Row, in the parish of St. Alkmond, on the 1st day of May 1847. Both parishes are within the borough. I was required to amend the third column by making it *houses in succession*, and the fourth by inserting "Coleham;" and I held that I had no power to do so, on the ground that both the qualifying properties occupied in succession should be stated in the list, and I therefore expunged

the name. A number of objections were determined by me at the court aforesaid upon the same point, and the parties, whose names are hereunder written are dissatisfied with my decision thereon. I hereby declare that the several cases depending upon the same decision ought to be consolidated. And I also declare that the following cases, which are identical with the above, should depend upon the decision on the case above stated, and that in the event of the Court holding my decision to be wrong, the names of the following persons should be retained

on the list of persons entitled to vote in the election of members for the borough of Shrewsbury, in respect of their occupation of property in the said borough.—Signed by the revising barrister.

"I, Henry Onions, of Butcher Row, Shrewsbury, (Baker), for myself, and on behalf of all the other persons who are interested as appellants in this matter, and whose names are hereunder written, do appeal against this decision, and agree to prosecute this appeal. (Signed), Henry Onions, of Butcher Row, Shrewsbury, (Baker)." [Then followed the names of seventeen other persons.]

*Whateley*, for the appellant.—The question in this case depends upon the power of the revising barrister to make amendments in the list of voters under the 40th section of 6 & 7 Vict. c. 18. The amendment required by the appellant ought to have been made. The Court will not be too astute in upholding objections on the ground of insufficiency of description where there is real *bona fides* on the part of a voter, and where the description may perhaps offend against the rules of technical precision, but where it is practically well understood. The barrister here was requested to alter the word "house," in the third column, to "houses," and to insert "Coleham" in the fourth column; and such alterations would have rendered the description of the qualification more accurate.

[MAULE, J.—The words in the act "for the more accurately defining the same," do not mean that the revising barrister may add a house.]

[WILDE, C.J.—How do you distinguish this case from *Bartlett v. Gibbs* (1), which decides that a person must describe in the list all the premises of which his qualification is made up, and that the revising barrister cannot amend a statement of his qualification which only comprises the premises then in his occupation?]

The distinction is this: there the description of the qualification did not allude to more than one house; it implied that the voter had always occupied one house in

East Street: now here it obviously refers to two houses, which the words "house in succession" irresistibly convey to the mind. The addition of "Coleham" would not alter the nature of the qualification, but would only more accurately define and specify, by expansion on the face of the list, the meaning which was intended to be, and was indirectly, expressed by the words "house in succession." This case is more like *Hitchins v. Brown* (2), where the alteration made by the revising barrister in the description of the qualification of the voter was held to have been correct: the word "house," in that case, was altered into the word "houses." In *Flounders v. Donner* (3), the qualification consisted, as here, of houses in succession, but the number of one of the houses was omitted in the list; and Erle, J. there said, "I am clearly of opinion, that if the number had been brought to the revising barrister, he had power, under the 40th section, to insert it, and was bound to insert it." The error (if it be an error) in this case occurs in the overseers' list, which is in no way under the controul of the appellants; and it will be a great hardship to deprive them of the franchise for technical mistakes committed by the overseers.

*Keating*, for the respondent.—This case cannot be distinguished from *Bartlett v. Gibbs*, which, it is submitted, is identical with it, and the decision in which will be upheld by the Court. The description of the qualification there was "house,"—so it is here; the house described was that last occupied,—so it is here: the only difference is, that the words "in succession" are here added, which, it is contended, must mean, in succession to another house. But the addition of those two words do not differ the two cases when the principle established by *Bartlett v. Gibbs* is properly defined. The principle is, that where a person claims to vote for houses occupied in immediate succession, they *all together* form one undivided qualification: if he does not describe them all in the list, he

(2) 2 Com. B. 25; s. c. 15 Law J. Rep. (N.S.) C.P. 38.

(3) Ibid. 63; s. c. 15 Law J. Rep. (N.S.) C.P. 81.

(1) 5 Man. & Gr. 81; s. c. 13 Law J. Rep. (N.S.) C.P. 40.



does not properly describe his qualification, and the statement is as defective as it would be if his qualification consisted of a cottage and land, and he described his qualification as "land." It is also extremely important that the situation of the premises should be given, that the value of the respective houses, the rating, &c. should be examined by all who are interested in keeping the register pure. The expressions, "house in succession," and "Butcher Row," are calculated to mislead, for if they mean two houses, they must mean two houses in Butcher Row, which is contrary to the fact. If the barrister could, in this case, add one house, he could add five houses if five were occupied during the year. The case of *Hitchins v. Brown* does not assist the appellant; the description there could not have been altered for the better: the word "house" stood in the third column, and in the fourth column, opposite to it, "Muck Lane" and "St. Mary Street," and the statement of the qualification, taken altogether, could only mean a house in each of the two streets named in the fourth column. *Flounders v. Donner* bears no resemblance to this case. The name of each of the places in which the houses were situate was there given, and the ground of the decision was, that the barrister was justified in erasing a name because certain matter of description, improperly omitted from the list, was not supplied to his satisfaction. It is impossible to find a judgment more expressly and cogently in favour of the respondent than the judgment of Tindal, C.J., in *Bartlett v. Gibbs*: "We think the legislature intended that the registration list should afford such information of the nature and situation of the premises, in respect of the occupation of which each person claimed a right to vote, as would enable the other voters to ascertain by inquiry the sufficiency of the occupation and value of each of the premises."

*Whateley*, in reply.—The fourth column in the list is only given for the purpose of specifying the situation of the qualification. The nature of the qualification is expressed in the third column, and therefore an alteration in the fourth column would make no change in the nature of the

qualification, and that is the change prohibited by the proviso in the 40th section of the Registration Act. If nothing at all were stated in the fourth column, the revising barrister might have inserted both Coleham and Butcher Row; and there seems no reason or principle why the same clause, which confers the power of supplying a total blank, should not be held to confer a like authority when the blank, as here, is only partial.

WILDE, C.J.—I think that the decision of the revising barrister was right, and that he had no power to make the amendment. The case of *Bartlett v. Gibbs* decided, that when the qualification of a voter consists of the occupation of two houses, the situation of each must be described in the list, and the necessity of such a description is apparent on reference to the act of parliament. The act contemplated that all persons who are interested in the correctness of a register of voters should, by means of objections to the names of persons who were not entitled to be thereon, be enabled to assist in securing its purity, and therefore the act required all particulars of the qualification to be given, in order that an opportunity for the necessary inquiries as to the period and nature of the occupation, as to the value and the rating, might be made with facility. When the qualification consists of two houses these inquiries as to each house are equally important, and therefore the situation of each must be given. The voter here did not give the necessary information: the information he did give was worse than nothing, for it was false; Butcher Row (if it be taken to mean two houses) means that both houses were in Butcher Row, and inquiries there would shew at once that his occupation was not sufficiently long to confer the franchise; and if on the objection being taken he can at the last moment add a house in Coleham when all opportunity for inquiry is gone by, the rights of the objector and the intention of the act will be alike defeated. The words "Butcher Row" contain nothing equivocal or ambiguous; and the 40th section, though it empowers the barrister to make amendments when the qualification is insufficiently described, precludes him from receiving any other qualification than that described in the

list. It is said that the latter expression means, that when a person appears as a householder he shall not prove that he is a freeholder or a freeman; but I think it means something far beyond that. Then can it be said that the amendment sought to be introduced will render more clear or more accurate anything which already exists? Coleham does not assist the perspicuity of Butcher Row, but adds something extraneous and wholly independent of it: its effect is to make a substantial addition to the qualification, which without such addition is no qualification at all. *Hitchins v. Brown* is no authority for the appellant: the situation of the two houses forming the qualification was specified in the fourth column, and thus the information required by the act of parliament was afforded. The case of *Flounders v. Donner* decided that when the qualification is made up by the successive occupation of two houses, and such houses are numbered, the voter should describe them by their number in the list. There was no question of amendment before the Court; and though Erle, J. expressed an opinion that the barrister might have amended there, still the case does not apply here, the nature of the amendment required not being similar. The application here was not to define the same thing more clearly, but to add another thing essentially different; and the decision of the revising barrister must be affirmed.

COLTMAN, J.—I am of the same opinion. It is urged upon us that the failure of description of the qualification occurs in the overseers' list, and therefore it would be hard to disfranchise the voter. *Vigilantibus non dormientibus jura subveniunt*. He had the opportunity to send in a full and sufficient description in a new claim, and therefore the omission is his own fault. "House in succession" in the third column may mean the successive occupation of two houses, but the fourth column confines their situation to Butcher Row. The proposed amendment would not more accurately define Butcher Row, but would introduce a qualification different from that stated in the list.

MAULE, J.—The powers of amendment given to the revising barrister are prescribed by the 40th section, and I agree that the amendment asked for in this case was not

within them. Those powers ought not to be extended. Amendments are allowed in cases of total omission, and for the purpose of more accurate definition. Does the word "Coleham," here sought to be introduced, come within the latter head of amendment? is the only question. Butcher Row is not rendered more clear by its addition, and there the alteration ought not to have been made.

WILLIAMS, J.—Taking a liberal view of the statement of the qualification as it appears in the list, it means, houses in succession in Butcher Row in the parish of A. By the proposed amendment it would be, two houses in succession in parishes A. and B: that would be a different qualification altogether, which the revising barrister had no power to introduce.

*Decision affirmed, with costs.*

1847. }  
Nov. 18. } PRIOR v. WARING.

*Parliament—6 & 7 Vict. c. 18. s. 44.—  
Form of Case in Consolidated Appeal.*

*If cases are included in a consolidated appeal, under 6 & 7 Vict. c. 18. s. 44, which do not depend upon a decision on the same points of law, the Court has no jurisdiction to hear the appeal.*

*A revising barrister granted appeals against his decisions in respect of five voters for a borough, and declared that such appeals ought to be consolidated. After stating the facts applicable to each voter, and the reasons upon which his decisions were founded, the case concluded, "If the Court should be of opinion that the occupation and residence of each or any of the appellants was sufficient, the names of all or such as the Court shall think fit, are to be retained on the register, otherwise to be expunged":—Held, that the appeals were improperly consolidated, as the decision on one would not govern the rest; that the Court had no jurisdiction to entertain any of the appeals, and that the case must be struck out.*

This appeal was consolidated with the appeals of James Templer, Henry Augustus Templer, and John Charles Templer.

The names of the appellants (who were

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duly objected to by the respondent) appeared upon the list of voters for the parish

of Lyme, in the borough of Lyme, in the following form :—

Prior, John Venn	Silver Street, Lyme	House and Land	Springfield House
Templer, James	Silver Street, Lyme	House and Land	Springfield House
Templer, Henry Augustus	Silver Street, Lyme	House and Land	Springfield House
Templer, John Charles	Silver Street, Lyme	House and Land	Springfield House

The appellants were duly rated for the property described, and the rates were duly paid by them, and the property is of sufficient value to entitle them all to be retained on the list of voters as joint occupiers, if the qualification is complete in other respects.

Mr. George O'Kelly Templer, a solicitor at Lyme, purchased for Mr. Attwood, in 1845, the property in question (Springfield House), from Mr. Tartt, for the residue of a term of twenty-one years, of which seven were unexpired. Mr. Tartt gave up possession to Mr. O'Kelly Templer, for Mr. Attwood, on the 25th of July 1845, the agreement for purchase having been made about three weeks before.

Mr. Prior is the brother-in-law of Mr. O'Kelly Templer, and is a barrister, practising in Lincoln's Inn, and has a residence with his wife and family at Greenwich, and has had so for some years.

Mr. John Templer is a brother of Mr. O'Kelly Templer, and is a special pleader practising in the Temple, and has a residence with his wife and family at Greenwich, and has had so for some years.

Mr. James Templer is the father of Mr. O'Kelly Templer, and is a solicitor residing at Bridport, within seven miles of the boundary of the borough of Lyme.

Mr. Henry Augustus Templer is another brother of Mr. O'Kelly Templer, and is a solicitor at Bridport, and resides with his wife there, and his house also is within seven miles of the boundary of the borough of Lyme.

Mr. O'Kelly Templer, at the latter end of July 1845, treated with Mr. James Templer, and Mr. H. A. Templer, for their taking Springfield with Mr. Prior and Mr. John Templer upon the terms hereinafter stated, and Mr. Templer (the father) wrote

in the last week of July 1845, to propose to Mr. Prior and Mr. John Templer, that they (the four appellants) should take the house furnished, as yearly tenants, rent free, on the terms of paying the rates and taxes, the tenancy to commence from the 30th of July 1845. An agreement, already prepared, was signed by Mr. Attwood, and all the four appellants, on or before the 31st day of July 1845, by which Mr. Attwood agreed to let, and the four appellants agreed to take, Springfield House, with the coach-house, garden, &c., together with the furniture and fixtures, &c., as tenants from year to year, from the 29th of July 1845, in consideration of the four appellants agreeing to pay all rates and taxes, and to keep the internal part of the house in its then state of repair.

In anticipation of the agreement being completed, Mr. O'Kelly Templer engaged a woman to take care of the house on behalf of the appellants, and she has lived there as their servant ever since.

Upon the 30th of July 1845, Mr. H. A. Templer went to the house, and told the housekeeper that he came to take possession, and he took the key.

Upon the 31st of July 1845, Mr. Templer (the father) came to the house and slept there on that night, and six times in the summer of 1846, and four nights in 1847.

Mr. Prior came down to Springfield House with his wife and family in September and October 1845, and stayed there a fortnight. He has not been there since until the 9th of September 1847, when he came to Lyme with his wife and children, and three servants, and remained for a month.

Mr. John Templer accompanied his father Mr. Templer to Lyme during the time of

the revision of the list of voters in October 1845, (Mr. Templer being professionally engaged in court attending to the revision), and remained a week at the house. In August 1846, he (Mr. John Templer) came to the house with his wife, two children, and one servant, and accompanied by his wife's father and three of his servants. He remained for eleven weeks. In October 1847, Mr. James Templer, with his wife and family, came to the house (while Mr. Prior and his family were living in it as above mentioned), and remained there from Thursday to the following Sunday as the guest of Mr. Prior, as far as his table was concerned.

Mr. and Mrs. H. A. Templer slept three or four nights at the house between the 31st of July 1845, and the 31st of July, 1846; one night in August 1847, and again when he came to attend the Court in October 1847, to support his qualification.

Whilst Mr. Prior and Mr. J. Templer have respectively been at Springfield, they have left their houses at Greenwich in the care of sometimes one, and sometimes two servants on board wages. Several friends and relatives of the Messrs. Templers, with their assent, have stayed for a few days at a time (on one occasion for two weeks) at Springfield during that year, and others have slept there with the assent of the Messrs. Templer also for single nights when they have come from the neighbourhood to balls at Lyme. The furniture in the house belongs to Mr. Attwood. The value of the furnished house and premises is 150*l.* a-year: the value of the house unfurnished is about 80*l.* a-year. Mr. Attwood pays a rent of 65*l.* a-year for the remainder of the term on a repairing lease.

The housekeeper has since the date of the agreement been paid by the appellants, and has acted entirely under their orders. So has a gardener who has been occasionally employed for the appellants. The produce of the garden (except what has been consumed by the appellants and their families and friends in the above visits,) has been consumed (with their assent) by the housekeeper and her husband; the produce of the grass field sold by Mr. O'Kelly Templer, on behalf of the appellants, has been carried by him to their account, to the amount of 2*l.* a-year. The rates and taxes,

amounting to 18*l.* per annum (of which 6*l.* 15*s.* is the amount of the poor-rate), have been paid by Mr. O'Kelly Templer, and repaid him by the appellants.

The revising barrister found that the exclusive object of the landlord was to enable the appellants to acquire the right of voting for the borough of Lyme; that the substantial object of the appellants was to acquire the right of voting; and although they then, and continually since, contemplated an occasional visit to Lyme, with their families, as a consequence of the agreement, that that object formed an inconsiderable part of their real motives for entering into the agreement; but that the agreement was executed by them with the *bona fide* intention of complying literally with its terms, that is to say, of paying the rates and taxes, and of paying for repairs, and of acquiring the rights of tenants from year to year, according to the agreement; and upon the above facts the barrister found and decided, that Mr. Prior and Mr. John Templer did not actually or constructively reside within the borough of Lyme, or within seven statute miles thereof or of any part thereof, for six calendar months next previous to the last day of July 1847, within the meaning of the statute 2 Will. 4. c. 45, and statute 6 Vict. c. 18. He found also that the house was not reasonably adapted to be contemporaneously inhabited by the appellants and their families, and thereupon found and decided that while Mr. Prior and his family were inhabiting the house, it was neither actually nor constructively occupied by the other appellants, within the meaning of stat. 2 Will. 4. c. 45, nor constituted their residence; and that while Mr. John Templer and his family were inhabiting the house, it was neither actually nor constructively occupied by the other appellants, nor constituted their residence.

If the Court should be of opinion that the occupation and residence of each or any of the appellants was sufficient, the names of all, or such as the Court should think fit, were to be retained on the register, otherwise to be expunged.

*Byles, Serj.*, for the appellants, was proceeding to argue on their behalf.—

[MAULE, J. — This is a consolidated appeal, and yet the facts in the cases are different: that is inconvenient.]

The facts are very nearly the same in each case; they relate to the common motives of the parties, their residence, and the occupation of the same house.

[MAULE, J.—The proximity of the facts renders it the more difficult to separate them: the 44th section of 6 & 7 Vict. c. 18. allows a consolidated appeal when the validity of any number of claims or objections depends upon the same points of law, and where one decision would bind all. This seems to be an appeal without jurisdiction, because the revising barrister expressly states, "that the names of all, or of such as the Court shall think fit, shall be retained on the register, otherwise expunged."]

[WILDE, C.J.—When actions on a policy of insurance are consolidated, different facts are not stated against different underwriters: one state of facts must apply to, and one decision must bind, the whole.]

Then the revising barrister will be directed to separate the cases. The Court will remit the case to him, as provided by the 65th section of the Registration Act, "if the statement of the matter of appeal is not sufficient to enable them to give judgment in law." If the Court decline to remit the case to the revising barrister for alteration, then, as Mr. Prior is an appellant properly before the Court, I will proceed on his case alone; he at all events is entitled to be heard.

*Kinglake, Serj.*, for the respondents.—I cannot consent to the last proposition. Even if the Court has power to proceed with one case alone,—which, under these circumstances, it has not,—the respondent would then not come properly before the Court. He has consented to appear in a consolidated appeal, and might have refused to appear against a single vote.

[MAULE, J.—The revising barrister had no power to do what he has done: if he had decided separately upon each case, he, perhaps, would not have doubted sufficiently upon any one to allow an appeal.]

*Per Curiam.*—The Court has no jurisdiction to entertain the appeal in its present shape, for the reasons which have been pointed out. Neither can we remit this case to be more fully stated: a paucity of statement is not here complained of; the defect

is an inherent vice in the framework of the case of appeal, which the addition of further statement can by no means remedy. If such a statement as this could be entertained, a consolidated appeal might contain every case argued before the revising barrister during the revision in which an appeal was allowed, though each case depended upon a different statement of facts. The appeal cannot be heard.

*Case struck out.*

1847. { FOLLETT AND ANOTHER, AS  
Nov. 18, 19. { SIGNEES OF UFFORD, v.  
HOPPE AND OTHERS.

*Bankrupt—Prior Act of Bankruptcy, Notice of—5 & 6 Vict. c. 122. s. 22.—2 & 3 Vict. c. 29.—Money had and received.*

*Under the 5 & 6 Vict. c. 122. s. 22, the filing of a declaration of insolvency is of itself a complete act of bankruptcy, without being followed by an advertisement of the same in the Gazette under the 6 Geo. 4. c. 16. s. 6.*

*Therefore, where a trader gave execution creditors notice that he had filed a declaration of insolvency, and thereby committed an act of bankruptcy, this was held a sufficient notice of a prior act of bankruptcy to deprive the creditors of the protection of the 2 & 3 Vict. c. 29.*

*A trader having been arrested on a ca. sa. at the suit of the defendants, who, as well as the sheriff's officer, had received a notice of a prior act of bankruptcy, paid over a portion of his assets to the officer in order to procure his discharge, and the officer paid over the amount to the defendants:—Held, that the bankrupt's assignees were entitled to recover back from the defendants the amount so paid, in an action for money had and received.*

*Assumpsit for money had and received, and on an account stated.*

*Pleas—First, except as to 21l. 1s. 6d., parcel, &c. non assumpsit; and second, as to the said 21l. 1s. 6d., parcel, &c., payment into court. The plaintiffs joined issue on the first plea, and accepted the money out of court on the second.*

*The action was brought by the plaintiffs as assignees of J. G. Ufford, a bankrupt,*

to recover the sum of 67*l.* 3*s.* received by the defendants, of which 46*l.* 1*s.* 6*d.* was received under a *ca. sa.* issued against the person of the bankrupt, and 21*l.* 1*s.* 6*d.* under a *test. fi. fa.* issued against his goods. By the consent of the parties, and by the order of Maule, J., the following CASE was stated for the opinion of the Court:—

In the month of February 1846, and before his bankruptcy, John George Ufford was indebted to the defendants in two several sums of 36*l.* and 9*l.* 12*s.* (that is to say), the said sum of 36*l.* upon a bill of exchange drawn by them upon, and accepted by him, which became due on the 14th of February in the year aforesaid, and in the sum of 9*l.* 12*s.* for goods sold and delivered. On the 13th of the same month the defendants commenced an action against the said J. G. Ufford in the Court of Exchequer, for the said sum of 9*l.* 12*s.*, for which they held no security; and on the 18th of the same month, the defendants commenced another action against the said J. G. Ufford in the same court to recover the amount of the said bill of exchange. In the former of these actions the defendants delivered their declaration on the 20th of February, and a plea having been pleaded thereto and issue joined thereon, notice of trial before the sheriff was given on the 27th of February; but upon the 4th of March a Judge's order was made by consent for a stay of proceedings in that action, upon payment of 9*l.* 12*s.*, the debt therein claimed, and costs to be taxed, the payment to be made on the 9th of March, the present defendants having liberty to sign final judgment therein forthwith; and final judgment was accordingly signed in that action on the 4th of March 1846. In the second action, namely, that for the amount of the bill of exchange, the present defendants delivered their declaration on the 26th of February, and a plea was pleaded; but the present defendants were allowed afterwards to sign final judgment under a Judge's order; and judgment was accordingly signed in that action on the 7th of March 1846. On the 9th of March 1846 the said J. G. Ufford signed and filed in the office of the Lord Chancellor's Secretary of Bankrupts, a paper writing, attested by Henry Swan in the form following:—

"I, the undersigned J. G. Ufford, of Highbury Brewery, Holloway, in the county of Middlesex, common brewer, do hereby declare that I am unable to meet my engagements. Dated this 9th day of March, A.D. 1846.—J. G. Ufford. Witness, Henry Swan, attorney of the Court of Queen's Bench at Westminster, No. 2, Great Knight Rider Street, Doctors Commons, London."

On the same day, a notice in writing was served upon the present defendants at their office, Pig's Quay, Bridewell Precinct, William Street, Blackfriars Bridge, in the city of London; and also on their attorney, Mr. Engleheart, at his office in Doctors Commons, of which notice the following is a copy:—

"In the Exchequer of Pleas. Between Charles Hoppe, Charles Edgely Hoppe and Joseph Hoppe, plaintiffs, and John George Ufford, defendant.—Take notice that I have this day filed in the office of the Secretary of Bankrupts, in Quality Court, Chancery Lane, in the county of Middlesex, a declaration of insolvency, a true copy of which is hereto annexed; and I, being a trader, have thereby committed an act of bankruptcy within the true intent and meaning of some or one of the statutes now in force concerning bankrupts. Dated this 9th day of March, A.D. 1846. Yours obediently, (Signed) J. G. Ufford, the above-named defendant, Highbury Brewery, Holloway. To Messrs. Charles Hoppe, Charles Edgely Hoppe and Joseph Hoppe, the above-named plaintiffs; and to Mr. W. Hayley Engleheart, their attorney or agent, 3, Great Knight Rider Street, Doctors Commons."

On the 9th day of April 1846, a writ of *testatum fieri facias* was issued on behalf of the present defendants on the judgment obtained in the first action, indorsed to levy 21*l.* 1*s.* 6*d.*, the amount of the debt and costs in that action; and this writ was delivered to an officer of the sheriff of Middlesex on the same day. On the said 9th day of April a writ of *capias ad satisfaciendum* was also issued on behalf of the present defendants against the said J. G. Ufford in the second action, indorsed to take 46*l.* 1*s.* 6*d.*, the amount of the debt and costs in that action; and this writ was also delivered to an officer of the sheriff of Middlesex on the

same day. On the said 9th day of April 1846, the officer of the sheriff levied upon the goods of the said J. G. Ufford, under the said writ of *test. fi. fa.*, the said sum of 21*l.* 1*s.* 6*d.*, which was afterwards paid over to the present defendants, and which sum they have paid into court in the present action. On the same day, the said 9th of April 1846, the officer to whom the said writ of *ca. sa.* had been delivered took the said J. G. Ufford in execution under that writ; and at the time of the said arrest, the said J. G. Ufford informed the said officer of his having filed the said declaration of insolvency. The said J. G. Ufford was, on the same day, removed in the custody of the said officer to a lock-up-house, where in order to procure his discharge he paid to one of the assistants of the said officer the amount indorsed on the said writ of *ca. sa.*, having also previously informed the said assistant of his having filed the said declaration of insolvency. This money, being the said sum of 46*l.* 1*s.* 6*d.* now claimed in the present action in addition to the sum paid into court, was part of the assets of the said J. G. Ufford, at the time when it was so paid to the said assistant of the said officer as aforesaid, and was afterwards (that is to say), on the 11th of April 1846, and before the commencement of this action, paid over, by the said assistant who received it, to the officer of the sheriff, and by him to Mr. Engleheart, the attorney to the present defendants, and was received by him on their behalf; and he has since paid over, or otherwise accounted to the defendants for, the same. The before-mentioned actions were commenced and prosecuted by the defendants against the said J. G. Ufford, adversely, and with the sole view of asserting their legal rights. On the 30th of April 1846 a fiat in bankruptcy was issued against the said J. G. Ufford, founded on the said declaration of insolvency, under which, on the 1st of May following, he was duly declared a bankrupt, and this fiat and the proceedings thereon are still in force, and the present plaintiffs have been duly appointed, under the said fiat, assignees of the estate and effects of the said J. G. Ufford, and now claim to recover from the present defendants, in addition to the sum of money already paid into court, the said sum of 46*l.* 1*s.* 6*d.*, as money had and received to

the use of the plaintiffs as such assignees.

The question for the opinion of the Court was, whether, under the circumstances above stated, the plaintiffs, as assignees as aforesaid, were entitled to recover the said sum of 46*l.* 1*s.* 6*d.* If the Court should be of opinion in the affirmative thereof, then the defendants agreed that judgment should be entered against them by confession for the said sum of 46*l.* 1*s.* 6*d.*, in addition to the said sum of money already paid into court in this action, immediately after the decision of this case, or otherwise as the Court might think fit; but if the Court should be of a contrary opinion, then the plaintiffs agreed that a judgment should and might be entered against them of *nolle prosequi*, as to the issue joined in this action, immediately after the decision of this case, or otherwise as the Court might think fit, and that judgment should be entered accordingly.

*Badeley (Talfourd, Serj. was with him)*, for the plaintiffs.—The defendants are not, according to the principles of the bankrupt laws, entitled to retain this money as against the assignees. The 2 & 3 Vict. c. 29. protects *bond fide* payments made by the bankrupt after the act of bankruptcy, only in cases where the person receiving the money had no prior notice that an act of bankruptcy had been committed. The case here finds that the defendants had such notice. Authority on the point is almost needless; but the case of *Allanson v. Atkinson* (1) is precisely in point. In that case, a person having committed an act of bankruptcy was arrested on a *ca. sa.*, at the suit of the defendants, and in order to procure his discharge he gave goods to the sheriff's officer to pledge, and the officer having accordingly pledged them, handed over the proceeds to the defendants. Under these circumstances, the assignees were held entitled to recover back the money, although the defendants had not been privy to the act of pledging. Though the bankrupt laws have been altered since that case, the same principle is directly applicable here, subsequent enactments only substituting notice of an act of bankruptcy for the committal of the act itself; and notice having been given as in this case, the consequences remain the same.

(1) 1 Mau. & Selw. 583.

*Simon*, for the defendants.—The notice of the prior act of bankruptcy, given in this case, is not sufficient under the statute. The mere filing of a declaration of insolvency is not, by 6 Geo. 4. c. 16. s. 6, an act of bankruptcy, unless followed by an advertisement of the same in the *London Gazette*; and therefore notice of it alone, without notice of such advertisement, will not take a payment out of the protection of the 2 & 3 Vict. c. 29. s. 1, which protects dealings with a bankrupt before the fiat, provided the party having such dealing had not notice of a prior act of bankruptcy. In *Conway v. Nall* (2) a notice that J. S. had signed a declaration of insolvency on the previous day, and that he would be declared a bankrupt immediately, a fiat having been sent for, was held insufficient to take away the protection of execution creditors under the 2 & 3 Vict. c. 29. Tindal, C.J. there says, "The meaning of these words (2 & 3 Vict. c. 29. s. 1.) appears to me to be that the party, in order to defeat an execution, shall have notice of a prior act of bankruptcy, complete in itself, at the time the notice is given to him."

[WILDE, C.J.—In that case the notice was prospective. It only stated that a declaration had been signed, and that the party would be declared a bankrupt.]

The notice in the present case may, perhaps, contain more than appeared in that case, but still there was no act of bankruptcy till the advertisement had been inserted. In the next place, the payment to the sheriff, or his officer, was not a payment to the defendants; and there is no pretence for saying that the identical money received by the sheriff's officer was handed over to the defendants, and it was not shown that the sheriff's officer gave notice to the defendants that he had been informed of the act of bankruptcy. Therefore an action for money had and received will not be against the defendants. The sheriff is himself responsible if any wrongful act was done. He was not the agent of the defendants, and he might have refused to take the money — *Drury v. Hounsfield* (3). Lastly, the money, having been paid by compulsion of law, cannot be recovered

back—*Belcher v. Mills* (4), *Foster v. Allanson* (5), *Reynolds v. Wedd* (6), *Teale v. Younge* (7), *Cox v. Morgan* (8), *Whitmore v. Green* (9).

*Badeley*, in reply.—*Conway v. Nall* was a case under the statute 6 Geo. 4. c. 16. s. 6, whereas the present case is under 5 & 6 Vict. c. 122. s. 22, which does not require an advertisement to make the filing of a declaration of insolvency an act of bankruptcy, but makes it a complete act in itself. At all events, the statute of Victoria, which was prior to that case, was not referred to in the discussion. In the present case, by virtue of the latter statute, the act of bankruptcy was complete before the notice, and the notice was good. Indeed, the notice was more specific than is requisite, for it stated the nature of the act of bankruptcy which had been committed, whereas, in several cases, a general notice that an act of bankruptcy had been committed, without specifying the manner, has been held sufficient—*Ramsay v. Eaton* (10), *Arthur v. Whitworth* (11), *Udal v. Walton* (12). In the next place, there are direct authorities to shew that the action for money had and received, at the suit of the assignees, will lie under such circumstances—*Allanson v. Atkinson* (13), *Hitchin v. Campbell* (14), *Reed v. James* (15). It appears from the case of *Noiley v. Buck* (16), that the sheriff himself, when he has improperly paid over money, is accountable to the assignees; but that is no reason why they should not have an action against the parties into whose hands the money has come.

*Simon*, in answer (by leave of the Court).—The 5 & 6 Vict. c. 122. s. 22. has not

(4) 2 Cr. M. & R. 150; a.c. 4 Law J. Rep. (n.s.) Exch. 160.

(5) 2 Term Rep. 479.

(6) 4 Bing. N.C. 694; a.c. 7 Law J. Rep. (n.s.) C.P. 244.

(7) M'Clel. & You. 497.

(8) 2 Bos. & Pul. 398.

(9) 13 Mee. & Wels. 104; a.c. 13 Law J. Rep. (n.s.) Exch. 311.

(10) 10 Ibid. 22; a.c. 11 Law J. Rep. (n.s.) Exch. 333.

(11) 6 Jurist, 323.

(12) 14 Mee. & Wels. 254; a.c. 14 Law J. Rep. (n.s.) Exch. 262.

(13) 1 Mau. & Selw. 583.

(14) 2 W. Black. 827.

(15) 1 Stark. N.P.C. 134.

(16) 8 B. & C. 160; a.c. 6 Law J. Rep. K.B. 271.

(2) 1 Com. B. 643; a.c. 14 Law J. Rep. (n.s.) P. 165.

(3) 11 Ad. & El. 101.



done away with the necessity for advertising in the *London Gazette*, under the 6 Geo. 4. c. 16. s. 6; and *Conway v. Nall* having come after the statute of Victoria, must be taken as an authority to shew that since that statute the advertisement is necessary to complete the act of bankruptcy, and that therefore a notice, such as was given in the present case, is not sufficient.

WILDE, C.J.—There is no real difficulty in this case. It is stated that certain monies, being part of the assets of the bankrupt, were paid over to the defendants after they had received notice that an act of bankruptcy had been committed by the bankrupt. The notice is stated to have been served on the defendants on the 9th of March 1846; and, on the 9th of April a writ of *testatum fi. fa.* was issued in the first action, and a *ca. sa.* in the second, and the bankrupt was then arrested on the *ca. sa.*, and to procure his discharge he paid the amount indorsed on the writ to the sheriff's officer, who paid it over to the defendants. Under these circumstances the first question which arises is, whether this is a transaction coming under the statute of 2 & 3 Vict., which establishes executions *bond fide* executed against, and contracts *bond fide* entered into with bankrupts, before the date of their fiats, provided no notice has been given of a prior act of bankruptcy. In this case the execution was executed, and the levy made before the fiat, and the defendants are entitled to retain the money unless they had received notice at the time when it was paid over to them. The notice here is much more explicit than that which was given in any one of the cases cited, for it not only states that an act of bankruptcy had been committed, but it mentions the nature of that act. It is objected that this is not a sufficient notice of an act of bankruptcy, because, by the 6 Geo. 4. c. 16. s. 6, the filing of such a declaration of insolvency as that mentioned in this notice is an act of bankruptcy only if an advertisement thereof is inserted in the *London Gazette*; and it does not appear that there has been any such advertisement in the present case. To this it was answered, that by the stat. 5 & 6 Vict. c. 122. s. 22, the filing by a trader of such a declaration of insolvency is of itself an act of bankruptcy from the

time of its being filed. It is said, on the other hand, that this statute does not repeal the 6 Geo. 4. c. 16; but I think the 5 & 6 Vict. c. 122. repeals all statutes, so far as they are inconsistent with its provisions; and it may be contended that it repeals so much of the 6 Geo. 4. c. 16. as requires anything to be done besides what is required by its own provisions. At all events, the statute of Victoria enacts that a certain thing shall be an act of bankruptcy, and that has been done here; and the plaintiffs are therefore entitled to say that the declaration filed in this case does now operate as an act of bankruptcy, and that the notice was therefore sufficient. The next objection raised in the case is, that the action was wrong in form, because it was not shewn that the money paid over to the defendants or their attorney was the identical money received by the sheriff's officer from the bankrupt. The answer to this is, that it is not necessary to shew in this form of action that the money is the same, as in trover or detinue, which are brought for the recovery of a specific chattel. The action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come into the hands of another. The same objection was made ineffectually in the case of *Allanson v. Atkinson*. The third objection made to the right of the plaintiffs to recover is, that this money was paid under the compulsion of process of law. *Allanson v. Atkinson* is an express decision on this point, for there the money was paid by the bankrupt, to procure his discharge from custody under a *ca. sa.*, and the assignees were held entitled to recover back the money. Several cases were cited to shew that payments by compulsion are within the statute protecting payments made in the ordinary course of trade, but the present payment was not under that statute. The defendants, therefore, having had notice of the act of bankruptcy, had no right to receive money from the bankrupt out of his assets. It is said that it has not been shewn that the defendants had notice that the sheriff's officer had been informed of the act of bankruptcy; but it was not necessary that they should, as they had received notice themselves, and received money, which was part of the assets of the bankrupt's estate. They adopted

the act of the sheriff's officer by receiving the money; and it then became money had and received to the use of the bankrupt's assignees. The cases on this point are collected in *Atkinson's Treatise on Sheriff Law*, p. 541. I am of opinion, for the reasons which I have just given, that the plaintiffs were entitled to recover.

COLTMAN, J.—I am of the same opinion. It was contended, in the first place, that the notice was not sufficient, and the case of *Conway v. Nall* was cited in support of that view. Mr. Badeley said, that that case arose under a different statute from the present; but I do not think so, although the 5 & 6 Vict. c. 122. was not alluded to in the argument; and the objection taken to the notice was equally applicable whether the case came under the one statute or the other. The 22nd section of the 5 & 6 Vict. c. 122. makes the filing of the declaration of insolvency, as stated in this notice, a sufficient act of bankruptcy. The next two objections are, that the action for money had and received does not lie in a case like this, where there was no privity between the parties, and it cannot be maintained when the money was paid under compulsion of law. The cases cited sufficiently answer these objections, for there can be no difference as to these points between a *fi. fa.* and a *ca. sa.* *Allanson v. Atkinson* is expressly in point, and is quite satisfactory on principle.

MAULE, J.—In general, where money, which belongs to one person, has been received by another, without that person's authority, the action for money had and received will lie to recover it back. It is contended that this principle is not applicable in the present case. There is really no question as to the identity of the money, for it sufficiently appears from the case that the same money which the sheriff's officer received was paid over to the defendants. That which is relied upon as an answer to the *prima facie* case is derived from the bankrupt law, and from the principle that money paid under legal process cannot be recovered back. The process here was process to which the bankrupt and the defendants were parties, but the plaintiffs were not parties or privy to them; and I cannot conceive how such proceedings can bind third parties. The transaction in this

case was, as regards the plaintiffs, "*res inter alios acta.*" The assignees do not claim under the bankrupt any more than a lessee does under a lessor, or a grantee under a grantor, but their claims are adverse to the bankrupt's. It is clear that the act of Victoria is to stand alone, and there was, therefore, a good act of bankruptcy, and a good notice of it. The payment was, therefore, out of the protection of the bankrupt laws; and being made by the bankrupt out of his assets, to which the plaintiffs were entitled, and having passed into the hands of the defendants, without the authority of the plaintiffs, it became money had and received to the use of the plaintiffs, and they were therefore entitled to recover it in this form of action.

WILLIAMS, J.—I am of the same opinion. The case of *Whitmore v. Green* does not shew that there is a want here of that kind of privity which is necessary to sustain this form of action. I think the 5 & 6 Vict. c. 122. s. 22. is to be taken as a substitute for the 6 Geo. 4. c. 16.

*Judgment for the plaintiffs.*

1847. } DUKE OF BRUNSWICK v. SLOMAN  
Nov. 20. } AND OTHERS.

*Practice.—Amendment of Issue.*

*The Reg. Gen. Hil. term, 4 Will. 4., give certain forms of issues, &c., and provide that, in case of non-compliance, the Court or a Judge may give leave to amend:—Held, that the application to amend should be made to a Judge at chambers.*

*Byles, Serj.* had obtained five rules on behalf of the five several defendants in this case, who had severed in pleading, calling upon the plaintiff to shew cause why the issues delivered should not be set aside for irregularity, or amended at the cost of the plaintiff.

*Lush* shewed cause.—There can be no doubt that, according to the rules of court, (Hil. term, 4 Will. 4.) the issues should be made out in compliance with the forms there given, provided that, in the case of non-compliance, the Court or a Judge shall amend. There is an irregularity here in the date of the writ of summons,—the 15th is

inserted instead of the 16th; and there is an affidavit, which states that the attorney of the plaintiff offered the attorney of the several defendants to amend at chambers, and pay the costs incident to that amendment. The case of *Ikin v. Plevin* (1) shews that amendments such as those asked for by this rule ought to be made at chambers, and the Court will not burden themselves with applications of this nature. The object of this rule is to oppress the plaintiff. The pleadings are very lengthy, and the defendants have obtained five rules, and have filed five copies of the issue, and five sets of affidavits, in order to put him to as much expense as possible; but there is in reality only one issue, because there is only one action, and one rule would have been sufficient; here there are five rules to amend one document.

*Unihank*, *contra*.—The defendants are entitled to apply to the Court; it is expressly so provided by the *Reg. Gen.* just referred to, and they are not bound to go to chambers. The mistake is one of the plaintiff's own commission, and the particular circumstances of the length of the issues, &c. do not at all affect the absolute rights of the defendants. It is always usual for defendants who plead separately to the action to obtain separate rules in all matters connected with the action.

*Per Curiam*.—The defendants are entitled to have the amendments made; and therefore the rule must be absolute, to correct the issues now delivered. The defendants might have accomplished this object by going before a Judge at chambers, where at a slight expense, and as a matter of course (as they perfectly well knew), the amendments would have been made; instead of doing this they endeavour to put the plaintiff to as much expense as possible, and apply to the Court to order the amendments. The Court therefore makes in each case the rule absolute to amend on payment of costs by each of the defendants: to such as do not consent to amend on those terms, the rule is discharged with costs.

*Rules accordingly.*

(1) 5 Dowl. P.C. 594.

[IN THE EXCHEQUER CHAMBER.]

1847.  
Nov. 29, 30. } WILLIAMS v. ARCHER.

*Detinue—Re-delivery after Action and before Verdict—Measure of Damages—Judgment, Form of—Railway Scrip.*

*In detinue for the detention of certain railway scrip re-delivered to the plaintiff after action brought and before verdict, the jury may as a measure of damages take into consideration the difference between the value of such scrip at the time of the demand and their value at the time of such re-delivery.*

*In such action, when by reason of a re-delivery before verdict a subsequent delivery becomes impossible, the jury may find the facts specially, and so confine themselves to an assessment of damages; and in such case the form of judgment may be simply that the plaintiff do recover his said damages and costs.*

Error from the Court of Common Pleas.

Declaration in detinue for the detention of 250 scrip certificates in the North Wales Railway Company.

Plea—Non detinet. Issue thereon.

At the trial, which took place before Cresswell, J., at the London Sittings after Hilary term, 1845, it appeared that the scrip certificates in question had been demanded of the defendant by the plaintiff on the 17th of May in that year, and that the defendant then refused to deliver them up. On that day the scrip certificates in question were worth 3*l.* 5*s.* each. The plaintiff gave in evidence an order of Cresswell, J., whereby it was ordered that on delivery of the articles claimed in this action, and payment of costs to be taxed, including the costs of the application, the plaintiff should be subject to the costs of this action unless he should recover more than nominal damages. In obedience to this order, the scrip certificates were delivered up to the plaintiff. On the day of such delivery they were worth 1*l.* per share. Upon this state of facts, the learned Judge directed the jury that the true measure of damages was the loss that the plaintiff sustained by not having the certificates when demanded, and that the jury might if they pleased measure that loss by the difference between the price at the time

of the refusal and the price at the time when the said certificates were delivered up.

A bill of exceptions was tendered by the defendant's counsel to this direction, upon the ground that "the loss of the contingent profit which the plaintiff might have made and gained by the sale of the said scrip certificates, if he had been in possession thereof as aforesaid, was not and is not recoverable in this action, and the said Justice ought to have directed the jury aforesaid that upon the evidence aforesaid nominal damages only were and could be recovered."

The finding of the jury and the judgment of the Court of Common Pleas were set out upon the record as follows:—"That the within-named defendant did detain the chattels and writings in the declaration mentioned, &c., before, and at the commencement of this suit, and from thence continually, until, and at the respective times of pleading the within declaration and the within plea, and from thence, until the 25th day of November, A.D. 1845, when the said defendant delivered the said writings and chattels to the said plaintiff, under and by virtue of an order of the Hon. Sir Cresswell Cresswell, Knt., one of the Justices, &c., in that behalf made, whereby the said Justice ordered that, upon delivery of the articles claimed in this action, and payment of the costs to be taxed, including the costs of the said application, the said plaintiff should be subject to the costs of this action, unless he recovered more than nominal damages for the detention; and they assess the damages of the plaintiff, on occasion of the detention of the said writings and chattels, over and above his costs and charges by him about his suit in this behalf expended, to 562*l.* 10*s.*, and for these costs and charges to 40*s.* Therefore, it is considered that the said H. Archer do recover against the said D. Williams his said damages, costs and charges, by the sums aforesaid, in form aforesaid assessed, and also 138*l.* for his costs and charges of the said Court here adjudged of increase to the said H. Archer, with his assent, which said damages, costs, and charges in the whole amount to 703*l.*; and the said D. Williams in mercy," &c.

A writ of error having been brought, the case was argued (Nov. 29.) by—

*Willes*, for the plaintiff in error.—First,

the direction of the learned Judge was wrong in the manner pointed out by the latter portion of the bill of exceptions. Substantial damages cannot be recovered in an action of detinue, but nominal damages only can be assessed by the jury. It may well be that, at the time of judgment given, the value of the scrip certificates in question was equal to what they bore at the time of the demand. There is no case to be found in which substantial damages have been awarded. The finding by the jury of the value of the goods is a matter altogether apart from the finding of damages for their detention. Secondly, the form of the judgment is erroneous. It varies from the common form, inasmuch as it is not in the alternative that the plaintiff below do recover the goods in question or their value, and his damages; but it is, simply, that he do recover the damages assessed. *Non detinet* puts in issue only the detention before action brought—*Jones v. Dowle* (1), *Selwyn's Nisi Prius*, vol. 1, p. 670. There is no precedent for a judgment in such a form.

*Peacock*, for the defendant in error.—First, the plaintiff, in an action of detinue, is entitled to recover the goods themselves, or their value, and also damages for their detention. In the present instance he could not recover the goods or their value, for they were re-delivered to him before verdict: he could only recover damages for their detention; the right estimate of which was the difference in price of the scrip certificates at the time of the demand, and at the time of such re-delivery. The direction, therefore, of the learned Judge was correct. Secondly, the form of the judgment in this case is correct. Since the scrip had been already delivered up, a judgment, that the plaintiff should recover the said scrip or its value, would have been improper.

[*PARKE, B.*—The jury seem to have involved themselves in some difficulty by departing from the ordinary course, and making a special finding as to the Judge's order.]

In effect they find that the scrip had been re-delivered; and, after such a finding, their course was to assess the damages only. The form of the judgment is in accordance with such finding.

(1) 9 Mee. & Wels. 19; s.c. 11 Law J. Rep. (N.S.) Exch. 52.

[PARKE, B.—At present, Mr. Willes, we have none of us any doubt that the direction of the learned Judge upon the question of damages was perfectly correct.]

*Willes*, in reply. — The plaintiff has chosen to bring *detinue*, and he must abide therefore by all the consequences resulting from that form of action. In that action the jury are required to assess the value of the goods, and the defendant has the option either of delivering them up or to pay their value: the jury are also to find damages for the detention; but it is obvious that they ought not to assess as damages any part of the value of the goods. With respect to the form in which the judgment of the Court of Common Pleas has been entered upon the record, it is impossible to sustain it without varying the old established forms.

*Cur. adv. vult.*

PARKE, B. now (Nov. 30.) delivered the judgment of the Court (2).—In this case we intimated our opinion yesterday, that the direction of the learned Judge was correct in telling the jury that they might take into consideration the difference in value between the scrip certificates at the time of the demand and of the delivery of them to the plaintiff; but a doubt occurred to us whether the finding of the jury and the judgment thereupon for damages only was correct. It differs from the ordinary modern form of verdict in *detinue* (3), which finds the value of the chattels and damages for the detention, whereupon the judgment is, that the plaintiff recover the chattels, or the sum expressed as their value if he cannot have the chattels again, and also his damages and costs. Here there can be no such judgment; and a doubt arose whether the special facts could be found as is done in the present case on the issue on *non detinet*; the only question on such issue apparently being, whether the chattels were detained, and if so, what are the damages for the detention. We do not think, on reference to the old authorities, that the objection ought to prevail. In *Roll. Abr.* 'Detinue,' it is said, that in *detinue* of charters on an issue on the *detinet*, if it be found that the defendant has burned the charters,

judgment shall not be to recover the charters, for it appears that he cannot have them, but he shall recover the value of the land in damages. A reference is, however, made to a contrary decision in the *Year Book*, 17 Edw. 3. 45, b. In that case, the jury found that the charters were burned by the defendant. Shardlow, J. said, that the issue was only on the *detinet*, which *detinue* was found, and the judgment, it was agreed by the Court, should be to recover the charters and damages to ten marks, and that the defendant should be distrained to return them.

By analogy to this case, the judgment given for the plaintiff on the record would be wrong. But the case does not appear to be law; for *Brooke*, in his Abridgment, 'Detinue de Biens,' pl. 25, says, that Newton and Paston, in 21 Hen. 6, 36, (both Justices of Common Pleas) say that, if in *detinue* of charters the charters are burnt, he, the plaintiff, shall recover *all* in damages. The like is laid down in 3 Hen. 6. p. 19. pl. 13; and *Brooke*, and also *Rolle*, in their Abridgments, evidently adopt that position as good law. If that be so, and it seems to us that it is, we may, on the authority of that case, hold that the jury may find the facts specially, whereby a re-delivery of the goods to the plaintiff becomes impossible, and so confine themselves to an assessment of damages. If the jury can do so where the destruction of the chattel takes place, and so it cannot be recovered in specie, they may do so also where its previous re-delivery renders the recovery of the chattel useless.

Our judgment rests on the fact of re-delivery, and we do not take into consideration my Brother Cresswell's order.

*Judgment affirmed.*

1847. } HARTLEY v. CUMMINGS AND  
Dec. 6. } ANOTHER.

*Master and Servant—Contract—Mutuality—Restraint of Trade.*

*The plaintiff agreed with T. P. in writing, among other things, that T. P. should, for seven years, serve the plaintiff and his partner or partners for the time being, or such of them as should carry on the trade of a glass and alkali manufacturer, then car-*

(2) Parke, B., Alderson, B., Coleridge, J., Wightman, J., Platt, B., and Erle, J.

(3) See Tidd's Forms, 340.

ried on by the plaintiff; that T. P. should not absent himself from such service without the licence of such persons so carrying on the business, nor serve other persons during the term; that the plaintiff should, during the time T. P. continued employed, pay him 24s. per week for 1,200 tables, and other rates for extra tables, and when tables were not wanted should find him other work, so that he should not earn less than 24s. per week, except when a furnace was out, when he should have 21s. per week; and in case that T. P. should become incapacitated to perform, or should fail to perform such work, or if the plaintiff or his partner, &c. should discontinue the business during the seven years, then that they should be able to employ other persons, and should not be bound to pay anything to T. P.:—Held, that this agreement was not void, either for want of mutuality, or as being in restraint of trade.

Case, for seducing servants from the service of the plaintiff, and for harbouring servants who had wrongfully left the plaintiff's service.

Plea—Not guilty.

At the trial, before Erle, J., at the Sittings in London, after Trinity term, 1846, the following agreement, made between the plaintiff and one of his servants (which was in the form generally used between the plaintiff and his workmen), was put in and read, for the purpose of proving the service; and it was proved that the defendants had seduced the servants while they were in the plaintiff's service under such agreements.

"An agreement, made this 14th of June, A.D. 1841, between Thomas Pike, glass maker, on the one part, and James Hartley, of Sunderland, in the county of Durham, glass and alkali manufacturer, of the other part, as follows:—And first, the said Thomas Pike, for the consideration hereinafter mentioned, doth hereby promise and agree to and with the said James Hartley, his executors, administrators, and assigns, in manner and form following (that is to say), that he, the said Thomas Pike, shall and will, from time to time, and at all times, for and during the term of seven years, to be computed from the day of the date of these presents, well, faithfully and diligently, and according to the best of his skill and

ability, work for and serve the said James Hartley and his partner or partners for the time being, or either or such of them as shall carry on the trade or business now carried on by him as a glass and alkali manufacturer; and also that he, the said Thomas Pike, shall and will, from time to time, and at all times during the said term, do his best endeavours and use his utmost care, diligence, and industry in and about the glass house, glass works, or alkali works, and service of the said James Hartley, and the person or persons aforesaid, for his and their benefit and advantage and behalf, and shall not and will not cause to be done any matter or thing whatsoever that may be or tend to the hurt, damage, or prejudice of the said James Hartley, or his partner or partners, or such of them as shall carry on the business now carried on by him; and shall not and will not at any time or times during the said term neglect or absent himself from the said work and service, without the licence and consent of the said James Hartley, or his partner or partners for the time being, or either or such of them as shall carry on the business now carried on by him, in writing, under his or their hand or hands, for that purpose first had and obtained, and shall not nor will at any time during the said term work with, or for, or serve any other person or persons whomsoever at any other glass house or place whatsoever, nor join any workman's union or any club, without such licence and consent as aforesaid; and further, that he, the said Thomas Pike, shall and will teach and instruct *gratis* any person or persons whom the said James Hartley or his partner or partners for the time being, or either or such of them as shall carry on the business now carried on by him, shall from time to time name or appoint, but no other person or persons whomsoever, in the art, mystery, or employment of pontysticker, gatherer, blower, piece-warmer, flasher, piler, kiln-assister, or any other department, which the said James Hartley shall direct; and also shall and will at all times when thereunto required, attend, and with his best endeavours help and assist in the setting of pots and doing all other matters and things relating to or concerning his business or station as aforesaid, or the business of the said James Hartley, or his

partner or partners for the time being, or either or such of them as shall carry on the business now carried on by him, and shall and will be subjected to such regulations in the mode or modes or time of working as the said James Hartley or his partners for the time being, or either or such of them as shall carry on the business now carried on by him may, from time to time, find it necessary to adopt in the carrying on of their works, and shall not or will not embezzle or waste the goods, or divulge or make known the secrets of the trade, or the affairs or business of the said James Hartley, or his partner or partners for the time being, or either or such of them as shall carry on the business now carried on by him, nor will either directly or indirectly during the said term become surety for, or bound with any person or persons whomsoever, for the security or payment of any sum or sums of money or of the performance of any act, matter, or thing whatsoever: in consideration of which said work and service so to be done and performed in manner aforesaid, and of the agreement herein contained on the part of the said Thomas Pike, the said James Hartley hereby promises and agrees to and with the said Thomas Pike in manner following, that is to say, that he, the said James Hartley, his executors, administrators, or assigns, or some of them, shall and will, when and so long as he, the said Thomas Pike, shall continue and be employed as &c., for the said James Hartley, or his partner or partners for the time being, or either or such of them as shall carry on the business now carried on by him, and perform the agreement hereinbefore contained, well and truly pay or cause to be paid unto the said Thomas Pike, so long as he continues to be employed as &c., 24s. per week, for 1,200 tables, and for all good and merchantable tables over and above 1,200, at and after the rate of 10s. per hundred [and for others at another rate], the said Thomas Pike engaging to make any quantity of tables that may be required, not exceeding 2,400 tables per week; and the said J. Hartley agrees to find the said Thomas Pike some other description of work, provided the said James Hartley does not require 1,200 tables, so that the wages of the said Thomas Pike shall not be less than 24s. per week, except when

a furnace shall be out, when he, the said Thomas Pike, engages to work for 21s. per week,—no payment to be made for bad or unmerchantable tables; and it is agreed, that in case the said Thomas Pike shall be sick or lame, or shall otherwise be incapacitated to perform, or shall not perform, the work and service aforesaid, and his engagement with the said James Hartley, or his partner or partners for the time being, or either or such of them as shall carry on the business now carried on by him, or in case he shall not, in his or in any of their opinions, have conducted himself properly, or as he ought to do, or if the said James Hartley, or his partner or partners for the time being, or either or such of them as shall carry on the trade or business now carried on by him, shall discontinue the said trade or business during the said term of seven years, then, in either of such cases, the said James Hartley, or his partner or partners for the time being, or either or such of them as shall carry on the business now carried on by him, shall and may be at liberty to retain and employ any other person or persons in the room or stead of the said Thomas Pike, and therefore shall not be obliged to make any payment, duty, wages, or other satisfaction to the said Thomas Pike.

(Signed) "Thomas Pike,  
"James Hartley."

The defendants' counsel insisted that this agreement did not prove a valid contract of service, because it was bad for want of mutuality, and as being in restraint of trade. The jury, by the direction of the learned Judge, found a verdict for the plaintiff; but leave was reserved to the defendant to move to enter a nonsuit on the above-mentioned ground.

A rule *nisi* having been obtained pursuant to the leave so reserved,—

*E. James* (Dec. 5th, 1847) shewed cause. —This case is not distinguishable in principle from the case of *Pilkington v. Scott* (1), the contract in which was exactly like the present one, and was held good. It is said that there is no mutuality in the contract, because there is no contract on the part of the master to employ; that the consideration disclosed is insufficient; and that the plaintiff did not bind

(1) 15 Mee. & Wels. 657; s. c. 15 Law J. Rep. (N.s.) Exch. 329.

himself to supply materials for the work. Looking at the whole of the agreement, it is evident that the servant during the continuance of the term was to earn not less than 21s. per week, and that work to that amount was to be provided for him; indeed, in case of the suspension of the usual business, the plaintiff was obliged to find him some other work. Supposing this case can be distinguished from *Pilkington v. Scott*, and that the agreement is not valid, yet the defendant, who was a wrong-doer, had no right to avail himself of its invalidity, as the servant was *de facto* employed, and was seduced by him from *actual service*—*Keane v. Boycott* (2).

*Allen, Serj., and Fry*, in support of the rule.—It is clear that the defendants had a right to avail themselves of the invalidity of the agreement as an answer to the action. The case of *Sykes v. Dixon* (3) is precisely in point. There, in an action for harbouring a servant, the defendant was allowed to take advantage of the objection, that the contract of service was invalid under the Statute of Frauds. *Keane v. Boycott* was not a case of a void, but one of a voidable, agreement. The contract there was with a person who was an infant and a slave, and the Court said that the effect of the contract might be the manumission of the slave, and therefore, as such a contract was for the benefit of the infant, it was only voidable. The contract in the present case is void as being in restraint of trade, because it contains a restriction with regard to the servant's employment larger than is necessary for the protection of the master. It comes within the principle laid down in the cases of *Hutchcock v. Coker* (4), *Mallan v. May* (5), and *Price v. Green* (6). Again, there is no mutuality. The servant binds himself to serve the plaintiff, and afterwards other persons, who are to have the controul of masters over him, although he has no corresponding rights against them. Then the servant is bound to serve for seven years,

although in case of the discontinuance of the business, the plaintiff is not bound to employ him. If during a suspension of the business within the seven years, the servant went into the service of a rival company, he would be guilty of a breach of this contract. If there is not a contract to employ during the whole term, the present case cannot be brought within the authority of *Pilkington v. Scott*. At all events, it is distinguishable from that case, because there was a provision there for dismissal of the servant on giving him a month's notice or a month's wages. Here, if there had been a discontinuance of the business, the servant would not have been entitled to employment, or notice, or wages. In the case of *Aspdin v. Austin* (7), although by the terms of the agreement the defendant was bound to pay the plaintiff wages for two or for three years if the plaintiff was willing to perform a condition precedent, it was held that no covenant could be implied thence that the defendant was to employ the plaintiff in the business. So in this case no reciprocal obligation on the part of the plaintiff can be inferred from the obligation cast on the servant. The case then comes within the principle laid down in *Young v. Timmins* (8), that a partial restraint of trade without an adequate consideration is illegal.

MAULE, J.—I think this rule ought to be discharged. — This was an action for seducing a servant from the service of the plaintiff as a glass manufacturer. The objection raised in the case is, that the plaintiff had entered into an agreement with Pike, a servant alleged to have been seduced, by which he could not oblige him to serve, because it was void either for want of mutuality or as being in restraint of trade. On the other side, it is contended, that the defendant, being a wrong-doer, is not entitled to take advantage of this objection; and in answer to that, a case in the Queen's Bench—*Sykes v. Dixon*—was cited to shew that the objection might be taken. It is not necessary to say whether that case was correctly decided, because it did not appear

(2) 2 H. Black. 512.

(3) 9 Ad. & El. 693; s. c. 8 Law J. Rep. (N.S.) Q.B. 102.

(4) 6 Ibid. 438; s. c. 6 Law J. Rep. (N.S.) Exch. 266.

(5) 11 Mees. & Wels. 653; s. c. 12 Law J. Rep. (N.S.) Exch. 376.

(6) 16 Ibid. 347; s. c. 16 Law J. Rep. (N.S.) Exch. 108.

(7) 5 Q.B. Rep. 671; s. c. 13 Law J. Rep. (N.S.) Q.B. 155.

(8) 1 Cr. & Jer. 331; s. c. 9 Law J. Rep. (N.S.) Exch. 68.



there, as it does here, that there was an actual service subsisting at the time, which was determined by the act of the defendant. I think that in the present case there was a valid and binding contract between Hartley and Pike, notwithstanding the objections raised. The person with whom Pike contracted was James Hartley alone; the thing agreed to be done was to serve him or his partners, or those of them who should subsequently carry on the trade or business which he was then carrying on. The contract goes on to provide that Pike during the term of service shall do his best endeavours and use his utmost care and diligence about the glass works, and that he shall not cause anything to be done to the damage of Hartley or his partners, or such of them as shall carry on the business then carried on by him. The whole of the provisions in the contract shew that the existence and carrying on of the business was the substratum, and a condition precedent to anything that was to be done, because the things which they require to be done are such as could not be done unless the business continued to be carried on. It follows that, if the business is not carried on, the agreement on both sides falls to the ground. Hartley undertakes to pay Pike 24s. per week for 1,200 tables, and certain prices for additional tables; and further on he engages, if he does not require 1,200 tables per week, to provide him with some other description of work, so that his wages shall never be less than 24s. per week, except when a furnace is out, when he is to have 21s. It is then provided that in case of the incapacity or misconduct of Pike, or of the discontinuance of the business during the term, Hartley may employ any other person in his stead, and shall not be obliged to pay anything to Pike. It seems to me that these provisions afford an answer to the objection raised on the ground of the restraint of trade. Whether an agreement between a master and a workman to keep him out of work for seven years would be void, it is not necessary to say, for here the master agrees to employ the workman, except in certain cases, namely, sickness, lameness, and under the other circumstances mentioned. I think this is not by any means an agreement in restraint of trade. It is an agreement on one side to find work with wages of, at least,

21s. per week, and on the other side to serve for seven years unless certain excepted cases arise, and there is therefore no want of mutuality. With regard to what has been said about taking in partners, there is nothing whatever in that to prevent Hartley and Pike from suing and being sued. Then it is said that Pike has put it out of his power to avail himself of some summary advantages which he might otherwise have had. There is no reason why he should not agree to do so if he chose.

CRESSWELL, J.—I am of the same opinion. I think the substantial contract on the part of Pike was to serve Hartley, or the persons who should become his partners, and the contract by Hartley was to find him work at 24s. per week, except when a furnace was out, at which times he was to have 21s. With respect to the stipulation to serve those who should be taken into partnership, it would be a grievous restraint of trade, and a very great injury to workmen also, if contracts were to be dissolved every time a new partner is taken into a firm. Hartley here stipulates to make himself personally responsible for finding work. With regard to the restraint of trade, I agree with my Brother Rolfe in the case of *Pilkington v. Scott*, when he says, "The case depends not so much on any principle relating to contracts in restraint of trade, as upon the principles relating to contracts in general; because if it was a contract with the workman to work for the plaintiffs for seven years, and by the plaintiffs to employ him for that time, it clearly was not void as being in restraint of trade." With regard to the position of the workman on the discontinuance of the business, I apprehend that if the works had been substantially and *bona fide* discontinued, Pike would have wanted no leave to work elsewhere, the leave contemplated in the agreement being leave to be given by the persons carrying on the work.

WILLIAMS, J.—I think that the contract does not shew any restraint of trade such as to make it void. I think also that there is nothing in the objection which has been made as to the introduction of new partners.

*Rule discharged.*

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1847. } BAKER AND ANOTHER v.  
Dec. 7. } PLASKITT.

*Railway Shares—Joint Stock Company,  
Formation of—7 & 8 Vict. c. 110. s. 26—  
Pleading—Evidence.*

*To an action for not accepting railway shares, the defendant pleaded that they were shares in a joint-stock company in England, exceeding, in the number of partners, twenty-five persons, and formed for the purpose of executing works which did not require the authority of parliament; that the company had not been "formed or established" in any way whatsoever on or before the 1st of November 1844; and that, at the time of the contract, the company had not been completely registered, according to the provisions of the 7 & 8 Vict. c. 110. The 26th section of that act restrains the sale of shares in such a company until complete registration, if the formation of it had not been commenced before the 1st of November 1844. At the trial, it was shewn that S. went to India, at his own expense, in 1843, and examined the country; that he proposed a railway between M. and D, and that he spoke of it to persons who agreed to become connected with it; that he got a draft deed in July 1844, and brought it with him to England, where he arrived after the 3rd of November 1844; and that the company was provisionally registered in May 1845. The Judge left it to the jury to say whether the company had been commenced to be formed before the 1st of November 1844, and they found for the plaintiffs.*

*Semble—That the plea would have been bad on demurrer for not stating that the company had not been commenced to be formed before the 1st of November 1844, but was good on being pleaded over to.*

*Held, that whether the plea was good or bad, the above facts were not sufficient evidence to go to the jury that the formation of the company was commenced before the 1st of November 1844.*

*Assumpsit for not accepting scrip receipts of the East India Railway Company, and on the common money counts.*

The ninth plea, founded on the provisions of 7 & 8 Vict. c. 110, was as follows:—  
And for a further plea in this behalf, as to

the first count of the declaration, the defendant says, that before the making of the said alleged contract and promise in the said first count mentioned, and before the accruing of the alleged causes of action in the said first count mentioned, or any of them, or any part thereof, and after the said 1st day of November, A.D. 1844 (to wit), on the 31st day of December, A.D. 1845, divers persons, whose names are to the defendant unknown, exceeding the number of twenty-five (without including any admission into the partnership hereinafter mentioned, subsequent to the formation thereof, on devolution or other act in law), consisting (to wit) of the number of thirty persons, had been and then were united in partnership, and established as a joint-stock company, in that part of the United Kingdom of Great Britain and Ireland called England, for the purpose of executing for profit to the said partnership certain works which then might and could and still can be carried into execution without obtaining the authority of parliament, that is to say, for the purpose of making a certain railway in that part of her Majesty's dominions called India (to wit), a railway, to be called the East India Railway. And the defendant further saith, that the said partnership and company hath not been formed or established either by or in the names of any other person or persons whatsoever, or in any way howsoever, on or before the 1st day of November, A.D. 1844, nor hath the said partnership or company ever at any time been incorporated by statute or charter, or authorized by statute or letters patent to sue or to be sued in the name of any officer or person. And the defendant further saith, that the aforesaid partnership or company had not, at the time of the making of the alleged contract and promise in the first count mentioned, or at the time of the settlement, purchase, or payments by the plaintiffs, as in the first count mentioned, or at any time before the commencement of this suit, obtained any certificate of complete registration under or in pursuance of the provisions of a certain act of parliament, made and passed in a session of parliament, holden in the 7th and 8th years of the reign of her Majesty Queen Victoria, for the registration, incorporation, and regulation of joint-stock companies.

N

And the defendant further saith, that the said shares in the said count mentioned and all and every of them were, at the time of the making of the contract and promise in the first count mentioned, and of the said settlement, purchase, and payments by the plaintiffs as in the first count mentioned, shares and interests in the aforesaid partnership and company claimed by divers persons, whose names and number are to the defendant unknown. And the defendant further saith, that the said scrip receipts, in the said first count mentioned and all and every of them were scrip receipt spurious to entitle the holder thereof to the said last-mentioned claimed shares and interests in the said partnership and company. And the defendant further says, that the said shares and scrip receipts, in the said first count mentioned, were not nor were any or either of them other or different shares or scrip receipts than as last aforesaid. And this the defendant is ready to verify.

Replication, *de injuriâ*.

At the trial, at Guildhall, before Erle, J., at the Sittings after Trinity term, 1846, a Mr. Stephenson stated that he had gone out to India in the year 1843, for the purpose of introducing steam navigation and railways generally into India. That during his stay he made inquiries about a line between Mirzapoor and Delhi, and that certain persons met together for the purpose of assisting him in getting up a company; and that he spoke of the matter to several persons, who agreed to take part in the company when formed. That about July 1844 he got a draft deed of settlement for a company prepared by counsel in India, and took it to England with him. That he left India in September 1844, and arrived in England after the 3rd of November, and on his way home he drew up a report on the line; that he gave a prospectus to Capes & Stuart in November 1844; that in the same month prospectuses were printed; and that the company was provisionally registered in May 1845. That he returned to India in 1845, for the purpose of examining the country through which the line was to pass. That on the first occasion he went to India on his private account and at his own expense. Under these circumstances, the defendant contended that the ninth plea was

proved, the company not having been formed or established before the 1st of November 1844. The learned Judge, in summing up, left it to the jury to say whether the formation of the company had commenced before the 1st of November 1844, stating that it was not necessary that the company should have been formed before that day, and pointing out to the jury the several things which had been done before that day, and which, he said, were strong evidence to shew that the company had been commenced. The jury found a verdict for the plaintiffs.

A rule *nisi* having been obtained for a new trial, on the grounds of misdirection, and that the verdict was against evidence,

*Byles, Serj.* and *Unthank* now shewed cause.—The 9th plea is founded on the 7 & 8 Vict. c. 110. s. 26, which restricts the disposal of shares in any joint-stock company coming within the descriptions mentioned in the act, the formation of which was “commenced after the 1st day of November 1844,” until the company has obtained a certificate of complete registration. The words of the plea differ from those of the statute: the plea alleging that the company was not “formed and established” before the day in question. It is submitted that the word “commenced” in the act is in some degree equivocal, and that the “formation of the company,” mentioned in the plea, may mean the same thing as the “commencement of formation” mentioned in the act. It was, therefore, no misdirection in the Judge to leave the question to the jury according to the meaning of the words which support the pleading. *Chambers v. Jones* (1) is an authority shewing that where there is an ambiguity in a plea, that construction of it will be adopted which will make it good.

[*WILLIAMS, J.*—Supposing this plea had been left to the jury in its terms, then, probably, they would have found for the defendant.]

It must be admitted, that if the plea is not equivocal in its terms, the Judge should have left the question to the jury as to the formation, not as to the commencement of the formation of the company. The word

"formed" cannot mean "completely formed," because, if so, a company could not be said to be formed till all the shares were taken and it was completely registered,—which is inconsistent with the provisions of the act. Taking it for granted then, that the plea can be read so as to be good, the Judge left the question to the jury in the language of the act; and it is submitted that there was abundant evidence to shew that the formation had commenced before the 1st of November 1844, and the Judge would have been wrong if he had not left that question to the jury. If the formation mentioned in the plea, and the commencement of formation spoken of in the act, are not the same thing, then the plea, deviating from the words of the act, is bad upon the face of it; and as the defendant must, therefore, be eventually unsuccessful, the Court, in its discretion, will not grant a new trial.

*Whitehurst* and *F. Edwards*, in support of the rule, were stopped by the Court.

*MAULE, J.*—It appears to me that the Judge was right in putting that construction on the plea which is now complained of. The plea says, that the company was not formed or established in any manner whatever before the 1st of November 1844. Although, upon special demurrer, that might have been held to be a plea which did not sufficiently follow the act of parliament, yet, as it has been pleaded over to by the plaintiffs, it is good. The proper question therefore for the jury upon this plea would have been, whether the formation of the company had been commenced before the 1st of November 1844. But I do not think that the evidence raised that question. There was an indisputable *prima facie* case that this company was begun after November 1844, and there was no evidence on the part of the plaintiff to rebut that case. The evidence of Stephenson shewed that he had thought about the railway, and had spoken of it to many persons, some of whom had agreed to become connected with the company when formed. Having obtained a draft deed in India, he arrived in England after the 3rd of November 1844, and it was not till some time after that that the formation of the company actually commenced:

at what time it does not appear, but some time between the 4th of November and the month of May when the provisional registration took place. I therefore think that there was not evidence of any commencement of formation of the company before the 1st of November, and that the Judge should not have left that question to the jury. The rule should therefore be made absolute, whether the plea is good or not. My impression is, that the plea is good, having been pleaded over to.

*CRESSWELL, J.*—I quite agree with the view of the evidence taken by my Brother Maule. There certainly was evidence of the formation after November 1844, and none of the commencement of it before.

*WILLIAMS, J.*—I am of the same opinion. My only doubt has been, whether the plea was not bad, so that the plaintiffs might be entitled to judgment notwithstanding a verdict for the defendant. There is no doubt at all that the plea would have been bad if it had been demurred to. On pleading over, if the Court can construe a plea so as to make it good, it will do so. The averment here may be considered as tantamount to an averment that the formation of the company had not been commenced before the 1st of November 1844.

*Rule absolute.*

1847. }  
Nov. 19. } *NASH v. COLLIER.*

*Practice.—F frivolous Demurrer—Name—Initial.*

*Where a declaration was demurred to on the ground that the defendant was therein described as "William Henry W. Collier," the initial letter W. being used for an unexpressed name, the Court held that the demurrer was not frivolous.*

*Semble—That such a demurrer is good.*

Assumpsit on a bill of exchange by an indorsee against the acceptor. The declaration described the defendant as "William Henry W. Collier."

To this the defendant demurred specially, the chief ground of demurrer being that the

declaration was uncertain for describing the defendant by the initial letter only of one of his names.

*Unthank* moved for a rule calling on the defendant to shew cause why the demurrer should not be set aside as frivolous.—This can be no ground for demurrer either at common law or by statute. Persons are sometimes baptized by initials. This is misnomer only.

[MAULE, J.—This "W." is certainly not a name. It stands for some unexpressed name.]

The right course for the defendant was to have the declaration amended by inserting the right name at the plaintiff's cost.

MAULE, J.—I do not think this is a misnomer. In the case of a misnomer there is nothing on the face of the declaration to shew a defect. I rather think that the demurrer is a good one, and that the plaintiff, on argument, would be obliged to amend. At all events, I cannot say that it is frivolous.

*Per Curiam*—

*Rule refused.*

1847. }  
Nov. 12. } JONES v. SAWKINS.

*Pleading — Immaterial Issue — Plea of Accord and Satisfaction, Material part of.*

*To an action for use and occupation, the defendant pleaded, first, that the plaintiff seized goods of the defendant sufficient to pay the rent and costs, and detained them for two years, and it was then agreed between them that the plaintiff should retain the goods in satisfaction of the debt, and that he did so accordingly. Secondly, that after a wrongful seizure by the plaintiff of goods of sufficient value, &c. the plaintiff and the defendant agreed that the plaintiff should retain the goods, and that they should relinquish their claims on each other. Thirdly, that they agreed that the plaintiff should retain the goods so seized, and that they should relinquish their claims, and the defendant should give up possession. Replications, traversing the seizure of goods of sufficient value, &c.*

*On demurrer to the replications, held, that the pleas were good, and that the replications were bad for putting in issue matter which was only inducement to the acceptance in satisfaction, such acceptance being the material part of the pleas.*

Debt for the use and occupation of certain rooms and apartments, and for meat, drink, and necessities; with counts for money paid, and on an account stated.

Besides the general issue, the defendant pleaded pleas to the following effect. Second plea, as to the first and third counts so far as they relate to 6*l.*, that the defendant occupied the rooms, &c. for one quarter of a year, viz. from the 25th of December 1844 until the 25th of March 1845, under a demise from the plaintiff for one quarter, and so on from quarter to quarter at the quarterly rent of 6*l.*; that the defendant became indebted in 6*l.* to the plaintiff in respect of the above-mentioned quarter's rent, and that the account in the third count as to 6*l.* parcel, &c. was stated concerning the same sum; that the plaintiff during the continuance of the demise, and nearly two years before the commencement of this suit, took the defendant's goods as a distress, they being of sufficient value to satisfy the rent and the costs of the distress and appraisement; that he never sold the goods, but retained them to his own use, till just before the commencement of this suit, when he, with the assent of the defendant, received and accepted them, and hath hitherto retained them in satisfaction and discharge of the said sum of 6*l.*

Third plea, that after the accruing of the causes of action, and before the commencement of the suit, the plaintiff wrongfully seized the defendant's goods, being of value more than sufficient to satisfy the causes of action in the declaration mentioned, and retained them for an unreasonable time, to wit, nearly two years, and converted them to his own use, and that it was before the commencement of this suit agreed between the plaintiff and the defendant that, for the termination of disputes between them concerning the causes of action in the declaration and claims made by the defendant in respect of the said seizure and conversion of the goods, that such demands and rights of action should be mutually relin-

quished, and that the plaintiff should retain the goods as a final settlement in full satisfaction and discharge of the said causes of action in the declaration mentioned; and that the plaintiff accepted and received and hath retained the said goods in such full satisfaction and discharge.

Fourth plea, as to 6*l.* parcel, &c. in the first and third counts, that before the accruing of the causes of action, to wit, on the 10th of April 1845, the defendant was tenant to the plaintiff of the said rooms and apartments, and during a certain tenancy which had commenced, to wit, on the 7th of December 1844, to wit, a tenancy for one month, and from month to month, at the rate of 1*l.* 4*s.* per month, under which tenancy the sum of 3*l.* 12*s.* had become due from the defendant to the plaintiff at the time of the accruing of the said causes of action for three months' rent, and before the commencement of the suit, the defendant was indebted to the plaintiff in 2*l.* 8*s.*, the residue of the 6*l.* for the meat, necessaries, &c. mentioned in the declaration; that the account in the third count was stated concerning the money in the first count; that after the accruing of the causes of action, and during the tenancy, and just after the expiration of the said first three months, to wit, on the day in this plea first mentioned, the plaintiff wrongfully seized the defendant's goods to the amount of the money in the first count mentioned, and detained them for an unreasonable time and converted them to his own use, and wrongfully disturbed the defendant in the peaceable possession of the rooms; that the plaintiff was desirous of regaining possession of the rooms, and after the accruing of the causes of action, and before the commencement of the suit, it was agreed between the plaintiff and the defendant that to put an end to disputes in respect to the said causes of action in this plea mentioned, and other alleged causes of action on the part of the defendant, they should mutually relinquish their claims, and the plaintiff should retain the goods in full satisfaction and discharge of his claims, and the defendant should relinquish her right to and give up possession of the rooms, and she should be discharged by the plaintiff from all claims; that the plaintiff accordingly relinquished her claims and gave up

possession during the tenancy, and the plaintiff resumed and hath hitherto retained possession of the rooms and retained the goods so seized in satisfaction and discharge of the said causes of action.

Replication to the second plea, that the plaintiff did not seize, take, or detain as a distress for the rent in the second plea mentioned any goods of the defendant of sufficient value to satisfy the said rent, and the costs and charges of the distress, sale, and appraisement, or out of which the plaintiff might have satisfied the said rent, costs, and charges, in manner and form, &c. To the third plea, that the plaintiff did not seize, take, or detain any goods of the defendant of value sufficient for a full satisfaction and discharge of the said causes of action in the said declaration mentioned, in manner and form, &c. To the fourth plea, that the plaintiff did not seize, take, or detain any goods of the defendant of the value in the said fourth plea mentioned, in manner and form, &c.

Special demurrers to the replications to the second, third, and fourth pleas. The principal grounds of demurrer set out were, that the replications were too large, and traversed immaterial allegations, and left the real defences set up in the pleas unanswered.

*Rew*, in support of the demurrers.—The defence set up in the second plea is substantially an accord and satisfaction; and the replication to it is directed to the inducement, which merely shews how the goods came into the plaintiff's possession. Whether they were in his hands as a distress, or otherwise, is quite immaterial, if he took them in satisfaction. The replication also attempts to put in issue the value of the goods, but that also is immaterial, the retaining of them being the satisfaction alleged in the plea. In a recent case in the Exchequer, *Sibree v. Tripp* (1), it was held that the acceptance of a negotiable security may in law be a satisfaction of a debt of larger amount. Parke, B., in giving his judgment in that case, cites the following passage from *Co. Lit.* 212, b.—“The obligor or feoffor cannot, at the time ap-

(1) 15 Mee. & Wels. 23; s. c. 15 Law J. Rep. (N.S.) Exch. 318.

pointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater; but if the obligee or feoffee do at the day receive part, and thereof make acquittance under his seal, in full satisfaction of the whole, it is sufficient by reason that the deed amounted to an acquittance of the whole." It is clear, then, that the accord was good, and that the acceptance in satisfaction is the material part of the plea. The replication also speaks of the costs of the sale and appraisement of the goods taken, though no sale or appraisement took place. The traverse is too large for thus introducing immaterial averments into the issue, and is therefore bad—*Stephen on Pleading*, 4th edit. 269, 272. *Thurman v. Wild* (2), *Eden v. Turtle* (3), *Basan v. Arnold* (4), *Tempest v. Kilner* (5). In *Eden v. Turtle*, Parke, B. said, "I quite agree that if the effect of the replication was to compel the defendant to prove more than he otherwise would have been bound to do in order to support his plea, it would be bad." Again the replication is bad, as containing a negative pregnant. It amounts to this: "the plaintiff never took any goods of sufficient value," &c. That allegation is pregnant with the affirmative that he did take the goods. In *Com. Dig.* tit. 'Pleader,' (R,) 5, an instance is given where the introduction of time and place was held to make a traverse bad as a negative pregnant. Similar arguments are applicable to the replications to the third and fourth pleas.

*Lush*, contra.—The authority of the cases is not disputed; and if more is involved in the issues than is necessary, the replications are bad. It is submitted that the third and fourth pleas are bad; and that if the second is good, the replication to it is good also. The second plea professes to be one of accord and satisfaction; but it does not contain an accord: if it does, it shews no satisfaction. It

is not alleged that there was any agreement that the plaintiff should take the goods in satisfaction; but that having got them, he accepted them in satisfaction with the assent of the defendant. The defendant may have said and done nothing in the matter.

[MAULE, J.—Surely the acceptance in satisfaction is the material part of the plea.]

There ought to be a delivery in satisfaction as well.

[WILDE, C.J.—The words "accept in satisfaction" must surely imply an accord.]

They may do so; but it does not follow that there is a satisfaction. This differs materially from the case where a person delivers goods to another, who has no prior right to them. If the Court can see that there was no consideration for the bargain, then there is no accord; and for this reason the value becomes material.

[MAULE, J.—The replication includes the costs of sale and appraisement.]

If the allegation is material at all, it is correctly traversed in the terms of the plea. If the plea had shewn on the face of it that the value of the goods was less than that for which they were accepted, it would have been bad. The plaintiff was also legally in possession of the goods before the arrangement.

[WILDE, C.J.—You suppose things to have no other than a pecuniary value. If a person chooses to become the owner of goods otherwise than by sale why should he not make an agreement to that effect?]

The third and fourth pleas are bad, because they set up bad accords. They shew a right of action by the defendant for the wrongful conversion, and a right of action by the plaintiff in respect of the matters mentioned in the declaration, and an agreement that they should be quit of their actions against each other. Such an accord is bad, according to the authorities—*Com. Dig.* tit. 'Accord,' (B.) 1, *Lutw.* 57, 1 *Roll. Abr.* 128, tit. 'Accord,' (A.) It is true that the pleas go on to say, that it was agreed that the plaintiff should keep the goods; but that only amounts to the same thing, namely, to be quit of actions.

[WILDE, C.J.—It is more than that, for the defendant gave up the property in the goods seized. The seizure is alleged to have been wrongful, and therefore the de-

(2) 11 Ad. & El. 452.

(3) 10 Mea. & Wels. 639; s. c. 12 Law J. Rep. (n.s.) Exch. 11.

(4) 6 Ibid. 559; s. c. 9 Law J. Rep. (n.s.) Exch. 189.

(5) 2 Com. B. 300; s. c. 15 Law J. Rep. (n.s.) C.P. 10.

defendant might have re-taken them, and still had property in them.]

[MAULE, J.—If a person seizes the horse or other chattel of another wrongfully, that other person may still sell it.]

*Per Curiam—*

*Judgment for the defendant.*

1847. }  
Nov. 25; } MAYBURY v. MUDIE.  
Dec. 9. }

*Abatement—Non-joinder, Plea of—Affidavit—Residence.*

*The affidavit verifying a plea in abatement for non-joinder of a co-contractor should state correctly his place of residence; and the Court will set aside the plea on motion, if it appears on affidavit that such place has not been correctly stated. It is not sufficient to state the place where the co-contractor carries on his business.*

This was an action of debt. The defendant pleaded in abatement the non-joinder of nine co-contractors, of whom Robert Denton and James Elkington Boord were two. In the affidavit which accompanied the plea the defendant stated that Robert Denton resided at No. 89, Leadenhall Street, in the city of London, and James Elkington Boord at Bath, in the county of Somerset. The plaintiff's attorney filed an affidavit, in which he stated that he had made inquiries as to the residence of Robert Denton; that Charles Bremner resided at No. 89, Leadenhall Street, and had informed the deponent that he was the only occupier of the premises, and that Robert Denton had not resided there for the last two months and upwards; that the deponent had made inquiries also as to the residence of J. E. Boord, and had learnt from a solicitor at Bath that he was not resident there. Affidavits were filed in answer, in which it was stated that Denton had formerly carried on business at 89, Leadenhall Street; that his name was over the door; that two persons called there, and asked if Denton was in; that Bremner answered that he was not, and it was uncertain when he would be in; that Bremner was asked if Denton had

given up business, and that he declined to answer, and did not give reason to believe that he had ceased to reside there. It was also stated that Boord had lately removed to Bath, and had been seen there.

*Meymott* having obtained a rule nisi to set aside the plea and the accompanying affidavit of the defendant, and for leave to sign final judgment for the plaintiff,—

*Scott* (Nov. 25) shewed cause.—The questions which arise under 3 & 4 Will. 4. c. 42. s. 8. are, whether the addresses of Denton and Boord are incorrect, and if so, whether advantage can be taken of such incorrectness by an application to the Court on affidavit. The affidavits in answer shew that the residence of Denton was correctly enough stated, the answers of Bremner being evasive; and there is no sufficient evidence that Boord did not reside in Bath. But the statute only requires the verification of the plea of non-joinder by affidavit, and if the affidavit is false, the party making it is liable to an indictment for perjury: and advantage cannot be taken of the incorrectness of the addresses on an application like this. The cases decided with regard to the correctness of the description of residences under the statute are *Lambe v. Smythe* (1), *Wheatley v. Golney* (2), and *Newton v. Stewart* (3).

[MAULE, J.—In *Lambe v. Smythe* the question whether advantage could be taken of such incorrectness by an application like the present was not raised at all. The other two cases were decided by my Brother Wightman on the authority of that case. In *Wheatley v. Golney* this point was not mentioned. In *Newton v. Stewart*, where the plea was set aside, the point was raised, but the case was decided on the supposition that *Lambe v. Smythe* was an authority on it.]

*Meymott*, in support of the rule.—The cases of *Lambe v. Smythe* and *Wheatley v. Golney* shew that the actual residences of the parties ought to be stated in the affidavit accompanying the plea; and *Newton v. Stewart* shews that the plea should be set aside, if it appears on affidavit for the plain-

(1) 15 Mea. & Wels. 433; s. c. 15 Law J. Rep. (N.S.) Exch. 287.

(2) 9 Dowl. P.C. 1019.

(3) 4 Dowl. & L. 89; s. c. 15 Law J. Rep. (N.S.) Q.B. 384.



tiff, that the addresses have been incorrectly given.

*Cur. adv. vult.*

MAULE, J. (Dec. 9.) delivered the judgment of the Court.—This was a motion to set aside a plea in abatement for non-joinder, and was argued before the Chief Justice, my Brother Williams, and myself. The ground of the application was, that the 3 & 4 Will. 4. c. 42. s. 8. had not been complied with. That section provides, "that no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea." The principal question which the Court took time to consider was, what the true construction of the latter part of this clause was? There were two cases in the Court of Exchequer, *Wheatley v. Golney* and *Lambe v. Smythe*, in which that Court decided that the question might be raised on an application to the Court. There was also a case where the point was expressly decided before my Brother Wightman in the Bail Court (*Newton v. Stewart*), but that point did not appear to be carefully reported. We have come to the conclusion that the true place of abode must be stated, and that the question whether it be so may be tried by the Court on affidavit. Before the statute, the law was, that the plea must be accompanied by an affidavit stating that it was true in substance and in effect, it being a dilatory plea, and that being required in all dilatory pleas. The statute did not alter the plea, except in requiring it to state that the person was resident within the jurisdiction of the Court. Now, there was nothing in the affidavit required before the act, which was not also stated in the plea. There was no allegation in it that might not be put in issue. But the provision of the act in question is a requisition which applies to the affidavit only. The residence must be stated in the affidavit, but need not be stated in the plea, and cannot consequently be put in issue by the replication. It would, therefore, be binding on the party

if it could not be controverted in the manner proposed; and the question therefore is, whether the legislature meant the allegation to be binding on the plaintiff. Certainly, if the matter of the plea were not true, the defendant would fail, and the plaintiff would obtain judgment; and a doubt was raised on the argument, whether anything more was required than that the defendant should pledge his oath to the truth of the allegation. We think the object of requiring the statement is to enable the plaintiff to sue the party, and unless he gets the true residence that object would not be attained. It is true that the defendant may be certain that the party is within the jurisdiction, and yet may not be able to find his true residence, and then he will be deprived of the plea. But pleas in abatement are not to be favoured, and we think the legislature intended, that if the defendant is so situated that he cannot point out to the plaintiff the residence of the party, who, he says, is within the jurisdiction, he ought to be deprived of the benefit of the plea. Otherwise, the plaintiff would be no better off. We think the words of the section do support that construction. Then, what does the place of residence mean? It means that particular place where, in fact, the person is residing, and the statute is not complied with unless the true place is stated. Taking that to be the true construction, it follows that the matter may be inquired into upon affidavits, and if it turns out that the true place of residence is not stated, the plea ought to be disallowed. This affidavit appears to have been made in good faith. The place was one where the party might reasonably be found and met with. It was where he carried on his business. But still we think, that is not his residence. It would not be his place of residence for the service of a writ, which it is well known must be at his place of residence. Consequently, the plea ought to be disallowed. But, considering that the defendant might have been misled, we think, in making the rule absolute, it should be on condition that the defendant be at liberty to plead in bar within a week.

*Rule absolute accordingly, without costs.*

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1847. }  
Nov. 24. } *In re DUNN.*

*Habeas Corpus—Jurisdiction to grant—Conviction and Sentence at Nisi Prius.*

*The defendant was tried on an indictment for perjury, convicted and sentenced, at Nisi Prius. On motion for a writ of habeas corpus to discharge him out of custody, on the ground that the judgment recited in the warrant of commitment was not warranted by law,—Held, that the Court will not grant a writ of habeas corpus, the effect of which will be to review the judgment of one of the superior courts. In such case the remedy is by writ of error.*

This was an application on behalf of R. Dunn, a prisoner in the Queen's Prison, for a writ of *habeas corpus* in order to obtain his discharge from custody on the ground that the warrant of commitment was illegal. It appeared on affidavit that the prisoner was in custody under two warrants. The first warrant stated "that the defendant having been this day convicted of wilful and corrupt perjury, he be committed to the Queen's Prison, there to remain until discharged by due course of law." The second warrant stated that at a sitting at Nisi Prius, held at Guildhall, in London, on Saturday the 10th of February 1847, before Lord Denman, C.J., the defendant "having this day been convicted by a jury of the county of wilful and corrupt perjury, it is considered and adjudged, and ordered by me, the said Chief Justice, that he, the said R. Dunn, for the said wilful and corrupt perjury, be imprisoned in the Queen's Prison for the space of eighteen calendar months, to commence and be computed from the day on which he shall first be taken to and confined in the said prison in execution of this sentence; and that he, the said R. Dunn, do give security to keep the peace and to be of good behaviour to Her Majesty and all Her Majesty's liege subjects, and especially to A. B. Coutts, for the space of two years, the said two years to commence and be computed from the end and after the expiration of the said eighteen calendar months; and that he, the said R. Dunn, do give security himself in 100*l.* with two sureties of 50*l.* each, and that he, the said R. Dunn, be further imprisoned until such

securities be given, and that the said R. Dunn be committed to the keeper of the said prison, to be by him kept in safe custody in execution of this judgment." (Signed) "Denman."

*Pashley*, in support of the application.—The first warrant is clearly bad, inasmuch as the term of imprisonment is not distinctly stated in it. With respect to the second warrant, if a free pardon were granted to R. Dunn for the offence of which he is convicted, and he could not get bail, he would still be compelled to remain in prison for the two years for which the sureties are required, and also for the eighteen months previous to such two years. The judgment therefore is erroneous and the sentence illegal. There is no authority to be found which decides, that on a conviction for perjury the defendant can be sentenced to imprisonment and further sentenced to find sureties to keep the peace any more than on a conviction for forgery: the only security which a defendant can ever be called upon to give is, that he will not offend again in a like manner. *In re Reynolds* (1) is an authority to that effect, and is in favour of this application. In that case two persons were convicted under the Night Poaching Act, and by the warrant of commitment they were ordered to be imprisoned and find sureties "not to offend again for the space of one year next following;" the commitment was held bad as being too general in its terms, and giving a power to the gaoler, not warranted by the statute, which might subject the parties to a longer term of imprisonment than the law permits.

[MAULE, J.—Then it is an erroneous judgment, and you are not entitled to be heard in this form. A single Judge at chambers may grant a writ of *habeas corpus*; but a single Judge cannot review the judgment of the Court of Queen's Bench.]

[WILDE, C.J.—It is perfectly clear the applicant's remedy is by a writ of error: that is the proper course. If this application were entertained, it would lead to consequences which cannot be anticipated.]

[MAULE, J.—There was a case, *O'Connell v. the Queen* (2), in which the plaintiff in

(1) 1 Dowl. & L. 846; s. c. 13 Law J. Rep. (n.s.) M.C. 65.

(2) 11 Cl. & Fin. 156.

error was sentenced to be imprisoned for a further term to keep the peace, he having been convicted of conspiracy, and no one advanced this point at all; it seems remarkable that it was not taken if it could have been. The prisoner here is not entitled to make this application under the statute 31 Car. 2. c. 2, for he is imprisoned for an offence which is not bailable. *In re Reynolds* was the case of a summary conviction by Justices, where the remedy by writ of error did not lie.]

That view of the case would take away the remedy by writ of *habeas corpus* whenever there is not a summary conviction. A writ of error could not safely be brought in this case, for the prisoner was sentenced at the time of the trial under the statute of 11 Geo. 4. & 1 Will. 4. c. 70. s. 9, which gives the power of amending the judgment, and thus the terms of the ultimate judgment are at present uncertain. The warrant as it stands is the existing judgment; it is submitted the sentence thereby pronounced is an illegal sentence, and the writ will, therefore, be granted.

WILDE, C.J.—There can be no doubt that the prisoner in this case must seek his remedy by a writ of error. If the sentence be illegal, that is the course for him to pursue. If the Court were to grant this application, it would follow, that by the summary process of a motion, which may be entertained by a single Judge at chambers, the judgment of the superior courts might be impeached; and thus, among other consequences, the remedy by writ of error, which the law provides for certain cases (of which this is one), would be virtually abrogated.

*Application refused.*

1847. } FIELD v. M'KENZIE, PUBLIC  
Nov. 13, 16. } OFFICER.

*Banking Company—Sci. Fa.—Setting aside—Suppression of Facts.*

*It is no ground for setting aside a rule for a sci. fa. granted against former partners of a banking company under 7 Geo. 4. c. 46. s. 13, that the plaintiff had a collateral security from the bank, which, by care and manage-*

*ment might have been made productive, and which he had omitted to mention in the affidavits on which the rule was granted.*

In this case, in which the plaintiff had recovered judgment upon a promissory note, against the defendant, as public officer of the Newcastle-upon-Tyne Joint-stock Banking Company, a rule for a *scire facias* against certain persons who were members of the banking company at the time the contract was entered into, was made absolute (1).

*Channell, Serj.* (Nov. 4,) on behalf of Joseph Stocks, one of the parties sought to be charged, obtained a rule *nisi*, calling on the plaintiff to shew cause why the former rule and all proceedings had thereon should not be set aside, with costs, on the ground that material facts had been suppressed by the plaintiff on the motion for that rule; and also on the ground of surprise.

The affidavit in support of the present rule contained statements to the following effect:—An indenture was executed on the 26th of July 1842, between T. C. Gibson of one part, and W. Nesham and R. Todd, trustees of the banking company, of the other part. It recited a bill of sale from the sheriff of Durham to Gibson of a leasehold colliery, called Hunwick Colliery, consisting of 712 acres, and Newfield Colliery, consisting of 67 acres, both in the county of Durham; and that Gibson had opened an account with the banking company, in respect of which they required security. The indenture then proceeded to assign and transfer to the said W. Nesham and R. Todd, as such trustees, all the estate and property comprised in the bill of sale, as security to the company in respect of the said account, to the amount of 20,000*l.* and interest. There was a proviso in the deed for redemption on the payment of the 20,000*l.* and interest. An indenture of the 28th of February 1845, between the said W. Nesham and R. Todd, as such trustees, of the first part, the said R. Todd and W. Nesham, G. T. Gibson, and S. Stobart, directors of the company, of the second part, the said T. C. Gibson of the third part, and the plaintiff, J. Field, of the fourth part, recited

(1) See the report of the case 16 Law J. Rep. (N.s.) C.P. 203.

the former indenture, and that 20,000*l.* with interest was due thereon, which T. C. Gibson had been called upon, but had found it inconvenient, to pay; that the above directors had, with the privity of T. C. Gibson, applied to the plaintiff to advance them 14,000*l.*, and that he had agreed to do so, on having the amount, with interest on it at 5*l.* per cent., secured by the promissory note of the company, and collaterally secured by an assignment of their mortgage security from the said T. C. Gibson, and also by a mortgage from him, with power of sale of a freehold messuage, farm, and lands, called Newfield, with the coal and other minerals in and under the same, for the purchase whereof, he, the said T. C. Gibson, had contracted and paid part of the price; that the plaintiff had paid the 14,000*l.* to the banking company, and that they, by a promissory note of even date with the deed, had promised to pay that sum to the plaintiff or his order, at the expiration of six calendar months, with interest. The deed then witnessed that Nesham and Todd, as trustees, did, with the consent of T. C. Gibson, and by the direction of the directors of the Bank, sell and assign the 20,000*l.* and interest, due upon the mortgage, and the hereditaments and premises therein mentioned, subject to redemption by the company on payment by them, or T. C. Gibson, of the said sum of 14,000*l.* and interest, the money not to be called in for five years if the interest was regularly paid.

On the 16th of April 1847, the plaintiff gave the company notice that he would, at the end of three months, sell the mortgaged property. It was further stated, that one S. Brooke held a second mortgage on the hereditaments and premises for 30,000*l.*, and that they might, with management and care, be made productive and valuable to an amount greatly exceeding the sum of 20,000*l.*, for which they were mortgaged to the Bank.

On behalf of the plaintiff, an affidavit was made by his solicitor, in which he stated that the Newfield property never was brought into the security, the purchase not having been completed, and that the plaintiff never had any lien on it; that the covenant not to call in the 14,000*l.* was conditional upon the performance by T. C. Gibson of the covenant to purchase the Newfield estate,

and of other covenants; and that it was further stipulated that the plaintiff was not to be bound to proceed at law or in equity to recover the mortgage debt of 20,000*l.*, or to put in force the other securities, otherwise than he should think fit. It further stated, that pending the notice of sale there had been great commercial distress and embarrassment affecting the mining district, and that an experienced colliery-viewer, on inspecting the property, had reported that if it was then brought into the market, no purchaser would be found, and its future value would be depreciated, but that if the colliery and premises were properly kept up they might become valuable. It also averred, that Stocks was well aware of the mortgage to Field, the plaintiff; and that if Stocks would pay the debt, the plaintiff was willing to hand over the mortgage to him.

*Martin and Hugh Hill* (Nov. 13,) shewed cause.—The important question in this case is, whether, according to the right construction of the 12th and 13th sections of the 7 Geo. 4. c. 46, it is necessary to shew that a person who has taken a collateral security is bound to realize it before he can obtain a *scire facias* against former shareholders in a banking co-partnership. This rule was moved on the ground that there had been an improper suppression of facts, but the affidavit in answer shews that there was no want of good faith in not mentioning the mortgage deed, which the plaintiff took as a collateral security for the payment of the money which he had advanced. All that the legislature requires is, that an execution shall be issued against the present members of a banking co-partnership before recourse is had to those who were members at the time the contract was entered into. There is no authority to shew that a collateral security must be realized first. At all events, the affidavit of the plaintiff's attorney shews that the security could not at that time be realized, from the state of the market. The only two cases at all applicable are *Eardley v. Law* (2) and *Harvey v. Scott* (3), which latter case recognizes the construction of

(2) 12 Ad. & El. 802; s. c. 10 Law J. Rep. (N.S.) Q.B. 46.

(3) *Ante*, Q.B. p. 9.

the statute adopted by this Court in giving judgment on the former rule in the present case. The principle to be derived from those cases is, that if the affidavits contain *prima facie* evidence that due diligence has been used in vain to obtain available executions against the present members of the company, the Court will grant the *sci. fa.* against the former members. It is for the Court to decide whether the efforts made for that purpose have been made *bond fide* or not; and even if the Court should be disposed to enter into all the circumstances of this mortgage, the affidavits shew that it could not be considered an available security.

*Channell, Serj. and Bramwell*, in support of the rule.—The intention of the legislature was to make former partners liable only when all other means had proved ineffectual.

[*MAULE, J.*—It is very important for you to establish that not only executions but all other means must be had recourse to in the first instance. The present inclination of my opinion is, that the statute contemplates nothing but executions.]

Supposing the party applying for a *sci. fa.* had a security upon which he could not issue execution, but which the Court could see that he could easily realize, would the Court in such case grant a *scire facias* against former partners? The affidavits in support of the former rule were not fair and candid, because they purposely omitted the statements relative to this mortgage.

*Cur. adv. vult.*

*WILDE, C.J.* (Nov. 16.) delivered the judgment of the Court.—We have looked through the affidavits in this case, and have come to the conclusion that there is no ground for this rule. The original rule, which asked for leave to issue a *sci. fa.* against J. Stocks and others, was made absolute last Trinity term, on the ground that the plaintiff had used all reasonable means to obtain satisfaction against the members primarily liable on the judgment which he had obtained, and that such endeavours had been unavailing (4). It is now sought to open that rule upon two grounds, first, because the plaintiff wrongfully sup-

pressed certain facts in the affidavits used by him in moving for the previous rule; and secondly, on the ground of surprise. On the first ground, it is said that the plaintiff mentioned nothing to the Court about a certain mortgage security of a colliery and works in the north of England, delivered to him by the Bank, which, if he had stated in his affidavit, that rule would not have been granted. It is to be observed, that there is very little said about this mortgage security in the affidavits now before the Court: the attorney of Mr. Stocks is the only person who mentions it. At the close of his affidavit, he states the existence of the mortgage security, and that he has been informed, and verily believes, that the said hereditaments and premises are of considerable value, and that by care and management they may be made productive of a large sum of money to an amount greatly exceeding 20,000*l.* He does not say when or how they can be made productive. It is sufficient to say, that such a statement as that shews no present means of payment; neither is there any reason why a plaintiff should not proceed with his remedy by *sci. fa.* against the former members, because there is in existence a certain security which by care and management may possibly at some time or other be rendered productive. There is nothing further urged on this point in support of the rule. In answer to that statement, it is said by the plaintiff, that property of this nature in the north of England is now so depreciated, and there is so little demand for it, that if put up for sale at the present time no buyer could be found for it, and such a course would materially injure the sale of it at any future period. He also goes on to say, that if Mr. Stocks will pay the debt, he is quite willing to hand over the mortgage security to him. The first ground, then, is wholly insufficient. There was no material suppression of a material fact such as would have induced the Court to vary from its former decision. Nor do we think, upon looking at the affidavits, that there was any wilful or fraudulent suppression of this mortgage-deed: it was perfectly notorious that there was such a security in existence and in the possession of the Bank, and the circumstance of its present want of value seems to be the reason why it was not mentioned. Neither is there

(4) See report, 16 Law J. Rep. (N.S.) C.P. 203.

anything to shew that Mr. Stocks was taken by surprise on the former occasion. He shewed cause against the former rule, and ought, previously to so doing, to have made all necessary inquiries about the property possessed by the Bank; and this he did not take the trouble to do. If he had made any inquiries he would have heard of this mortgage, and the proper time to bring it before the Court was before the rule was made absolute, not after. The circumstances stated do not constitute a surprise, by which I understand that a party has discovered something, which by the use of reasonable care and diligence he could not previously have found out. That is not this case; and as the plaintiff has been brought here without due reason, this rule must be

*Discharged with costs.*

1847. }  
Nov. 25. } MOORE v. POSTER.

*Practice—Irregularity—Declaration—Debt and Assumpsit—Variance from Process.*

*The writ was in an action of debt; and the commencement of the declaration was in the form usual in debt. The first count was good either in debt or in assumpsit, and the second and only other count was a good count in assumpsit:—Held, that this was a good declaration in assumpsit, and should therefore be set aside for irregularity, as varying from the process.*

*Held, also, that under these circumstances the plaintiff could not insist that the declaration was demurrable for misjoinder of a count in debt with a count on promises, as an answer to an application to set it aside for irregularity.*

In this case, the process was issued in an action of debt, and the form of the declaration in its commencement was in an action of debt. The first count alleged that the plaintiff drew his bill of exchange on the defendant, and the defendant accepted the same, and promised the plaintiff to pay him the same, according to the tenor and effect thereof and of the said acceptance thereof, but did not pay the

same on the day when it became due, or at any time afterwards. The second count alleged that the defendant was indebted to the plaintiff on an account stated; and the declaration then continued, "and the defendant afterwards, to wit, &c., in consideration of the last-mentioned premises promised the plaintiff to pay him the said last-mentioned monies on request. Yet the defendant hath disregarded his last-mentioned promise, and hath not paid the said last-mentioned monies," &c.

*Chadwick Jones, Serj.*, having obtained a rule nisi for setting aside the declaration for irregularity, as varying from the process,

*Pearson* now shewed cause. — If the first count is a good count in debt, and the second a count in assumpsit, then there is a misjoinder, and the defendant ought to have demurred—*Rotton v. Jeffery* (1). The word "promise," occurring in a count, does not necessarily make it a count in assumpsit—*Compton v. Taylor* (2), *Cloves v. Williams* (3). No formal conclusion is necessary in a count for debt—*Ashbee v. Pidduck* (4). No promise need be alleged in an action against an acceptor—*Stericker v. Baker* (5); therefore, the first count is a good count in debt. But at all events, an application to set aside a declaration for irregularity, on the ground that it varies from the process, should be made with despatch to a Judge at chambers—*Tory v. Stevens* (6).

*Chadwick Jones, Serj.*, in support of the rule.—In *Marshall v. Thomas* (7) the form of action was wrongly stated in the commencement of the declaration, and that was held to be an irregularity, and not a ground for special demurrer. In *Thompson v. Dicas* (8) the writ was in trespass, and the declaration, which was in case, was set aside for irregularity.

(1) 2 Dowl. P.C. 637.

(2) 4 Mee. & Wels. 138; s. c. 7 Law J. Rep. (n.s.) Exch. 286.

(3) 3 Bing. N.C. 868.

(4) 1 Mee. & Wels. 564; s. c. 5 Law J. Rep. (n.s.) Exch. 251.

(5) 9 Ibid. 324; s. c. 11 Law J. Rep. (n.s.) Exch. 98.

(6) 6 Dowl. P.C. 275.

(7) 2 Ibid. 208.

(8) 1 Cr. & M. 768; s. c. 2 Law J. Rep. (n.s.) Exch. 294.

WILDE, C.J.—I think the rule ought to be made absolute. The process was clearly issued in an action of debt; and the declaration professes to follow the process. It contains two counts, the first of which would be good, either in debt or in assumpsit, and the second is a count in assumpsit. The general rule is, that a record is to be construed as being in accordance with the rules of pleading; and a party is not entitled to contend that his own pleading is bad. It would open the door to trickery, if when an application was made on the ground of an irregularity, the party charged with it might say, I have not committed that fault, but I have committed another. The first count may be good in assumpsit, and the second is in assumpsit. There is, therefore, a sufficient declaration in assumpsit; but as it is not in accordance with the process issued, there is an irregularity in the proceedings which entitles the defendant to have this rule made absolute.

MAULE, J.—The form of the declaration in the commencement is in an action of debt; but that does not alter what follows. The first count states a breach of a promise, and the second is the usual count, on an account stated in assumpsit. The distinction between assumpsit and debt, when brought for the payment of money, is sometimes rather subtle. In assumpsit, the claim is for damages, and in debt the sum is claimed as a duty. When a plaintiff goes on beyond the statement of a duty, and states a promise and a breach of that promise, that may be properly considered as shewing an intention to adopt that form of action in which a breach of promise is material.

CRESSWELL, J. concurred.

*Rule absolute.*

1847. }  
Dec. 8. } VARNEY v. HICKMAN.

*Gaming—8 & 9 Vict. c. 109. s. 18.—Money deposited with Stakeholder—Money had and received.*

*After the passing of the 8 & 9 Vict. c. 109, a sum of money was deposited by two persons respectively with a stakeholder to abide the event of a wager on a trotting match. Before the time fixed for its determination one of the depositors repudiated the*

*wager and demanded his money, which the stakeholder refused to return. In an action for money had and received, held, that the deposit was recoverable from the stakeholder, notwithstanding the 18th section of that act.*

*Semble, that if the 8 & 9 Vict. c. 109. s. 18. be a bar to such an action, it must be specially pleaded.*

Debt for money had and received.

*Plea*—Never indebted. *Issue thereon.*

The action was tried, before Wilde, C.J., at the sittings in London after Michaelmas term, 1846, when the following memorandum was put in by the plaintiff:—"March 25th, 1846.—Mr. Varney bets Mr. Isaacs 20*l.* that his horse will make the best of his way for two miles against Mr. Isaacs's horse. Mr. Varney to have the same horse that he used when Mr. Hickman rode with him to the coursing match at Hampton. Each horse to draw ten hundred weight besides the carriage. The match to come off on Monday the 30th of March 1846. The horse to have been the property of Mr. Isaacs for the last eighteen months. The match to come off on the Uxbridge road. (Signed) John Varney."

"The money to be deposited with Mr. Hickman on or before the 28th of March 1846. Witness to 1*l.* having been staked on both sides for the completion of the above match, (Signed) Samuel Ellis; J. Hickman for Mr. Isaacs."

Varney and Isaacs severally deposited 20*l.* with the defendant. The plaintiff gave the defendant notice before the time appointed for the race that he repudiated the wager and demanded back his money, which the defendant refused to return. The plaintiff did not attend to contest the race, Isaacs walked over the ground, and the money was paid over to him by the defendant on the same day. The present action was brought by the plaintiff to recover the 20*l.* deposited by him in the hands of the defendant.

The defendant's counsel, at the trial, submitted that the plaintiff must be non-suited on the ground that the contract proved was an illegal contract under the 8 & 9 Vict. c. 109. s. 18. (1). The learned

(1) Which enacts, "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of

Chief Justice overruled the objection, and told the jury, that if they were satisfied that the plaintiff had revoked the authority of the stakeholder before the determination of the event, the plaintiff was entitled to recover. The jury found for the plaintiff. A rule having been obtained for a new trial, on the ground of misdirection,—

*Talfourd, Serj.* and *Phinn* shewed cause.—The verdict is right, and may be supported upon two grounds: first, the act 8 & 9 Vict. c. 109. does not apply to a case like the present; and, secondly, if it does apply, the defendant ought to have pleaded that the contract was illegal. Looking to the preamble of the statute, "Whereas the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom," and construing it in connexion with the 18th section, it is contended, that the intention of the legislature was to prevent the recovery of the stake deposited to abide the event of a wager by the party who assumed to have won the wager; it was not intended to prevent either party who had deposited money from voluntarily withdrawing his assent to the contract before the determination of the wager, and thus of his own free will preventing the result which the act was passed compulsorily to prevent. If the construction contended for by the defendant be correct, then the title of the act should be: "An act to continue wagering," &c., for its effect will be that the *locus pœnitentiæ* always allowed in agreements which savour of illegality is taken away, and a thoughtless wager hastily entered into cannot be departed from. The latter part of the 18th section "that no suit shall be brought in any court of law for recovering any sum of money won upon any wager," is an expansion and repetition of the former part, "all contracts by way of wagering shall be null and void;" and the effect intended, and in fact accomplished,

money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum or money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

by the 18th clause is to withdraw from courts of justice the unprofitable and idle task of inquiring into and deciding which of two persons had won a wager and was entitled to the stakes. If the language be ambiguous the Court will not give a wider sense to the words of the 18th section than is warranted by the obvious intention of the statute, but will restrain the meaning within proper limits—*Dwarris on Statutes*, p. 580, ed. of 1848, *Salkeld v. Johnston* (2), *Crespigny v. Wittenoom* (3), *Green v. Wood* (4), *Bac. Abr.* tit. 'Statutes' (1), 5. Secondly, if the statute did constitute a defence, such defence should have been pleaded specially, and cannot be taken advantage of under *nunquam indebitatus*. The Statute of Limitations contains words quite as strongly prohibitory as this statute; so does the 6 & 7 Vict. c. 73. s. 37, which makes the delivery of an attorney's bill a condition precedent to the commencement of an action. In both those cases a special plea is required, and the same principle must govern this case. The general issue denies that a debt ever existed. If the effect of this statute be to create a disqualification, which disables a plaintiff from recovering that which once existed as a debt, such a defence must be specially pleaded—*Potts v. Sparrow* (5), *Martin v. Smith* (6). They also referred to *Marryatt v. Broderick* (7), and *Emery v. Richards* (8).

*Byles, Serj., Parry, and Joyce* supported the rule.—Before the passing of the late statute 8 & 9 Vict. c. 109. a deposit even upon a legal wager could be recovered in an action, if notice were given to the stakeholder before the money was paid over—*Eltham v. Kingsman* (9), *Egerton v. Furzeman* (10); and it cannot be disputed that there was a right to recover the deposit if the wager were illegal; nevertheless, it is to

(2) 1 Hare, 196, 207; s.c. 11 Law J. Rep. (N.S.) Chanc. 201.

(3) 4 Term Rep. 790.

(4) 7 Q.B. Rep. 178; s.c. 14 Law J. Rep. (N.S.) Q.B. 217.

(5) 1 Bing. N.C. 594; s.c. 4 Law J. Rep. (N.S.) C.P. 201.

(6) 4 Ibid. 436; s.c. 7 Law J. Rep. (N.S.) C.P. 201.

(7) 2 Mee. & Wels. 369; s.c. 6 Law J. Rep. (N.S.) Exch. 113.

(8) 14 Ibid. 728; s.c. 16 Law J. Rep. (N.S.) Exch. 49.

(9) 1 B. & Ald. 683.

(10) Ry. & Moo. 214.



be observed, that the rule that an authority coupled with an interest cannot be revoked, does not seem to have been alluded to in these cases. The object and intention of this part of the 18th section of the statute was threefold: first, to put an end to all actions of every sort, whether before or after notice, whether before or after the event, which depended in any way upon wagers or contracts by way of wagering; secondly, to protect the stakeholder from an action under all circumstances; and thirdly, to operate as a penalty against every person who made a deposit to abide the event of a wager. The words of the 18th section, "no suit shall be brought for recovering any sum which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," are very strong, and it is submitted conclusive to shew that the plaintiff in this case ought to have been nonsuited. As to the second point, it was not necessary to state this defence in a special plea. The construction of the 18th section is as if it had enacted in terms, "that no promise shall be implied from any such deposit." There never was any right of action; there never was any debt, and therefore the new rules of pleading do not apply. This is more like the case of an apothecary who cannot recover without proving his certificate, though the general issue be the only plea on the record—*Shearwood v. Hay* (11).

[CRESSWELL, J.—I think that instance is more like the Statute of Frauds.]

MAULE, J. (12).—This is an action of debt for money had and received brought by the plaintiff against the defendant, on the ground that the defendant had received 20*l.* in money which he held to his (plaintiff's) use. It appears there had been a wager on a horse-race, and that 20*l.* had been deposited by each of the parties with the defendant, and that before the race was run the plaintiff gave notice that he would not run the race, and desired that the defendant would return his deposit to him. Under these circumstances, it is contended, that the plaintiff in this case cannot recover: first, on the ground that the 8 & 9 Vict. c. 169. s. 18.

(11) 5 Ad. & El. 383; a.c. 5 Law J. Rep. (N.s.) K.B. 246.

(12) Wilde, C.J. was sitting at Nisi Prius, and Coltman, J. had left the court.

prevents the bringing of an action like the present; and, secondly, supposing that not to be so, then in order to avail himself of that section the defendant ought to have pleaded it specially. I am of opinion that the plaintiff is entitled to sustain the verdict notwithstanding the objection involved in the first point; but that if that objection had been a good one the defendant could not render it available as a defence without having specially pleaded it. With respect to the first point the question is, whether when a wager is rendered void by the first clause of the 18th section of the act, a stakeholder can be made liable at the suit of one party who has repudiated the wagering contract. Now the first part of the section provides that all contracts or agreements by way of gaming or wagering shall be null and void; it does not stop there, but further enacts that "no suit shall be brought or maintained for recovering any sum of money alleged to be won upon any wager," and also that no suit shall be maintained for recovering any sum "which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Now, the second provision was certainly comprehended in the first, and would have been the legal consequence of the first; but as there is nothing unusual in an act of parliament stating in terms that which would otherwise have been inferred, I do not think that fact ought to have any great weight in construing the act in question. Then, with respect to the third clause, it is said that provision would be idle, inasmuch that it would be no more than the legal consequence of the first unless there was given to it the further effect of depriving a party of his right to recover a deposit under a repudiated wagering contract. This construction, it is true, would give an operation to the clause beyond that which was merely the consequence of and incidental to the previous parts of the section. But I think if the second part of the section be looked at, it is more conformable that the third part should be considered as no more than an exposition of the legal consequence of the first. The second clause relates to the case where a winner brings an action against a loser, seeking to recover against a loser; and although the third clause might have been omitted, yet, if the second were

inserted then the third became necessary. I think, therefore, on looking closely at the section and treating it as a matter of grammatical construction, that it does not apply to a case of a repudiated contract such as this. This construction, however, can, I think, be supported on still higher ground. It seems to me that the present action cannot be considered as an action brought to recover a sum of money or valuable thing which had been deposited in the hands of any person to abide the event of any wager. Such an action would be one in which the plaintiff would claim the money, because it had been deposited in the defendant's hands to abide the event of a wager: but here it is quite the contrary; the money is claimed because it is money which belongs to the plaintiff and which the defendant holds for him, and is under no obligation to pay over to anybody else. After the notice of repudiation it ceased to be money in the defendant's hands to abide the event of a wager, and became money in his hands belonging to the plaintiff, which the defendant had no good reason for retaining. Upon these grounds, I think the case ought to be determined in the plaintiff's favour. It was said that the scope of the act was to prevent gaming, and to operate as a penalty upon every party who made a deposit, by disabling him from recovering it back, and that

therefore the construction contended for by the defendant, as it would have the effect of discouraging gaming, ought to be upheld. But I do not think that it is reasonable to suppose that the act was intended to impose so penal a forfeiture as that suggested. Supposing, however, the true construction of the 18th section to be, that the plaintiff is thereby deprived of the right to recover back his stake, then I think it is necessary that such a defence should be specially pleaded, although in the present case it is unnecessary to give any decision on that point.

CRESSWELL, J.—I am also of opinion that the words of the act do not apply to this case. It is difficult to say whether the latter clauses of the 18th section are to be considered superfluous, or as inserted *ex abundanti cautela*. Looking, however, at the whole scope of the act it appears to me that it leaves the claim of a person to his deposit under a repudiated wager, as here, just as it was before at common law, and therefore that the plaintiff is entitled to recover. On the second objection as to pleading specially, I also think, though it is not necessary to decide the point, that a defence on the ground of illegality under the statute ought to be specially pleaded.

WILLIAMS, J. concurred.

*Rule discharged.*

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END OF MICHAELMAS TERM, 1847.

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# CASES ARGUED AND DETERMINED

IN THE

## Court of Common Pleas.

HILARY TERM, 11 VICTORIÆ.

1848. }  
Jan. 14. } LINEGAR v. HODD.

*Indebitatus assumpsit — Contract Executory and Executed.*

*Where the father of an illegitimate child, in order to prevent the mother from applying to the magistrates for an order in bastardy, promised to pay her 2s. 6d. per week for the child, and the time for going before the magistrate had expired before action brought without any application having been made: — Held, that indebitatus assumpsit lay at the suit of the mother against the father for the child's maintenance, the consideration, which was originally executory, having been executed.*

Assumpsit for meat, drink, and necessities supplied by the plaintiff, at the request of the defendant.

Plea—Non assumpsit.

At the trial, before the under-sheriff of Surrey, it was proved that the plaintiff was the father of an illegitimate child by the defendant; that after the birth of the child the plaintiff was about to apply to the magistrate for an order in bastardy; that the defendant, in order to prevent her from doing so, said he would pay her 2s. 6d. a week for the child; that he did so for some time, but had refused to do so any more; and that the time limited by the statute for applying for an order in bastardy had expired

before the commencement of the action: On behalf of the defendant, it was objected, that *indebitatus assumpsit* would not lie, and that the declaration ought to have been special, the consideration being executory and not executed. A verdict was found for the plaintiff, but leave was reserved to the defendant to move to enter a nonsuit.

Phinn now moved for a rule nisi accordingly.—The express promise proved does not support the declaration. The consideration was the forbearing to go before the magistrates. The mere moral consideration arising from the duty to support an illegitimate child would not be sufficient to maintain the promise. The insufficiency of a moral consideration is established in *Eastwood v. Kenyon* (1) and *Mortimore v. Wright* (2).

[WILLIAMS, J.—The consideration in those cases was executed. Here, it is executory, namely, to maintain the child.]

In *Jennings v. Brown* (3), the father of an illegitimate child promised the mother that if she would maintain it he would pay an annuity, and it was held that the promise was founded upon a sufficient consideration. But the point now made is, that there is

(1) 11 Ad. & El. 438; s. c. 9 Law J. Rep. (n.s.) Q.B. 409.

(2) 6 Mee. & Wels. 482; s. c. 9 Law J. Rep. (n.s.) Exch. 158.

(3) 9 Ibid. 496; s. c. 12 Law J. Rep. (n.s.) Exch. 86.

here an express promise proved, which does not correspond with the promise alleged in the declaration to pay for the maintenance on request.

**WILDE, C.J.**—As the transaction in this case was one which might be made the foundation of an action, it becomes a question of pleading how it should be stated in the declaration; and looking at the nature of the action, the objection to the pleading ought to be a strong one to induce the Court to sustain it. The consideration for the agreement was the forbearance of the plaintiff from applying to the magistrates, and the period for applying had passed by before the commencement of the action, so that the defendant has had the full benefit of the forbearance. Therefore the contract has been executed on the plaintiff's side; and when a contract, executory at the time it was made, has been executed, a general *indebitatus* count is sufficient.

**CRESSWELL, J.**—I am of the same opinion. I think there was evidence to support the common count. If there was any special contract it has been performed, and nothing further was to be done but to pay the money.

**WILLIAMS, J.**—I am of the same opinion. The agreement on the part of the defendant was to this effect:—"If you will maintain the child out of your own resources, I will reimburse you 2s. 6d. a week." I think the verdict was correct.

*Rule refused.*

1848. }  
Jan. 15. } *Ex parte CARR.*

*Fines and Recoveries Act—Acknowledgment to bar Dower—Affidavit on Paper—Practice of Court.*

*The certificate of acknowledgment of a married woman to bar her dower, taken under a special commission, was verified by an affidavit written on paper, contrary to the usual practice of the Court, by which such documents are required to be on parchment:—Held, that the affidavit and other documents might be received and filed.*

A special commission had been issued to take the acknowledgment of a married woman at Toronto to bar dower: the time

for the return of the commission expired on the 14th of January. The documents were presented to the officer to be filed on the 12th of January, which he declined to do without the order of the Court.

*Ball* moved that the officer might be directed to receive and file the commission, &c., and that the time for the return be enlarged till the 1st of February next. The affidavit verifying the certificate required by the 85th section of the 3 & 4 Will. 4. c. 74. is written on paper, and it is suggested by the officer that that document should be on parchment. There is no rule of court which renders it obligatory on parties to make use of parchment; but such was the invariable practice which prevailed under the rule of Hil. term, 14 Geo. 3, in respect of affidavits verifying acknowledgments of fines and warrants of attorney to suffer recoveries. The same practice has been adopted under this act; but it is submitted that the reason of the practice as to the use of parchment does not apply here. An acknowledgment to bar dower operates only for a very limited period during the lifetime of the married woman, and the same durability in the material is not required as when the document operates so as to pass the fee simple in an estate. In all other respects the documents are quite regular, and the Court will not deem it necessary to issue a fresh commission to Toronto, in order that the practice (in this instance unnecessary) may be strictly complied with. The documents were presented to the officer before the commission expired; but in consequence of his refusal to receive them the time for its return has now gone by, and an extension of the time is therefore required.

By the COURT.—The affidavit and notarial certificate are required to satisfy the Court that the acknowledgment has been duly taken. In this case, which is merely an acknowledgment of a married woman to bar her dower, it is not so necessary that the affidavit should be on parchment as in the case of documents verifying acknowledgments which pass the estate in fee. The usual rule that documents of this nature must be on parchment may be in this instance relaxed, and the documents may be received and filed by the officer.

*Motion granted.*

1848. }  
Jan. 15. } *DOE d. GAINS v. ROAST.*

*Will, Construction of — Description of Devises.*

*A testator, by his will of November 1845, devised an estate to his "dear wife Caroline;" he had been twice married,—in 1834 to Mary, in 1840 to Caroline; they both survived him, and he lived with the latter up to the time of his death in November 1845:—Held, that the words "dear wife" were not inapplicable to Caroline, and that she was entitled as devisee.*

Ejectment for the recovery of a house and premises situate at No. 5, Osborn Street, Whitechapel.

The case was tried, before Wilde, C.J., at the sittings for Middlesex after last Michaelmas term, when it appeared that Caroline Gains, the lessor of the plaintiff, claimed as devisee of one John Gains, who died on the 20th of November 1845 leaving a will, dated the 5th of November 1845, which directed "As to all my freehold messuage or tenement situate No. 5, Osborn Street, Whitechapel, in the county of Middlesex, and also my ready money, household furniture, plate, &c., I give, devise, and bequeath the same and every part thereof unto my dear wife Caroline, her heirs, executors and administrators absolutely." The lessor of the plaintiff proved that she was married to the testator at St. Paul's, Islington, some time in the year 1840, and lived with him as his wife from that period up to the time of his death. The defendant then proved that the testator was married on the 3rd of March 1834 to one Mary Whitpen; that he soon afterwards left her; that she was now living, and therefore contended that the words of the devise, "my dear wife," must be taken to designate his first and lawful wife; and that she was entitled to the premises. The learned Judge directed a verdict for the lessor of the plaintiff, reserving liberty to the defendant to move to have the verdict entered for him; and now—

*Hawkins* moved for a rule to shew cause accordingly.—The only person who answers the description in the will is Mary, the tes-

tator's real wife. The lessor of the plaintiff, Caroline Gains, never having been his wife at all, cannot shew any title to the premises in Osborn Street.

[MAULE, J.—There is an old rule—*veritas nominis tollit errorem demonstrationis*.]

It is not allowable to give extrinsic evidence to explain any word in a will, which of itself has a well known and well defined meaning: thus in *Doe d. Brown v. Brown* (1) no evidence was allowed to shew what the word "copyholds" meant. If there be a devise to children, and the testator leave only one legitimate child and others illegitimate, the latter will not take—*Bagley v. Mollard* (2). And a person described in a will as heir, if not really heir, will be excluded—*Mounsey v. Blamire* (3). In that case "heir" meant legal heir; in this "wife" means legal wife.

[CRESSWELL, J.—Caroline also means Caroline.]

There can be no doubt that the testator meant to give the premises to the lessor of the plaintiff; but evidence of his intention is not admissible. Extraneous circumstances cannot alter or extend the unambiguous and plain words in this will; and as there is but one lawful wife, Mary, she is the only person legally designated and legally entitled to the premises. He referred also to *Jarman on Wills*, vol. i. 331, vol. ii. 134, *Pitcairne v. Brace* (4), and *Doe d. Hiscocks v. Hiscocks* (5).

MAULE, J.—I am of opinion there should be no rule granted in this case. The testator devises "to my dear wife Caroline," which is a devise to a certain person by name; the name is that of the lessor of the plaintiff; no competitor appears for it, and it is not suggested there is any other person to whom the testator contemplated it would apply. The question then arises, whether the lessor of the plaintiff, not being the legal wife, can take under the will, which describes her as "my dear wife." One of Lord Bacon's *Maxims of the Law* enlights us

(1) 11 East, 441.

(2) 1 Russ. & Myl. 581; s. c. 8 Law J. Rep. Chanc. 145.

(3) 4 Russ. 381.

(4) Cas. Temp. Finch, 403.

(5) 5 Mee. & Wels. 363; s. c. 9 Law J. Rep. (N.S.) Exch. 27.

upon this subject: *veritas nominis tollit errorem demonstrationis* (6), and one of the examples he gives by way of illustration is this: "So if I grant land *Episcopo nunc Londinensi qui me erudit in pueritid*, this is a good grant, although he never instructed me." No doubt, this rule, which used to be most strictly applied, has been relaxed in modern times when it can be shewn from what appears on the face of the will itself, that the testator meant another and a different person from the person named in the will; the reason is, in order that the real intention of the testator may be carried out; but in this case there is a struggle against the old rule that the name must prevail, not on the ground of the testator's intention having failed, but in order to get rid of a devise to a person by name who is and was intended to be named in the will. As there is no dispute that the testator intended that the lessor of the plaintiff should have the estate, I think that even if the words "dear wife" were inapplicable to her, still she would take as devisee; but that is not so. Caroline was his wife *de facto*; she lived with him up to the time of his death; he might have considered the first an invalid marriage, and it is clear that he insists upon the last marriage by his will. The description is not inapplicable altogether, but really and properly applicable in a certain sense, and that sense understandable by any one. An ordinary person would have said the testator had two wives: he calls Caroline his "dear wife," and it seems to me these terms are intelligible only when applied to the lessor of the plaintiff. Interpreting, then, the language of this will according to its proper acceptation, and the circumstances existing at the time of its execution, there can be no doubt what the testator intended; and it is equally free from doubt that he used apt words to effectuate his intention.

CRESSWELL, J.—I agree, for the reasons which have been fully stated by my Brother Maule. The judgment of Lord Abinger in *Doe d. Hiscocks v. Hiscocks* lays down the rule which we now act upon.

WILLIAMS, J. and WILDE, C.J. concurred.

*Rule refused.*

(6) 25th Maxim.

1848. } STEAD v. WILLIAMS AND  
Jan. 18. } OTHERS.

*Insolvent Plaintiff—Patent Cause—Costs, Security for.*

*At the trial of an action for the infringement of a patent, the plaintiff obtained a verdict which was afterwards set aside, and a new trial granted. Before the second trial, the plaintiff became insolvent, and the defendants applied for security for costs:—Held, that in such case, the Court will not order a plaintiff to give security for costs, unless it can be fairly presumed that the action is adopted and promoted by his assignee.*

This was an action for the infringement of two patents. The declaration consisted of two counts, to which the defendants pleaded, first, not guilty; and, secondly, that the plaintiff was not entitled to the patents. The action was tried, at the Liverpool Summer Assizes, 1843, when the plaintiff abandoned his right to the patent, an assignment of which was alleged in the first count of the declaration, and succeeded in getting a verdict on the second count. A rule *nisi* was granted to set aside the verdict then obtained, which was made absolute in Trinity term, 1844; the venue was then changed to Middlesex, and the plaintiff gave notice that he should proceed against the defendants on both counts of the declaration. No further steps had been taken in the action since Trinity term, 1844. On the 7th of November 1847 the plaintiff was taken in execution, at the suit of one Anderson, for the sum of 300*l.*; he was committed to prison on the 25th of November, and, on the 26th of December 1847, an order was obtained on Anderson's petition, under the 36th and 37th sections of 1 & 2 Vict. c. 110, vesting the insolvent's property in the official assignee. The plaintiff had given notice of trial for the sittings after Hilary term, and now

*Channell, Serj.* applied for a rule calling upon the plaintiff and his assignee to shew cause why the plaintiff should not give security for costs, and, in the mean time, all proceedings be stayed.—The expenses of this action will be very heavy, and the defendants have a good defence. Notice has been given of this application, and as the plaintiff is now insolvent, the defendants

ought to have, and are entitled to a stay of proceedings till security be given for their costs—*Denton v. Williams* (1). There is a distinction between actions of contract and actions of tort in respect of a right to security for costs; and though this is an action of tort, still it is of such a nature that it would survive to executors, and may be proceeded in by the assignee.

[WILDE, C.J.—When assignees proceed to try a right in the insolvent's name for their own benefit, the rule is, they must then give security for costs. Does the assignee adopt this action?]

There is little doubt such will be the case, for though the damages recovered in the action would go to the insolvent, still the benefit of the right to the patent (if thereby substantiated), which would be of great value, would go to the assignees—*Mason v. Polhill* (2). In *Denton v. Williams* the Court ordered security for costs to be given without an affidavit that the action was prosecuted by the assignees; that was also an action of tort, and there is no distinction for this purpose between a bankruptcy and a voluntary or forced insolvency—*Heaford v. Knight* (3), *Wray v. Brown* (4).

[MAULE, J.—No man is to be estopped from his action on account of his poverty. If you make out that the plaintiff is not proceeding on his own account, then there is a reason for requiring security for costs.]

WILDE, C.J.—I see no reason for ordering the plaintiff to give security for costs, unless we were satisfied that the action was only prosecuted in his name for the benefit of other parties. Here no application has been made to the assignee or execution creditor to know whether they, or either of them, adopt the action, and, therefore, the first material on which to support this motion fails. And surely the Court is not to infer that the action will be prosecuted by the assignee; the presumption is the other way, for he might secure the benefit of the insolvent's patent rights by an easier and less expensive course than an action at law. In such an action the damages would be

(1) 8 Dowl. P.C. 123.

(2) 1 Cr. & M. 620; s. c. 2 Law J. Rep. (n.s.) Exch. 233.

(3) 2 B. & C. 579; s. c. 2 Law J. Rep. K.B. 114.

(4) 6 Bing. N.C. 271; s. c. 9 Law J. Rep. (n.s.) C.P. 174.

merely nominal, whilst the responsibilities it would entail upon an assignee are very great. We cannot see any ground for granting this rule.

MAULE, J., CRESSWELL, J., and WILLIAMS, J. concurred.

*Rule refused.*

1848. }  
Jan. 25. } *In re —.*

*Fines and Recoveries Act—Certificate of Acknowledgment—Description of Married Woman.*

*The certificate of acknowledgment of a deed by a married woman, described her as Mary, the reputed wife of A, otherwise Mary —, spinster; she was similarly described in the deed. The Court directed their officer to receive and file the certificate and affidavit.*

*Prideaux* moved that the officer of the court appointed under the 89th section of the 3 & 4 Will. 4. c. 109, should be directed to receive and file the certificate and affidavit of the acknowledgment of a deed by —, on behalf of whom he made this application. The deed described the applicant as *Mary, the reputed wife of A. B, otherwise Mary —, spinster*. The certificate of the Commissioners was in the usual form, except that it described the applicant as "*Mary, the reputed wife of A. B, otherwise Mary —, spinster*." The affidavit of verification described the applicant as *Mary, the wife of A. B, otherwise Mary —, spinster*.

[WILDE, C.J.—Did she execute the deed as, and does she call herself, a married woman?]

Yes, she does; there is nothing but the unusual style of description of the party which induces the officer to decline to file the documents without an order from the Court. There seems to be some doubt in the minds of the Commissioners as to the validity of the marriage; but it is submitted, that as the description in the documents corresponds with the description in the deed, there is in reality no such departure from the prescribed forms as warrants their rejection.

The COURT directed the officer to receive and file the certificate and affidavit.

*Motion granted.*

1848. }  
Jan. 27. } *Ex parte HUTCHINSON.*

*Fines and Recoveries Act—Certificate—Jurat.*

*It is not necessary to state in a certificate, under 3 & 4 Will. 4. c. 74. s. 83, the specific place at which the acknowledgment of a married woman has been taken; it is enough if the deed appear to have been executed within the terms of the commission.*

*A British consul abroad has no authority per se to administer oaths verifying the documents required by this act; but if a public notary of the foreign country certify that by the laws of that country the British consul is competent to administer oaths, the certificate and other documents sworn before him will be received by the Court.*

A special commission had been issued to three merchants at Madeira, or any two of them, to take the acknowledgment of a married woman, under 3 & 4 Will. 4. c. 74. s. 83, which was certified to have been done at Madeira. The jurat to the certificate was in the following form:—

“Sworn in the island of Madeira, on the 27th of November, in the year of our Lord 1847. Before me,

(Signed) “George Stoddart,

“Her Britannic Majesty’s consul, and authorized by the laws of the island of Madeira to administer oaths in the island of Madeira.”

On the same parchment was added the following certificate:—

“I, Servulo Nicolao Sowzao Drommond, notary public, &c. at Madeira, certify that Her Britannic Majesty’s consul, as such, is entitled to administer oaths in the island of Madeira.”

Cole now moved that the officer of the court might be directed to receive and file the above certificate, &c., which he had objected to do without the order of the Court.—It was suggested, first, that the certificate should have specified the place at which the acknowledgment was taken; but it is submitted, that the words “at Madeira” are sufficient, and that the place in the island where the commission was executed

need not be now precisely defined. *In re Shufflebottom* (1) decides that a certificate stating that the acknowledgment was taken in Philadelphia is sufficient. The General Rules of this court of Hilary term, 1834 (2), do not direct how certificates of acknowledgment, taken under special commissions, are to be verified; those rules are to be confined to acknowledgments in this country, and the officer has adopted the practice with respect to acknowledgments taken abroad under this act, which prevailed in this court under the rule of this court of Hilary term, 14 Geo. 3. (3), relating to common recoveries. It has been held that the 6 Geo. 4. c. 87. s. 20, which authorizes a British consul at a foreign port to administer oaths, &c., does not give such consul power to act in cases of this nature, where there are native authorities to administer the oath—*In re Eady* (4); but as it appears here from the jurat, that the British consul can administer an oath in Madeira by the laws of that place, which fact is duly authenticated by the certificate of a public notary at Madeira, the spirit and intention of the act, as well as the practice of this Court, are abundantly satisfied.

*Per Curiam.*—We think the certificate of the notary shews that the British consul was authorized to administer the oath, and therefore the certificate, &c. may be received and filed.

*Motion granted.*

(1) 6 Scott, 898.

(2) 1 Bing. N.C. 242; s. c. 3 Law J. Rep. (N.S.) C.P. 1.

(3) By which it is ordered, “That if the party or parties shall be in Ireland, or in any other part or parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in this court, or before some magistrate of the place, where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary, which notary shall also certify, in writing, under his hand and seal, as well the due administering of this oath, as also the name, signature, and office of the magistrate administering the same.”

(4) 6 Dowl. 615.



1848. }  
Jan. 29. } GILBERTSON v. RICHARDSON.

*Trespass—Declaration—Damages.*

*The defendant drove against the plaintiff's chaise, and the collision threw the person sitting in it on to the front part of the chaise, which caused the horse to kick and break the chaise. The declaration stated, that the defendant drove his chaise against the plaintiff's chaise, and thereby greatly crushed and broke to pieces the chaise of the plaintiff:—Held, that the trespass was a continuing trespass; that the plaintiff had properly alleged, and was entitled to recover all the damages occasioned by the collision.*

**Trespass.** The declaration stated, that the plaintiff before and at the time of the committing of the trespass hereinafter mentioned, to wit, on the 22nd of June 1847, was lawfully possessed of a certain carriage, to wit, a chaise of great value, to wit, of the value of 50*l.*, and of a certain horse then drawing the same, in which said chaise the plaintiff was then riding in and along a certain public and common highway, and the defendant was then riding in a certain other carriage, to wit, a chaise then drawn by a certain other horse, which said last-mentioned chaise and horse were then under the care and management of the defendant, in and along the said highway, and thereupon the defendant then, to wit, on the day and year aforesaid, with force and arms, &c. drove the said chaise, so then under his care and management, with great force and violence upon and against the said chaise of the plaintiff, and thereby then greatly crushed, broke to pieces, and damaged the said chaise of the plaintiff, and the said chaise of the plaintiff thereby then became and was rendered of little or no use or value to the plaintiff, and the plaintiff was thereby then subjected to and incurred a great expense, to wit, 40*l.* in repairing the said chaise, to the plaintiff's damage, &c.

**Plea—Not guilty.** Issue thereon.

At the trial, before Coltman, J., at the Sittings in London, on this day, it appeared that the plaintiff had alighted from his chaise, in Oxford Street, to adjust some part of the harness, leaving R. T. sitting on the seat, when the defendant drove his chaise against the plaintiff's; the shock

threw R. T. off the seat on to the splashing-iron in front, which then touched the horse (a high-spirited one) of the plaintiff, which thereupon kicked and broke the chaise, doing considerable damage thereto. The learned Judge told the jury that if the damage were occasioned by the wilful and negligent act of the defendant, they should find their verdict for the plaintiff for the full amount. The jury found for the plaintiff accordingly.

**Bytes, Serj.** moved for a new trial, on the ground of misdirection, or to reduce the damages.—The question which should have been left to the jury was, would the horse have kicked if he had not been an unsteady horse? For if the unsteadiness of the horse were the real reason of the damage, the plaintiff would not be liable. Then, under this declaration as framed, the plaintiff can recover nothing but the damage which occurred at the time the plaintiff's chaise struck the defendant's chaise, and that amounted only to the sum of 2*d.* The damage done by the horse kicking might have been recovered in an action on the case, and perhaps in trespass if properly laid. The declaration states that the defendant drove against the plaintiff, and nothing more.

[**CRESSWELL, J.**—Suppose you drive against a carriage, knock off the coachman, and break his leg, what is the form of action?]

It is submitted that the proper form would be an action on the case. *Scott v. Shepherd* (1) shews that all damage consequential upon the trespass must be recovered in an action on the case.

**MAULE, J. (2).**—*Scott v. Shepherd* is a very different case from this, and furnishes no authority for this application. I have no doubt that the damage was contemporaneous with the act done; the trespass was a continuing trespass, and the learned Judge's direction to the jury was right, and no rule can be granted.

**CRESSWELL, J.** and **WILLIAMS, J.** concurred.

*Rule refused.*

(1) 2 W. Black. 892.

(2) Wilde, C.J. was absent from indisposition.

1848. } THORPE v. BARBER AND  
Feb. 10. } ANOTHER.

*Witness—Co-defendant, Admissibility of, in Action of Tort.*

*One of two defendants, in an action of tort, suffered judgment by default, and it was sought to call him at the trial to give evidence for his co-defendant:—Held, that the proposed witness was inadmissible; and that being a party to the record, interested in the event of the suit, he was not within the privilege of the 6 & 7 Vict. c. 85.*

Trover for beans, peas, &c.

Plea,—by defendant Barber, not guilty by statute; the other defendant, Spall, suffered judgment by default.

This action was tried, before Coleridge, J., at the Spring Assizes for Suffolk, 1847, when it appeared that Spall, who was a constable, accompanied the defendant Barber to the house of the plaintiff to search for a lamb that had been stolen from Barber. Leave was given by the plaintiff to search his house for the lamb, which was not found there, but a large quantity of peas, beans, &c. were observed by the constable, who, suspecting they were stolen, took possession of them. Barber, the other defendant, procured a cart, in which the beans and peas were taken away; the plaintiff was taken into custody, examined before, and remanded by, the magistrate. No owner could be found for the beans, peas, &c., which were subsequently demanded of the constable, who refused to deliver them. At the close of the plaintiff's case, *Byles, Serj.* proposed to call Spall as a witness, not with a view to reduce the damages, but for the purpose of shewing the innocence of Barber, who, he alleged, merely acted in the transaction in aid and assistance of the constable. On objection taken, the learned Judge ruled that his evidence could not be received.

A rule for a new trial had been obtained by—

*Byles, Serj.*, and now—

*Couch* shewed cause.—The learned Judge rightly rejected the witness at the trial. There is one case at *Nisi Prius*, *Ward v. Haydon* (1), in which Lord Kenyon decided

that a defendant in trover, who had suffered judgment by default, could be examined on the part of his co-defendant; but in this case the jury are summoned to try and to assess the damages, whereas it does not appear that it was so in that case.

[MAULE, J.—That would follow as a matter of course, would it not?]

No; the plaintiff might have entered a *nolle prosequi* against Haydon, who was called as a witness; and then that decision is reconcileable with the true principle which governs the admissibility of witnesses. The act 6 & 7 Vict. c. 85. does not affect this case; that act leaves the admissibility of parties to the record as witnesses just as it stood before the act passed. The case of *Chapman v. Graves*, reported in a note to *Stevens v. Lynch* (2), decides that a co-defendant in an action of tort, cannot be called for a plaintiff, and some expressions are there used by Le Blanc, J., which seem to approve of Lord Kenyon's ruling in *Ward v. Haydon*, but the opinion there unnecessarily expressed does not make *Chapman v. Graves* an authority here. In *Mash v. Smith* (3), Best, C.J. admitted a witness out of deference to the opinion of Lord Kenyon, at the same time expressing his doubt of the admissibility, and the reason for that doubt must prevail here: "The witness may give such a complexion to the case as to reduce the damages." That is exactly the case here, and that decision is in my favour. It is submitted that a defendant in an action of tort is quite as much interested in favour of his co-defendant as he is in an action of contract, and it is unnecessary to quote cases to shew that in the latter form of action a defendant who has suffered judgment by default is not admissible. The rules on the subject are laid down in *Greenleaf on Evidence*, p. 501, and in *Phillipps on Evidence*, vol. 1. p. 53. The reason for his exclusion is, that if the defendant, for whom he is called, obtains the verdict, the witness is also thereby discharged. The same result may occur in an action of tort, as appears from the case of *Biggs v. Bengier* (4), where a verdict having been found for one defendant on a plea which shewed that the plaintiff had no

(2) 2 Campb. 333, n.

(3) 1 Car. & Pay. 577.

(4) 2 Ld. Raym. 1372.

(1) 2 Esp. 552.

cause of action, the judgment was arrested as to the other, who had allowed judgment to go by default.

[COLTMAN, J.—In that case the justification appeared on the record; it could not do so here.]

It is true that in the case referred to, there was a special plea, upon which the defendant succeeded; in this there is only the plea of not guilty "by statute," but under that a defence might be set up which would go to the whole cause of action, and the jury would then be directed to find nominal damages only against the defendant. It was suggested that the witness would be examined respecting the innocence of his companion *only*, and not with a view to reduce the damages, but the two matters cannot be separated; they are mutually involved, and the alteration or addition of any fact, as it stood upon the plaintiff's case, would materially affect the damages. There is also direct authority to shew that the examination of a witness cannot be restricted to a single point; if called, he may be examined on every point connected with the case—*Hawkesworth v. Showler* (5). Besides, it cannot be said that Spall was not a party interested in the suit: the jury were to assess the damages against him; he was, therefore, entitled to appear by counsel; and if called would be enabled to give evidence directly in his own favour.

*T. Sanders*, in support of the rule.—The point to be decided is an important one, and since the time of *Ward v. Haydon* it seems to have been generally admitted, in all the cases, as well as laid down in all the text-books on evidence, that a defendant in an action of tort, who has suffered judgment by default, may be examined for his co-defendant. From the report of that case it is evident that Lord Kenyon considered the point a good deal before he decided it. The defendants obtained the verdict, and his ruling seems never to have been questioned, though the plaintiff had every interest to move the Court, had there been any grave doubts about the correctness of his ruling. The report also shews that no *nolle prosequi* had been entered against the defendant, who was a witness: if such had been the case, his name need not have been mentioned

(5) 12 Mee. & Wels. 45; a.c. 13 Law J. Rep. (N.S.) Exch. 86.

at all, and the question about his liability to future costs could scarcely have been alluded to. The case is also to be found in *Peake's Additional Cases*, p. 126, and no suggestion of a *nolle prosequi* there appears. In *Mash v. Smith* the witness was admitted; and it cannot, therefore, be considered a decision against this rule. It does not appear what became of the verdict in that case; and the report is so unsatisfactory that it cannot be considered of much weight either way. *Chapman v. Graves* really decided that a defendant, who had suffered judgment by default, in an action of tort, was admissible as a witness for his co-defendant, but not for a plaintiff. The learned reporter states the law thus in a note to that case: "In an action of trespass, if one of several defendants allows judgment to go by default, he is not a competent witness for the plaintiff, *although he is for his co-defendants*;" and Le Blanc, J. says, referring to *Ward v. Haydon*, and a similar case, before Wood, B., at Lancaster, "In those two cases the co-defendant was called to exculpate the other defendants; here it is proposed to call a co-defendant to inculpate the others, and therefore the witness is inadmissible." *Chapman v. Graves* has frequently been referred to with approbation—*Brown v. Brown* (6), *Emmet v. Butler* (7), *Mant v. Mainwaring* (8); and thus there are the opinions of three different Judges (at the least) in favour of the admissibility of this witness. Lord Denman's Act does not affect the case; the witness can only be rejected on the ground of interest—*Worrall v. Jones* (9); and it is submitted that a defendant who has suffered judgment by default is called against his interest when called for a co-defendant. There is no contribution in actions of tort as there is in actions of contract; and it is his interest to fix his co-defendant, if possible, in order to transfer the whole liability, which now attaches to the witness, to that co-defendant.

[MAULE, J.—There is sometimes contribution, and even more than that, in an action of tort. Suppose A. cuts down a tree, on the land of a third party, by the command of B: if a verdict be obtained against

(6) 4 Taunt. 752.

(7) 7 Ibid. 607.

(8) 8 Ibid. 139.

(9) 7 Bing. 395; a.c. 9 Law J. Rep. C.P. 70.

both A. and B. would be bound to indemnify A.]

That would be upon B.'s express or implied assumpsit, arising out of collateral facts; and not referable to the simple fact of a verdict against A. and B. jointly in an action of tort; whereas, in an action of contract, the verdict against A. and B. imports of itself a vested right of contribution *inter se*. It is not necessary to shew that in no possible event can a witness be interested, in order to render him admissible; if his interest be much less, or nearly equal, on one side, his evidence is admissible. It is said in *Starkie on Evid.* 3rd edit. p. 105, in order to exclude a witness "the interest must be a present certain vested interest," and "not uncertain or contingent." The defendant here is much more interested to fix his co-defendant, and thus be enabled to escape all liability, than to reduce the damages; or at any rate the latter are so contingent and uncertain that the chance of their reduction in amount is not so vested an interest before they are assessed as to exclude him.

[COLTMAN, J.—The damages are certain, for, whatever they are, he is liable to pay them.]

He must pay everything unless his co-defendant is fixed; and no way of putting the case can shew more strongly his interest against the party for whom he is called. The principles upon which the defendant was admitted in *Pipe v. Steel* (10), shew that the co-defendant was admissible here; and in ejectment, which is in its nature an action of tort, a defendant who has suffered judgment by default is admissible as a witness for his co-defendant—*Dormer v. Fortescue* (11). *Hawkesworth v. Showler* does not apply: it was there proposed to call the wife of a defendant who had not suffered judgment by default; husband and wife are one and the same person, and examining the wife of a defendant is, in law, the same thing as examining the defendant himself; but in the judgment in that case Lord Abinger pointedly refers to, commends, and upholds the decision in *Ward v. Haydon*. The decision of the Judges in *Biggs v. Benger* is reported without any reasons; and there

is an older case—*Marler v. Eylett* (12), which decides that a defendant, in an action of tort, will not be discharged, though his co-defendant plead a justification on the record, and obtain a verdict. This witness was not proposed to be called to prove that no right of action existed against himself, but to shew the innocence of the defendant Barber.

COLTMAN, J.—I am of opinion that the learned Judge was right in rejecting the witness. It is said in the text-books no doubt since the authority of *Wood v. Haydon*, that a co-defendant, in an action of tort, who has allowed judgment to go by default, may be called for the defence; but the cases are not uniform, for *Mash v. Smith* is an authority the other way; and it appears from a case decided by Burroughs, J., *Webb v. Budd*, referred to in *Roscoe's Evidence*, p. 191, that a similar witness was rejected by him. *Webb v. Budd* is a later decision than *Mash v. Smith*, and this leads me to think that communication had taken place between some of the Judges since the ruling in *Mash v. Smith*, and that Burroughs, J. was then intentionally supporting the opinion of Best, C.J. in preference to that of Lord Kenyon. Upon principle, it appears, the witness is inadmissible; he has the greatest interest in reducing the damages as low as possible; and it does not appear that Spall was to be called to give evidence on any point which was not necessarily involved and connected with the damages.

MAULE, J.—I am of the same opinion. The witness proposed to be called was a co-defendant, and, being a party to the record, he would not be admissible if he were interested in the event, not being within the privilege of Lord Denman's Act. I think that *Worrall v. Jones* overrules *Chapman v. Graves*, and shews that his evidence could not be received. Suppose you try it, as you would upon the *voir dire*, thus, Is this witness admissible (without reference at all to what he is to prove) when nothing more appears than that he is upon the record? Clearly not, for Spall is interested to make the damages as small as possible. If we are allowed to look further than the record, and to inquire what the witness was called to

(10) 2 Q.B. Rep. 733.

(11) Bull. Nisi Prius, 98, 285.

(12) Cro. Jac. 134.

prove here, the answer is, he is not called to prove that another person was jointly guilty with me, which would not perhaps have materially affected the amount of the damages, but he is called to shew that there was no ground of action to the plaintiff; that the corn, &c. had been lawfully removed, or that his co-defendant was so little in fault that the damages should be assessed by the jury at the smallest possible sum. It appears to me, therefore, that the witness was directly interested, and to a very great extent, for the acknowledged and direct tendency of his evidence was to bring the suit to as favourable an end as possible, both for himself and for his co-defendant. As far as the cases go, *Worrall v. Jones* overrules *Chapman v. Graves*. *Ward v. Haydon* was doubted in *Mash v. Smith*, and ruled against in *Webb v. Budd* at Nisi Prius, by Burroughs, J. Both principle, therefore, and authority, are in favour of the rejection of this witness.

WILLIAMS, J.—I am of the same opinion. Whatever may have been the professed intention for calling the co-defendant, he was inadmissible as a witness, for his evidence must have affected the amount of the damages. I should be sorry to add to those inconvenient and anomalous cases, in which it has been decided that a witness may be called for one purpose, but not for another.

CRESSWELL, J. had left the court.

*Rule discharged.*

1847. { THE QUEEN v. THE SHERIFF OF  
Nov. 20.\* { DEVON, in the cause of NATHAN v. ELWORTHY.

*Sheriff—Fi. Fa., Non-return of, after Proceedings under Interpleader—Setting aside Attachment.*

*On an application to set aside an attachment issued against a sheriff for not returning a fi. fa., it appeared that the writ was issued on the 21st of July; the goods were seized on the 22nd; the sheriff was ordered on the 24th to return the writ; the goods were claimed on the 27th; the sheriff applied under the Interpleader Act, on the 30th; the plaintiff attended the summons and various adjournments thereof, and declined to contest the claim, which was allowed on the 12th of*

\* Decided in the previous term.

*August; on the 14th of September the sheriff returned nulla bona:—Held, that the delay on the part of the sheriff having caused no damage to the plaintiff, the attachment might be set aside on payment of all costs by the sheriff.*

A rule had been obtained, by *Montague Smith*, on the 15th of November, calling upon the plaintiff in the cause of *Nathan v. Elworthy*, to shew cause why the writ of attachment of contempt, issued forth against the said sheriff, pursuant to a rule made in the said cause on the 4th of November last, should not be set aside on payment, by the said sheriff to the said plaintiff, of his costs occasioned by the writ of attachment, and of this application.

*Lush* shewed cause.—The sheriff is not entitled to the relief prayed for; he was in contempt, and the attachment has been regularly issued. It appears by the affidavits that judgment had been obtained by *Nathan* against *Elworthy*, for 66*l.* 19*s.*, and a writ of *fi. fa.* was delivered to the sheriff on the 21st of July 1847; certain goods of *Elworthy's* were seized on the 22nd; the sheriff was ordered, on the 24th, to return the writ; on the 27th all the goods, except to the amount of 5*l.*, were claimed by one *Wilmot*, and there was a sum of 15*l.* 15*s.* due to the landlord for rent; on the 30th the sheriff took out a summons to interplead, which, after several adjournments, was finally settled on the 12th of August; the plaintiff then declined to accept an issue, and the claim was allowed. The sheriff ought to have made his return on the 2nd of August, but he waited until the 14th of September, and then returned *nulla bona*. The sheriff made no application for an enlargement of the time to make a return, and produced no affidavit before the Judge at chambers, on the 12th of August, to shew there were no other goods of *Elworthy's* in his bailiwick on which he could have levied, nor is there any such affidavit up to this time. The sheriff applied at chambers, on the 2nd of September, to set aside the order (of the 24th of July) to return the writ and all subsequent proceedings, on payment of costs, but *Williams, J.* refused to interfere.

[*WILDE, C.J.*—Are not proceedings under the Interpleader Act adopted instead of applying to enlarge the time?]

The facts are all before the Court; and it is contended that the sheriff was bound to make a return before the 14th of September; he might have returned *nulla bona præter*. *Cleaves v. Fisher* (1) shews that a return in the form suggested was, in this case, necessary. The plaintiff has been prejudiced by the sheriff's neglect and delay; he was unable to issue a *ca. sa.*, as he could not ascertain, till the return was made, whether the former writ had been rendered available. Elworthy might have had other goods than those claimed, and the sheriff might have had such other goods in his possession, in which cases the issuing a second writ would have been improper. By analogy of the cases on mesne process, under the old law, the sheriff is liable here.

*Montague Smith*, contra.—It appears upon the affidavit that the sheriff had difficult circumstances to contend with, and that it was necessary to apply to a special pleader to advise upon the return; this was done as soon as the sheriff understood he was required to make a return, which he did not anticipate after the interpleader summons was disposed of, and the plaintiff's claim abandoned. The most that the sheriff has been guilty of is a formal error, and the Court will, therefore, grant him relief. It is not suggested there were any other goods, or that the defendant has been prejudiced by the delay—*The Queen v. the Sheriff of Essex* (2).

WILDE, C.J.—It is generally understood in interpleader cases that the application relates to all the goods seized by the sheriff, that is, to all the goods of the debtor in his bailiwick. If the party who has put the sheriff in motion requires any further return he should say so, and give notice to the sheriff to that effect. There is nothing before the Court in this case to shew that the plaintiff has sustained any damage or suffered any inconvenience by the delay in the return, and the occurrence of that delay is, to a certain extent, explained by the sheriff. The attachment has been regularly issued, and the sheriff was clearly in contempt for not returning the writ earlier than the 14th of September. We think, how-

ever, the sheriff has been guilty of a formal default only, from which no ill effects have arisen to anybody. This rule, therefore, must be made absolute, and the attachment set aside on payment, by the sheriff, of the costs incident to these proceedings.

COLTMAN, J., MAULE, J., CRESSWELL, J., and WILLIAMS, J. concurred.

*Rule absolute, on payment of costs.*

1848. }  
Feb. 8. } WORTHINGTON v. WARRINGTON.

*Stamp Act—Lease—Agreement, Construction of.*

*It was stated in an agreement, which amounted to a lease, that A. agrees to let certain premises to B. for two years, at the rent of 50l. a year; that B. shall have the right of purchasing the premises at any time during the term, it being understood that A. is possessed of the same premises for his own life, and the life of M, and the survivor of them:—Held, that a 30s. stamp was sufficient.*

*Held also, that by the agreement A. was bound to make out a title to the premises for the lives of A. and M, and the survivor of them.*

Assumpsit. The declaration stated, that heretofore, to wit, &c., the defendant agreed to let to the plaintiff, and the plaintiff then agreed to take for two years, from the 9th of October 1844, at the rent of 50l. per annum, the house and premises, called Bremlow, then in the occupation of the plaintiff; and it was therein, in and by the said agreement in writing, also agreed between the said parties, that the plaintiff might, at his own expense, make such alterations to the house and premises as he might think proper, the same being improvements, and that the plaintiff should have the right of purchasing the said premises at the end of the said term of two years, for the sum of 600l., it being then understood by and between the said parties that the defendant was possessed of the said premises for his own life and the life of one Mrs. M, and the survivor of them. And the said agreement being so made, and in consideration thereof, and that the plaintiff, at the request of the defendant, then promised the defendant to perform all things

(1) 2 Dowl. N.S. 292.

(2) 8 Sco. 363; s. c. 9 Law J. Rep. (N.S.) C.P. 126.

in the said agreement contained on his, the plaintiff's, part to be performed, he, the defendant, then promised the plaintiff to perform all things in the said agreement contained on his, the defendant's, part, to be performed, and that he, the defendant, was possessed of the said premises for his own life and the life of the said Mrs. M, and for the life of the survivor of them, and that the said defendant would, if the plaintiff elected to purchase the said premises according to the said agreement as aforesaid, make and deduce to the plaintiff a good and valid title to the said hereinbefore-mentioned estate and interest of him, the said defendant, in and to the said premises; and the plaintiff avers, that he, confiding in the said agreement and promise of the defendant, did, to wit, on &c., take the said house and premises, &c. from the said defendant, and enter into possession and occupation thereof on the terms aforesaid; that during the said term, to wit, on &c., he, the plaintiff, gave notice to the defendant that it was his, the plaintiff's, intention to exercise his right of purchasing the said house and premises, &c., for the said sum of 600*l.*, in the said agreement mentioned, and that he would purchase, and that he then elected to purchase the said house and premises, &c. at that price, as in the said agreement mentioned; and the plaintiff then requested the defendant to make and deduce to him a good and valid title to the said hereinbefore-mentioned estate and interest of him, the defendant, in the said premises; and although reasonable time after the defendant had such notice, and was so requested to make and deduce to the plaintiff such good and valid title, had elapsed before the commencement of this suit, and although the plaintiff had always been ready and willing to pay the said purchase-money according to the said agreement, and has always performed all things contained in the said agreement on his part to be performed, yet the plaintiff says the defendant has disregarded his promise, and was not, either at the time of the making of the said agreement, or within a reasonable time after he had notice of the intention of the plaintiff to purchase the said premises according to the said agreement, or when the said purchase was to have been completed, or at any other time possessed of the said pre-

mises for his own life, and the life of the said Mrs. M, and for the life of the survivor of them, according to the true intent and meaning of the said agreement, and of his said promise. And the defendant, further disregarding his said promise, did not nor would within such reasonable time as aforesaid, or at any other time make or deduce to the plaintiff a good or valid title to such estate and interest in the said premises, according to the true intent and meaning of his said promise, by means whereof the plaintiff hath been deprived of all the benefits which would have been derived from the completion of the said purchase; and the plaintiff, confiding in the promise of the defendant, and intending to purchase the said premises according to the said agreement, did, during the said term, make divers alterations and improvements in the said premises, at his own expense, to wit, to the amount of 1,000*l.*, which are now, by reason of the said breach of promise of the defendant, wholly lost to the plaintiff, to the plaintiff's damage, &c.

Pleas—First, that the defendant did not promise in manner and form, &c.; second, that the plaintiff did not give notice to the defendant that it was his, the plaintiff's, intention to exercise his right of purchasing the said premises for 600*l.*, or that he would purchase, or that he elected to purchase at that price, according to the said agreement, *modo et forma*, &c. Third, that the plaintiff did not request the defendant to make and deduce to him, the plaintiff, a good and valid title to the said estate and interest of him, the defendant, in the said premises, as mentioned in the said agreement, in manner and form, &c. Fourth, that the plaintiff was not ready and willing to pay the said purchase-money according to the said agreement, in manner and form, &c. Fifth, that the defendant was, at the time of the making of the said agreement, and within a reasonable time after he had notice of the plaintiff's intention to purchase the said premises according to the said agreement, and when the said purchase was to have been completed, possessed of the said premises for his own life, and the life of the said Mrs. M, and for the life of the survivor of them, according to the true intent and effect of the said agreement and his said promise, &c. Lastly, that the defendant did within such

reasonable time as aforesaid, make and deduce to the plaintiff a good and valid title to such estate and interest in the said premises as in the declaration mentioned, according to the true intent and effect of the said agreement and of his said promise, &c.

Issue was joined on all the pleas.

At the trial, before Coltman, J., at the Chester Spring Assizes, 1847, the plaintiff, in support of his case, put in the following agreement stamped with a 30s. stamp; its reception was objected to by the defendant, who contended it should also have been stamped with two 30s. stamps. The learned Judge admitted the document, and reserved leave to the defendant to move to enter a nonsuit:—

“Memorandum, that the undersigned, Thomas Warrington, agrees to let to the undersigned George Worthington for two years from the 9th of October last, at the rent of 50*l.* per annum, the house, out-buildings, gardens and field, at Bromborough, now in the occupation of the said George Worthington; and also agrees that the said George Worthington may, at his own expense, make such alterations and additions to the premises as he may think proper, the same being improvements. And that the said George Worthington shall have the right of purchasing the above premises at the end of or at any time during the term for the sum of 600*l.*, it being understood that the said Thomas Warrington is possessed of the same premises for his own life and the life of Mrs. Mainwaring, and of the survivor of them. And the said George Worthington hereby also agrees to the above terms. Dated the 7th of November 1844. (Signed) Thomas Warrington, George Worthington. Witness, Robert Hughes.”

It appeared that the defendant was not possessed of the estate mentioned in the agreement, but of a term of sixty-one years, whereupon the plaintiff rejected the title, and having made various improvements on the premises, brought the present action to recover the amount he had expended, with damages. The defendant contended that by the agreement he was not bound to convey the identical estate therein mentioned, and the learned Judge being of that opinion a verdict was entered for the defendant on the first, second, third and fourth issues, and for the plaintiff on the fifth and last issues.

A rule had been obtained, calling upon the defendant to shew cause why there should not be a new trial for misdirection.

*Welsby* shewed cause.—First, the plaintiff should have been nonsuited. The agreement was not properly stamped, and should not have been admitted. The legal effect of the document is twofold: it is a lease *in præsenti* to be computed from a day past, and an agreement to purchase distinct from the lease. Being therefore both a lease and an agreement it required two stamps of 30s. each—*Wharton v. Walton* (1).

[WILLIAMS, J.—In that case there was a distinct agreement, by a third party who had nothing to do with the lease, to guarantee the payment of money.]

Suppose the lease and the agreement to purchase were on two separate papers, each must be stamped.

[MAULE, J.—So must each covenant if on a separate skin.]

The revenue is not to be defrauded by a combination of two distinct things. The agreement to purchase here is not an accessory to the principal matter, the lease, as in *Price v. Thomas* (2).

[CRESSWELL, J.—This is not more than a covenant to renew, which is usual in leases, and which do not on that account require two stamps. The lease and the agreement to purchase are the consideration for the rent. If the lease were forfeited the right to purchase would be forfeited also.]

It is submitted that the only connexion between the agreement to purchase and the lease is that they are between the same parties, and on the same paper: each is complete by itself—*Clayton v. Burtenshaw* (3), *Corder v. Drakeford* (4).

[MAULE, J.—If the agreement to purchase were disannexed from the lease there would be no consideration for it.]

Secondly, the material issue is that on the first plea. There was no misdirection. The learned Judge said that the agreement amounted to an engagement by the defendant, that whatever interest he possessed the plaintiff might purchase it; and that is its true legal effect. The defendant was not bound

(1) 7 Q.B. Rep. 474; s.c. 14 Law J. Rep. (N.S.) Q.B. 321.

(2) 2 B. & Ad. 218.

(3) 5 B. & C. 41.

(4) 3 Taunt. 382.



to make out a good title and the identical title named. This case is not like those where the vendor agrees to sell and has no interest at all, in which case he would be liable; but here the defendant had an interest which, without fraud on his part, turned out to be a term instead of a freehold. The proof of his interest in the term was a substantial and legal compliance with the agreement, and therefore the verdict is right—*Flureau v. Thornhill* (5).

*Egerton*, contra.—The single stamp was sufficient. The agreement contains only one contract, a demise; the option of purchase is ancillary to it, and forms part of the consideration for entering into the lease. *Wharton v. Walton* has been distinguished by the Court. *Corder v. Drakeford* only decides that the stamp must be referred to the principal object of the deed. *Doe d. Phillippis v. Phillippis* (6) and *Nicholls v. Cross* (7) are direct authorities in favour of the plaintiff. (He was then stopped by the Court.)

COLTMAN, J.—The stamp on the document received in evidence is sufficient. The agreement is on the one side for a lease for two years, with the option to purchase during the term, which together form the consideration; the engagement on the other side is to pay certain rent. Thus the connexion of the several parts is complete, and the object of the agreement indivisible. On the second point, I took an erroneous view of the effect of the agreement at the trial. It struck me then, that by its terms the defendant was not bound to make out the title which he thought he had at the time the agreement was made, but only such a title as he actually had in the premises. An agreement to purchase means, in the first instance, to purchase in fee, and the subsequent words are introduced into the agreement for the benefit of the vendor, in order that he may not be called upon to convey an estate in fee. The stipulation made by the defendant is, that he shall be required to convey (not an estate in fee, but) a particular estate for life, and this he

has failed to perform. The rule for a new trial must be made absolute.

MAULE, J.—I am of the same opinion. The agreement is to take certain premises for two years, at a rent of 50*l.* a year. The consideration for that rent is, that the plaintiff shall have the premises, and the option of purchasing them during the term. It is contended, that the agreement does not import that the defendant has an interest in the premises for two lives, because the earlier words are, "the said George Worthington shall have the right of purchasing the said premises at any time during the said term for 600*l.*," which mean purchasing such estate as he can get; but that cannot be, otherwise the plaintiff would pay rent on the chance of getting no estate at all. The agreement then says, "it being understood that the said Thomas Warrington is possessed of the same premises for his own life and the life of Mrs. Mainwaring, and of the survivor of them;" and I think the latter words have the effect of cutting down the estate to be purchased under the agreement to an estate for two lives, which, without those words, would mean that Worthington should purchase an estate in fee. They are not mere idle words, but important, and most important for the interests of the defendant: they mean that he has the estate for two lives, and for two lives only. That is put in issue by the plea of non assumpsit, which having been found for the defendant, there must be a new trial.

CRESSWELL, J. and WILLIAMS, J. concurred.

*Rule absolute.*

1848. }  
Jan. 18. } PINKUS v. STURCH AND OTHERS.

*Practice—Judgment as in case of a Non-suit—Death of Co-defendant—Suggestion on the Record.*

*In an action against four defendants, two died before issue joined, and issue was joined against the two survivors. The plaintiff neglected to make up the record and proceed to trial; and on application by the surviving defendants,—Held, that surviving defendants against whom issue has been joined cannot obtain a rule for judgment as in case*

(5) 2 W. Black. 1078.

(6) 11 Ad. & El. 796.

(7) 14 Mee. & Wels. 42; s. c. 14 Law J. Rep. (n.s.) Exch. 244.

of a nonsuit, unless the deaths of their co-defendants against whom issue has not been joined appear by suggestion on the record.

Semble—If, in such a case, the plaintiff fail to make up the record and enter a suggestion of the death, the course for a defendant to pursue is to call upon the plaintiff to do so, and if he fail, to apply for leave for the defendant to do it; and then (the suggestions having been entered) to move for judgment as in case of a nonsuit.

This action was commenced in 1839, against four defendants, Sturch, Hoskins, Wollaston and Shaw. In 1843 Shaw died, after having pleaded, but before issue joined as against him; Wollaston died in 1845, without having pleaded. On the 22nd of July 1840, issue was joined as against the defendants Sturch and Hoskins.

Crompton stated the above facts from affidavits, and moved, on behalf of Sturch and Hoskins, for a rule for judgment as in case of a nonsuit.—This rule cannot usually be applied for, unless the record has been completely made up. The record in this case has been complete as against the surviving defendants since 1840; it cannot, however, be perfectly completed without entering suggestions upon it of the deaths of the other defendants, but the duty of entering those suggestions devolves upon the party who is to take the next step, and is the duty of the plaintiff.

[WILDE, C.J.—How could you enter up your judgment now? The action is commenced against four; issue is joined against two only, and there is no explanatory suggestion on the record. If judgment were now entered it would not appear that the plaintiff had ever been in a position to try, and the statute only gives a defendant the right to judgment as in case of a nonsuit after issue joined, “if the plaintiff shall neglect to bring such issue on to be tried according to the course and practice of the Court.”]

The plaintiff is bound to make up the roll, and therefore should have entered the suggestions; he has failed to do this, and is, therefore, in default; he has not proceeded according to the course and practice of the Court to try the existing issues; and, therefore, the defendants are entitled to the benefit of the statute.

NEW SERIES, XVII.—C.P.

[MAULE, J.—After issue joined the proceedings are entered on record, and then follows the *venire facias juratores*, which is the act of the Court. But this record is not in a state to receive the *venire*, because issue is not joined against all the defendants, and there is nothing to explain this defect; the Court should be informed of the death of the parties, which must appear by suggestion on the roll, and then the *venire* issues in due course.]

[WILDE, C.J.—The presumption is, that the parties are alive. How does the plaintiff know they are dead? Would it not be the better course to call upon the plaintiff to bring in the roll and have the suggestions entered; or if he refuse, to ask for leave for the defendant to do it? The present motion could then be made, as the record would be completed.]

[WILLIAMS, J.—The 8 & 9 Will. 3. c. 11. does not say who is to enter the suggestion. If the plaintiff has not done all that he ought to do, in order to go to trial, he is in default without the statute 14 Geo. 2. c. 17.]

It is difficult to say how the defendants can call upon the plaintiff to bring in the roll, or how they can obtain a record to enter the suggestions upon. Since the New Rules there is no roll, and the defendants are not entitled to draw up the *Nisi Prius* record, which now constitutes the first formal entry of the proceedings.

WILDE, C.J.—There is always a roll or materials somewhere for making one. The deaths of these parties must come properly before the Court, on record, before the defendants can obtain what they ask for. If they are not in a position to shew that the necessary suggestions can be entered, they are not in a position to ask the Court to grant this application.

*Rule refused.*

1848. } LINDUS v. BRADWELL.  
Jan. 29. }

*Bill of Exchange—Acceptance by Wife of Drawee in her own name.*

*A bill of exchange was drawn upon the plaintiff, and accepted by his wife in her*

R

name, she having authority to accept for him:—Held, that the plaintiff was liable on the bill as acceptor.

*If a principal authorises an agent to accept a bill, such principal is liable as acceptor, though wrongly described by his agent in the acceptance.*

**Assumpsit.** The first count of the declaration stated that on &c., one W. L. made his bill of exchange, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said W. L. 30*l.*, two months after the date thereof; that the defendant afterwards accepted the said bill, and that W. L. then indorsed the same to the plaintiff, &c. Second count, that the defendant, on &c., was indebted to the plaintiff in 30*l.* on an account stated.

**Pleas**—First, as to the first count, that the defendant did not accept the said bill; second, as to the last count, non assumpsit. On which pleas issues were joined.

At the trial, before Maule, J., at the first sittings for Middlesex in Easter term, 1847, the bill of exchange mentioned in the first count was produced and read, when it appeared that it was directed to William Bradwell, accepted by M. Bradwell; and that the acceptance was written by Mary Bradwell, the defendant's wife. It was proved that the defendant's name was William David Bradwell; that he was called upon when the bill became due, and that he then said, "I suppose you call about that bill; I know all about it; it is a milliner's bill. Mrs. Reece, my wife's milliner." The bill was then shewn him; he looked at it, and said, "It is my wife's acceptance, but it is all the same thing; I have authorized her for this particular,—Mrs. Reece's for millinery." He also said, "There are several other bills besides this; I shall pay all of them in a week or ten days." It was submitted at the close of the plaintiff's case, by *Talfourd, Serj.* for the defendant, that there was no case to go to the jury, but the learned Judge directed a verdict for the plaintiff for 32*l.* 7*s.* (the amount of the bill, with interest thereon), reserving leave to the defendant to move to enter a nonsuit or a verdict for him on both or either of the issues.

A rule had been obtained accordingly, and also to shew cause why the damages should not be reduced to 30*l.* in the event of the Court deciding that the plaintiff could recover only on the second count.

*Symons* shewed cause.—It is contended, on the other side, that the facts proved at the trial negatived that the defendant's wife had any authority to accept this bill, and therefore that the plaintiff must fail on the first issue; and, next, that as the conversation related to a void bill, there was no evidence on the second issue. It is, however, submitted that the circumstances are explicit to shew authority in the wife to accept this bill for her husband, and that more satisfactory evidence could scarcely have been produced on that head. It is then much relied upon, as a fact in favour of the defendant, that his name does not appear as acceptor on the face of the instrument, and that, therefore, he is not liable to pay. *Cotes v. Davis* (1) is a case very similar to the present, and so is *Prestwick v. Marshall* (2); they decide that an indorsee who derives his title through a married woman, can recover against an acceptor, if the bill be indorsed by her and in her name with the consent of her husband. In *Davis v. Clark* (3), which will be relied upon on the other side, the acceptor was a stranger, and not named as drawee, and the instrument there declared upon was not a bill of exchange at all, and that decision does not apply.

*Talfourd, Serj., Byles, Serj., and Swann*, in support of the rule.—M. Bradwell means the defendant's wife; there is a distinction between bills of exchange and other written agreements; no person whose name does not appear on a bill as acceptor can be charged as such. Unnamed principals are in no case bound.

[*CRESSWELL, J.*—Suppose a drawee writes his acceptance in another name, is he not bound?]

It is submitted that he is not. The cases of *Cotes v. Davis* and *Prestwick v.*

(1) 1 Campb. 485.

(2) 7 Bing. 565.

(3) 6 Q.B. Rep. 16; s. c. 13 Law J. Rep. (N.S.) Q.B. 305.

*Marshall* are cases of indorsement merely. In *Davis v. Clark*, Coleridge, J. says, "The safe course is to adhere to the mercantile rule, that an acceptance can be made only by the party addressed or for his honour. Here the last is not pretended, and the first cannot be presumed." Those remarks are strictly applicable to this case; *Polhill v. Walter* (4) is to the same effect. There are three authorities which substantiate the proposition now contended for, namely, that a person whose name is not on the bill is not liable. In *Pentry v. Stanton* (5), cited in *Story on Agency*, p. 125, note 3, it was held that a person who drew a bill for goods bought on account of his principal, and signed it A. B. agent, was personally bound, and that the principal was not. In *Leadbitter v. Farrow* (6), Holroyd, J. says, "I apprehend that no action would lie on the bill, except against those who are parties to it." There the plaintiff knew that the defendant was agent for the Durham Bank, and that he drew the bill as agent, but as he signed it in his own name, he was held liable. *Bull v. Morrell* (7) is also in favour of the defendant; R. Parker, a member of a company, was there found not to have in fact accepted, and, therefore, was held not liable.

[MAULE, J.—The point did not necessarily arise in that case. The bill was drawn upon the directors, not upon the company, and Parker was not a director.]

There is no authority to shew that a person whose name is not on a bill or note is liable. Suppose J. to be the plaintiff in an action against A. B. the maker of a promissory note; could A. B. shew that he made the note as agent for John Smith? Clearly he could not: such an inquiry would be collateral, and, if once admitted, interminable in actions of this kind. If there was any evidence of any authority to the wife, it was to accept a bill drawn by Mrs. Reece, and not a bill drawn by W. L. Lastly, there is no evidence to go to the jury on the second issue. The admission is of a liability to Mrs. Reece on a bill,

and therefore the defendant is not liable to the plaintiff for money due on an account then stated between them. The conversation related to the bill, and the bill alone; the bill was produced, and the defendant said, "I'll pay the bill;" that is no evidence on an account stated.

MAULE, J.—There was considerable discussion when this cause was tried, as to the defendant's being bound by his wife's signature; I then expressed no opinion upon the matter, but reserved leave to the defendant to move the Court upon the point. I think that, in this case, the defendant is bound. In the conversation that was proved to have passed between him and one of the witnesses, the bill on which he is now sued was produced; he looked particularly at the acceptance on it, and then considered it was a bill of exchange he was liable to pay, for after looking at it, he said, "It's my wife's acceptance; it makes no difference. I gave her authority for that particular." Then if the defendant admits his liability on the bill, he also admits those facts from the existence of which his liability arises. If a husband authorizes his wife to accept bills for him, in her name, upon principle such husband is liable to pay the bills accepted, and *Cotes v. Davis* is an authority to support that principle. The acceptance on a bill such as this need not be in any particular form; it must be in writing, and that is all the stat. 1 & 2 Geo. 4. c. 78. requires. Then if a husband gives his wife authority to accept a bill in her name for him, he means she may accept such a bill as this, or he means nothing at all. It is said that no person can be liable, unless his name be upon the bill; but suppose a party, whose name is on the bill as drawee, writes the acceptance on it with his own handwriting, in another and a totally different name, is he not liable? Suppose the defendant here, whose proper initials are W. D. B., had so accepted this bill, which is directed to him as W. B., would he not then have been liable? Suppose he had accepted it with his own hand, as M. B., how would it be then? In neither of those cases would the party be liable to pay, if the argument for the defendant is to be supported. The fact is, that in the cases supposed, the name of the party sought to be charged would appear

(4) 3 B. & Ad. 114; s. c. 1 Law J. Rep. (n.s.) K.B. 92.

(5) 10 Wend. R. 271.

(6) 5 Mau. & Selw. 345.

(7) 12 Ad. & El. 745; s. c. 10 Law J. Rep. (n.s.) Q.B. 52.

on the face of the bill, and when it is urged that nobody but William Bradwell can accept this bill, I think so too. He has accepted it under the name of Mary Bradwell, the authority so to accept for him amounting to the same thing. The acceptance being in writing, the statute is satisfied; and I know of no principle which says such an authority is void.

CRESSWELL, J.—*Cotes v. Davis* goes very nearly the whole length of the case we are now deciding. There the indorsement by a married woman passed the property in a note, for which the husband's indorsement is necessary,—as appears from *Barlow v. Bishop* (8); and in *Cotes v. Davis*, Lord Ellenborough directed the jury that the husband's authority to his wife to indorse, and in the name by which *she* was known, might be fairly presumed. That doctrine is subsequently recognized in *Prestwick v. Marshall*, and *Prince v. Brunetti* (9). The jury have here found that the wife had authority to accept this bill. The defendant saw the bill, and expressed no dissatisfaction at the name by which he was therein described; he has therefore described himself by that name in the acceptance on this bill, and that acceptance is in writing, which is sufficient; this is not unlike the cases where partners in trade draw a bill, under the name of James & Co., when perhaps there is no person of the name of James in the firm. The defendant has consented to this acceptance as his acceptance, and he is, therefore, liable upon it.

WILLIAMS, J.—If there were any evidence, at the trial, to go to the jury to disprove the first plea this rule cannot be made absolute. It certainly would have been more in the usual course of business if the wife had written the husband's name as acceptor instead of her own; but he gave her authority to accept, and afterwards recognized the acceptance in the form she used; he is therefore liable to pay the amount.

*Rule discharged.*

(8) 1 East, 432.

(9) 1 Bing. N.C. 435; s. c. 4 Law J. Rep. (N.S.) C.P. 90.

1848. }  
Feb. 9. } CARD V. CASE.

*Action on the Case—Mischievous Animals—Scienter, in issue under Not Guilty.*

*The declaration stated that the defendant wrongfully and injuriously kept a ferocious dog, well-knowing him to be ferocious; that the defendant kept his said dog so negligently that he bit and worried divers sheep of the plaintiff:—Held, that the plea of not guilty put in issue the scienter, which is a material averment in the declaration.*

Case. The declaration stated that the defendant, theretofore, to wit, on the 18th of November 1846, and from thence until and at the time of the injury being sustained by the plaintiff as thereafter mentioned, wrongfully, wilfully, and injuriously did keep a certain dog of a ferocious and mischievous disposition, and dangerous to go at large, he, the defendant during all that time well knowing that the said dog was and during the whole of the said time continued to be of a ferocious and mischievous disposition as aforesaid, and that he was dangerous to be suffered to go at large, and during the whole of the said time it was and continued to be the duty of the defendant to use due and reasonable care and precautions in and about the safe keeping and management of the said dog. Yet the defendant, well knowing the premises, but not regarding the duty of him, the defendant, in that behalf as aforesaid, afterwards, to wit, on the 19th of November 1846, and whilst the defendant so kept and continued to keep the said dog so being and continuing to be of such disposition as aforesaid, did not and would not use such due and reasonable care and precautions in and about the keeping and management of the said dog, but on the contrary thereof so negligently did keep the said dog, that he wrongfully, injuriously and negligently suffered the said dog to go at large, and thereupon and by reason of the premises, and of the wrongful, injurious and negligent conduct of the defendant in so negligently keeping and using the said dog as aforesaid, and whilst the defendant so kept and continued to keep the said dog as aforesaid, and whilst the said dog was and continued to be of such disposition as aforesaid, to wit, on the said 19th of Novem-

ber 1846, the said dog did hunt, chase, drive, bite, and worry divers, to wit, fifty sheep and fifty lambs of the plaintiff of great value, to wit, of the value of 2*l.* each, by means whereof divers, to wit, twenty of the said sheep and twenty of the said lambs of the plaintiff of great value, to wit, of the value of 20*l.* then and before the commencement of this suit died and became of no value to the plaintiff, and the residue of the same sheep and lambs being also of great value, to wit, of the value of 2*l.* each, were and each of them was otherwise greatly terrified, damaged and injured, and rendered of little use or value to the plaintiff, to the damage of the plaintiff of 50*l.*, &c.

The defendant pleaded not guilty.

The facts stated in the declaration were proved at the trial, before Williams, J., at the Spring Assizes, 1847, for the county of Somerset, but the plaintiff failed to shew that the defendant's dog was vicious to the defendant's knowledge, whereupon the learned Judge nonsuited the plaintiff, reserving leave to move to have a verdict entered for him for 9*l.* 15*s.* (which was admitted to be the proper amount of damages), if the Court should be of opinion that the *scienter* was not put in issue by the plea of not guilty. A rule had been obtained accordingly, and now

*Pashley* shewed cause.—The nonsuit was right, the plea of not guilty puts in issue the *scienter* alleged by the plaintiff in his declaration, and it was necessary for him to prove that the dog was ferocious to the knowledge of the defendant, which he omitted to do—*May v. Burdett* (1), *Jackson v. Smithson* (2), *Thomas v. Morgan* (3).

The Court then called upon—

*Crowder* and *Phinn*, contra.—The general issue does not put in issue the facts alleged by way of inducement. Those facts are, that the defendant kept a ferocious dog knowing him to be ferocious. The pleading rule of Hil. term, 4 Will. 4. r. 4, says, "In actions on the case the plea of not guilty shall operate as a denial only of the breach of duty or *wrongful act* alleged to have been committed by the defendant, and not of the facts

stated in the inducement," &c. The wrongful act here complained of is, that the dog bit the plaintiff's sheep. Declarations in actions of this nature are not usually framed as this is. It is alleged that upon the facts stated by way of inducement, it was the duty of the defendant to use due care and precaution in and about the safe keeping of the said dog.

[MAULE, J.—The allegation of the duty is immaterial, it is a mere inference of law. The foundation of the action is, you kept a dog knowing him to be ferocious.]

The New Rules lay down a principle, and it depends upon the form of the declaration what are the precise facts put in issue by not guilty. It never puts in issue the inducement, but the wrongful act only. "The inducement" in a declaration is that part which precedes the charge, which contains a statement of facts, out of which the charge arises, or which are necessary or useful to make the charge intelligible, as said by Tindal, C.J. in *Taverner v. Little* (4). It is not a wrongful act to keep a ferocious dog, knowing him to be ferocious; but it is wrongful to keep a ferocious dog negligently, so that he bites sheep; and those are the two facts traversed by the plea of not guilty.

[MAULE, J.—I cannot say it is not unlawful to keep a ferocious dog knowingly.]

There can be no right of action unless damage results, which shews that the damage occasioned by the biting is the real offence, and the only cause of complaint; the gist of the action is—the defendant kept the dog so negligently that he bit, &c.

[MAULE, J.—Then there are a host of cases against you—*May v. Burdett* and *Jackson v. Smithson*.]

The decision in *May v. Burdett* turned upon the pleadings. The objection was taken after verdict, and though the averment of negligent keeping was omitted from the declaration in that case and held of no consequence, still it must be remembered that after verdict everything is intended in favour of a declaration. In *Jackson v. Smithson* the Court gave no reasons for their judgment, and the objection there also was after verdict. In an action for

(1) 16 Law J. Rep. (N.S.) Q.B. 64.

(2) 15 Mees. & Wels. 563; s.c. 15 Law J. Rep. (N.S.) Exch. 311.

(3) 2 Cr. M. & R. 496; s.c. 5 Law J. Rep. (N.S.) Exch. 64.

(4) 5 Bing. N.C. 678; s.c. 9 Law J. Rep. (N.S.) C.P. 59.

debauching the plaintiff's daughter there is no right of action unless there be a loss of service; yet it was held in *Torrence v. Gibbins* (5) that the service was not denied by the plea of not guilty; and in *Dunford v. Tratiles* (6) it was held that the plea of not guilty only put in issue the negligence of the defendant's mariners in navigating his ship. *Wright v. Lainson* (7), *Hart v. Crowley* (8), *Mummery v. Paul* (9), and *Taverner v. Little* were also referred to.

[WILLIAMS, J.—Suppose a declaration allege that the defendant was in charge of a cart, and that he, by negligent driving, run over a man and broke his leg, what does not guilty put in issue?]

That is the case of *Taverner v. Little*: it puts in issue the negligent driving and the running over. So here, it puts in issue the negligent keeping and the biting.

[WILLIAMS, J.—No; the ownership of the cart is an innocent act distinct from the negligence. In this case if you satisfy us that it is an innocent act to keep a ferocious dog knowingly, then *Taverner v. Little* will apply. It is not an innocent act to keep a furious animal—*May v. Burdett*, *Jackson v. Smithson*.]

[MAULE, J.—In the New Rules inducement seems something unconnected with, and which is not in itself an unlawful act.]

COLTMAN, J.—In this case the plea of not guilty puts in issue the keeping the ferocious dog knowing it to be ferocious. The terms of the New Rules, applicable to actions on the case, are, "The plea of not guilty shall operate as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant." The question then is, what is the wrongful act here? Looking at the words of the declaration, it might be said that keeping the dog negligently was the act complained of; but to understand the declaration to mean

that would be to restrict the operation of its allegations to the narrowest limit, and to overlook the sense and spirit in which they are intended to be used. It was necessary to allege that the defendant knew the dog was ferocious in order to make the act wrongful; it is a material averment, and therefore put in issue by not guilty. If it were necessary to prove that the dog was kept negligently, then that would be put in issue by not guilty also; but *May v. Burdett* decides that the allegation of negligent keeping is wholly immaterial. I think the case of *Wright v. Lainson* is applicable, and in favour of the defendant. The sheriff's false return was in that case the act complained of; and in this case not the mode of keeping the dog, but keeping the dog knowing him to be a biter is the act complained of.

MAULE, J.—I am of the same opinion. The effect of not guilty in actions on the case, as that plea is restricted by the New Rules, is to deny the wrongful act or omission alleged in the declaration. There may be many stated in the same declaration, and then not guilty would put them all in issue. This declaration alleges that the defendant knowingly kept a dog accustomed to bite, that he kept him negligently, and that the dog worried the plaintiff's sheep. The two cases of *May v. Burdett* and *Jackson v. Smithson* decided that the knowingly keeping a ferocious animal, and damage received from it, are sufficient to maintain the action without alleging any negligence at all. It is certainly stated in this declaration, that it became and was the duty of the defendant to use due care and precaution in keeping the dog; but that allegation does not make out that it was a material part of his duty so to do, they are mere idle words, and inserted as an inference of law. We decided the other day, in *Brown v. Mallett* (10), that stating in a declaration that which the plaintiff considers to be the duty of the defendant resulting from certain antecedent facts is not the proper subject of a traverse, and is not a material averment. Suppose, however, that the keeping negligently is an unlawful act, and a material averment, which is the most favourable supposition for the plaintiff, then the keeping knowingly and the keeping

(5) 5 Q.B. Rep. 297; s. c. 13 Law J. Rep. (N.S.) Q.B. 36.

(6) 12 Meo. & Wels. 529; s. c. 13 Law J. Rep. (N.S.) Exch. 124.

(7) 2 Ibid. 739; s. c. 6 Law J. Rep. (N.S.) Exch. 197.

(8) 12 Ad. & El. 378.

(9) 1 Com. B. 316; s. c. 14 Law J. Rep. (N.S.) C.P. 9.

(10) See post.

negligently are both in issue. That argument goes to shew that the negligence in keeping, coupled with ferociousness in the disposition of, an animal might be a cause of action; but no doubt there is a good cause of action here, because it is a wrongful act to keep a ferocious dog knowing him to be so, and the damages are the same whether he be kept negligently or not. I think it was necessary to prove the *scienter*, and therefore the nonsuit was right.

WILLIAMS, J. concurred.

CRESSWELL, J. had left the court.

*Rule discharged.*

1848. } DOE *d.* BATHER *v.* BRAYNE  
Feb. 10. } AND ANOTHER.

*Practice.* — Trial — Right to begin in Ejectment.

*In ejectment the lessor of the plaintiff claimed under a will of the testator, dated the 23rd of September 1844. The defendant claimed under a subsequent will of the same testator, dated the 30th of December 1844. The defendant admitted that the will of the 23rd of September was a perfect will in every respect, and upon that admission claimed the right, and was allowed by the Judge, to begin at the trial:—Held, that the admission of the defendant was not an admission of the whole of the plaintiff's case, and therefore the right to begin had been improperly conceded to the defendant.*

*If it appears to the Court that the party entitled to begin at the trial has been deprived of that right, and that his cause has been thereby substantially prejudiced, a new trial will be granted.*

This was an action of ejectment, tried at the Spring Assizes for the county of Salop, 1847, before Mr. Serj. Gaselee.

Upon the cause being called on for trial, the defendants' counsel stated that the lessor of the plaintiff claimed the premises mentioned in the declaration as devisee under a will properly executed, of the date of the 23rd of September 1844; and that the defendants claimed as devisees under a subsequent will executed by the same testator on the 26th of December 1844. The testator died on the 30th of December 1844, four

days after the execution of the second will. The defendants' counsel admitted that the plaintiff was entitled to a verdict under the will of the 23rd of September, unless the defendants could establish a subsequent valid devise to them of the property by the will of the 26th of December, and upon that admission he claimed the right to begin. The counsel for the plaintiff insisted on his right to lay his own case first before the jury; but the learned Judge ruled that the defendants were entitled to begin, and they obtained a verdict.

*Talfourd, Serj.*, having obtained a rule *nisi* for a new trial, upon the ground that the lessor of the plaintiff had been improperly refused the right to begin at the trial,—

*Sir F. Kelly and Gray* now shewed cause. —The Judge was right in his ruling, and both upon principle and authority the defendants were entitled to begin at the trial. They admit a perfect case on the part of the plaintiff, that the will of September was duly made and executed, and the estate devised thereby; upon those admissions (if no evidence were offered) a verdict must pass in the plaintiff's favour. The defendants then say, we have another subsequent will which we shall establish; it therefore lies upon them to begin and shew their case. It is a settled practice at *Nisi Prius*, that if no evidence is required to establish the case on one side, the other side is entitled to begin. Thus, it has been the law for more than half a century, that in an action of ejectment by the heir-at-law against the devisee under a will, if the heirship be admitted, the defendant begins—*Goodtitle d. Revett v. Braham* (1). So in ejectment by the devisee under a will against a defendant, who relies upon a codicil of a later date than the will, if the will be admitted the defendant begins—*Doe d. Corbett v. Corbett* (2) decided in 1813, and never since impeached. This is a third case: ejectment by devisee under a prior will, against the defendants, who are devisees under a subsequent will. There is no distinction in principle between this third case and the former; and therefore if the first will (under which

(1) 4 Term Rep. 497.

(2) 3 Campb. 368.



the plaintiff claims) be admitted, the defendant is entitled to begin. It is to be observed, that the decision in *Goodtitle d. Revett v. Braham* goes somewhat further than the point now contended for, because there the plaintiff first proved his pedigree, the defendant then called witnesses, whose evidence was answered by witnesses on the part of the plaintiff, and still the defendant was held entitled to the general reply; but the case of *Doe d. Corbett v. Corbett* is in principle identically the same as that now before the Court, for the operation of a codicil in so far as it alters a former will is the same as that of a subsequent will. As regards the estate which is the subject of the codicil or the subsequent will, either of them is a complete revocation of the prior will. In *Doe d. Chamberlayne v. Lloyd* (3), which was a case between tenant and landlord, the landlord admitted the lease and was allowed to begin. In *Doe d. Wollaston v. Barnes* (4) Lord Denman mentions a case tried at Nottingham, in which he was counsel for the defendant, who claimed under a will; the plaintiff claimed under a prior will, which the defendant admitted, and was therefore allowed to begin. That is a conclusive authority for the defendant. The cases of *Doe d. Warren v. Bray* (5) and *Doe d. Tucker v. Tucker* (6) will be relied upon for the plaintiff, but in neither of those cases did the defendant admit the complete title of the plaintiff; and there is no doubt that the defendant before he can claim to begin must admit everything which *prima facie* would entitle the plaintiff to recover. In *Doe d. Warren v. Bray*, the defendant did not admit that the plaintiff was heir-at-law, which he claimed to be, and therefore the admission did not go far enough. In *Doe d. Tucker v. Tucker*, the defendant did not admit that the ancestor died seised; he relied upon a previous conveyance, and proposed only to make a conditional admission, which did not establish even a *prima facie* case.

[CRENSWELL, J.—There is a difference in this case and that where the heir-at-law is the lessor of the plaintiff; in the latter case the defendant admits absolutely that the

lessor of the plaintiff is heir, and that the deviser died seised.]

[MAULE, J.—It is quite different in principle, whether you admit a case *in omnibus*, or whether you confess and avoid.]

There is nothing in the case of the defendants here inconsistent with the case admitted on the part of the plaintiff. Take the defendants' admission *per se*, and there stop, the plaintiff is entitled to a verdict.

[MAULE, J.—That will not do, because you say, I will call witnesses to contradict everything I admit; you do not admit that the lessor of the plaintiff continued devisee, and that he was entitled at the time of the death.]

The plaintiff is not called upon to shew that; he is not bound to prove a negative, and the non-existence of a subsequent will is no part of his case. The setting up of a second will would not contradict the plaintiff's title here any more than a will contradicts the title of the heir-at-law. The practice so long established is for the convenience of all parties, and to economize the time of the Court, which would be fruitlessly wasted in proving a case which was admitted. There are many cases on policies of insurance where the right to begin has been keenly contested, but they are not applicable here. In such cases there are frequently many special pleas, and the right depends on questions of nice and refined distinction; but this is a plain case of ejectment, and stands upon the principles applicable to actions of ejectment.

[MAULE, J.—Suppose this was a case of special pleading, how would the issue be then? How would the plaintiff set out his title, and what would the defendant admit?]

In the case of a codicil, as in *Doe d. Corbett v. Corbett*, the lessor of the plaintiff would allege title under the will, and that the testator died seised. The plea would set up a subsequent codicil, and then the issue would be on the defendant. That case and the present are quite undistinguishable. The parties in ejectment used formerly to be the real parties. The action of ejectment, as it at present exists, is of comparatively recent creation. The pleadings used to be special, and the titles of the contending parties appeared on the record (*Lilly's Entries*, p. 205, vol. 1.) The proceedings are now regulated by rules of court, which

(3) Peake's Evid. 5.

(4) 1 Moo. & Rob. 386.

(5) Moo. & Mal. 166.

(6) Ibid. 536.

compel the defendant to plead "not guilty," and under that plea he can rely upon matter of title only. If it can be shewn that if the rules of special pleading were applied to this case, and by them the defendants could so plead as to take upon themselves the onus of proof, they are entitled to all the benefit of that now, though "not guilty" is in point of form, the only plea on the record. If this case had been under the ancient form of pleadings, the plaintiff would then have stated in the declaration (precisely what he states now, only the parties would be real persons,) "that the lessor of the plaintiff demised to him, by virtue of which demise he entered," &c.

[MAULE, J.—How would you plead to avoid an argumentative denial of the demise?]

By giving colour; the plea would be, "that the testator made a will, devising the estate to the defendant, and that the lessor of the plaintiff, claiming under colour of a previous will of the testator, entered and demised to the plaintiff," &c. On such a plea the plaintiff must have traversed the devise to the defendant, and the onus would thus be upon the defendant. There is a precedent of that kind in *Rastell's Entries*, p. 641, tit. 'Trespass, Executors,' 6. He also cited *Rastell's Entries*, tit. 'Eject. Firmæ.'

[MAULE, J.—It is usual in pleading to say that the testator died without having revoked his will. Why should not the plaintiff set out his real title?]

Because the action of ejectment is founded on a mere possession, and it would be surplusage for a plaintiff to set out his title. There never was such a declaration either now or formerly, and the precedents of declarations in ejectment were always as they now are.

[CRESSWELL, J.—By pleading as you propose, a defendant might always entitle himself to the right to begin, and therefore it may be that the application of the doctrine of special pleading to these cases is an incorrect test.]

There is nothing in the nature of things which decides that a plaintiff must always begin at the trial; the reason why he does generally begin is, because he is to prove something, but if that reason does not exist, then the defendant should begin. As the

formal nature of the pleadings in ejectment does not disclose the merits of the case or the question really in dispute, the Judge should ascertain upon which party the proof substantially lies, and as a matter of convenience, as well as of justice, direct that party to begin at the trial. But further, unless some substantial injury has been sustained in consequence of the wrong party having been allowed to begin, the Court will not grant a new trial—*Edwards v. Matthews* (7). *Geach v. Ingall* (8) shews that if a wrong party be allowed to begin, the ruling of the Judge cannot be reviewed by a bill of exceptions. There must be some injustice, or the Court will not interfere—*Ashby v. Bates* (9); and the word "injustice" does not mean the denial of the abstract right of the plaintiff to begin, but injustice in the result of the trial in consequence of the mode pursued. Rolfe, B. there says, that "it would be a scandal to the administration of justice if the question of the right to begin at Nisi Prius were made *per se* a ground for granting a new trial."

*Talfourd, Serj., Whateley, and Whitmore*, in support of the rule.—A new trial has never been refused when the proper party to begin has been deprived of his right. In *Ashby v. Bates* it is said, by Platt, B., "I think it of the last importance that the discretion of a Judge as exercised at Nisi Prius should be most extensively revised by the superior wisdom of the Court from which the record emanates; and that any misdirection of his, by which injustice is worked, whether by placing a party in an unfortunate position from not having his case properly discussed before the jury, or in any other matter, should be equally subject to the jurisdiction of that Court." It is submitted that the plaintiff was materially injured by the course adopted at the trial, which course his counsel endeavoured to prevent, and that there must be a new trial. The argument on the other side seeks to invest the Judge with a power never before heard of; and it cannot be that the plaintiff is to be called upon to disclose his case, in order that the Judge may then

(7) 16 Law J. Rep. (n.s.) Exch. 291.

(8) 14 Mea. & Wels. 95; s. c. 15 Law J. Rep. (n.s.) Exch. 37.

(9) 15 Ibid. 589; s. c. 15 Law J. Rep. (n.s.) Exch. 349.

the plaintiff claims) be admitted, the defendant is entitled to begin. It is to be observed, that the decision in *Goodtitle d. Revett v. Braham* goes somewhat further than the point now contended for, because there the plaintiff first proved his pedigree, the defendant then called witnesses, whose evidence was answered by witnesses on the part of the plaintiff, and still the defendant was held entitled to the general reply; but the case of *Doe d. Corbett v. Corbett* is in principle identically the same as that now before the Court, for the operation of a codicil in so far as it alters a former will is the same as that of a subsequent will. As regards the estate which is the subject of the codicil or the subsequent will, either of them is a complete revocation of the prior will. In *Doe d. Chamberlayne v. Lloyd* (3), which was a case between tenant and landlord, the landlord admitted the lease and was allowed to begin. In *Doe d. Wollaston v. Barnes* (4) Lord Denman mentions a case tried at Nottingham, in which he was counsel for the defendant, who claimed under a will; the plaintiff claimed under a prior will, which the defendant admitted, and was therefore allowed to begin. That is a conclusive authority for the defendant. The cases of *Doe d. Warren v. Bray* (5) and *Doe d. Tucker v. Tucker* (6) will be relied upon for the plaintiff, but in neither of those cases did the defendant admit the complete title of the plaintiff; and there is no doubt that the defendant before he can claim to begin must admit everything which *prima facie* would entitle the plaintiff to recover. In *Doe d. Warren v. Bray*, the defendant did not admit that the plaintiff was heir-at-law, which he claimed to be, and therefore the admission did not go far enough. In *Doe d. Tucker v. Tucker*, the defendant did not admit that the ancestor died seised; he relied upon a previous conveyance, and proposed only to make a conditional admission, which did not establish even a *prima facie* case.

[CRESSWELL, J.—There is a difference in this case and that where the heir-at-law is the lessor of the plaintiff; in the latter case the defendant admits absolutely that the

lessor of the plaintiff is heir, and that the devisor died seised.]

[MAULE, J.—It is quite different in principle, whether you admit a case *in omnibus*, or whether you confess and avoid.]

There is nothing in the case of the defendants here inconsistent with the case admitted on the part of the plaintiff. Take the defendants' admission *per se*, and there stop, the plaintiff is entitled to a verdict.

[MAULE, J.—That will not do, because you say, I will call witnesses to contradict everything I admit; you do not admit that the lessor of the plaintiff continued devisee, and that he was entitled at the time of the death.]

The plaintiff is not called upon to shew that; he is not bound to prove a negative, and the non-existence of a subsequent will is no part of his case. The setting up of a second will would not contradict the plaintiff's title here any more than a will contradicts the title of the heir-at-law. The practice so long established is for the convenience of all parties, and to economize the time of the Court, which would be fruitlessly wasted in proving a case which was admitted. There are many cases on policies of insurance where the right to begin has been keenly contested, but they are not applicable here. In such cases there are frequently many special pleas, and the right depends on questions of nice and refined distinction; but this is a plain case of ejectment, and stands upon the principles applicable to actions of ejectment.

[MAULE, J.—Suppose this was a case of special pleading, how would the issue be then? How would the plaintiff set out his title, and what would the defendant admit?]

In the case of a codicil, as in *Doe d. Corbett v. Corbett*, the lessor of the plaintiff would allege title under the will, and that the testator died seised. The plea would set up a subsequent codicil, and then the issue would be on the defendant. That case and the present are quite undistinguishable. The parties in ejectment used formerly to be the real parties. The action of ejectment, as it at present exists, is of comparatively recent creation. The pleadings used to be special, and the titles of the contending parties appeared on the record (*Lilly's Entries*, p. 205, vol. 1.) The proceedings are now regulated by rules of court, which

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(4) 1 Moo. & Rob. 386.

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(6) Ibid. 536.

ham, but the principle of the two cases is dissimilar, the analogy relied upon by Bayley, J. is fallacious; and as the plaintiff seems to have had no merits, the decision there given was not worth a contest. The cases of *Doe d. Tucker v. Tucker* and *Doe d. Lewis v. Lewis* (11) are in favour of the plaintiff; and on the broad ground that a plaintiff cannot be displaced from his proper position, and ousted of his right to begin at the trial, unless the defendant admits the whole of the plaintiff's case, it is submitted that this rule must be made absolute.

COLTMAN, J.—There are undoubtedly cases in favour of the course contended for by the defendants, and the cases of *Doe d. Corbett v. Corbett* and *Doe d. Wollaston v. Barnes* are entitled to great respect, although decided merely at Nisi Prius. At the same time it does not seem that there was any desire, or any possibility, to bring those decisions before the Court, and the parties respectively seem to have been satisfied with the decisions. It does not appear on which side the verdict was in the case referred to by Lord Denman in *Doe d. Wollaston v. Barnes*, or that there was any opportunity or wish to review the decision in that case; and if the plaintiff had succeeded there would have been no dissatisfaction. The reported cases appear to have been decided on analogies which do not apply here. When the contest is between the heir-at-law and a devisee their titles are perfectly independent; and when the heirship is admitted (which is in its nature indivisible) the case on the part of the plaintiff is admitted altogether, and he is entitled to a verdict unless that title is displaced by the proof of some new matter of fact. That case, however, is very distinct from this now before us. The plaintiff here claims as devisee, that is, he claims title under a good and valid will at the time of the death of the testator; the defendant proposes to admit only part of that title, and sets up another and a subsequent will; in fact, he says, "You are not the devisee, but I am." It is not necessary to say, whether in every case where the wrong party has begun at the trial, and where no mischief arises, we must interfere and send down the cause again to another jury. It

(11) 1 Car. & Kir. 122.

seems to me that on this occasion the plaintiff has sustained great disadvantage by the course adopted (which he was then unable to prevent), and on that ground there ought to be a new trial.

MAULE, J.—Without stopping to consider and decide whether there is or should be a general rule that a wrong beginning induces a new trial, I think that here enough has appeared to shew that a wrong beginning has caused injustice, and therefore there must be a new trial. I think, notwithstanding the case of *Doe d. Corbett v. Corbett*, and the case referred to in *Doe d. Wollaston v. Barnes*, (which, as far as they go, are authorities in favour of a defendant's right to begin,) that in this case the defendants had no such right. Those cases were both decided at Nisi Prius, and it often happens at Nisi Prius that an acquiescence takes place between the parties; at any rate that seems to have been done in *Doe d. Corbett v. Corbett*. We do not know the history of the anonymous case referred to by Lord Denman in *Doe d. Wollaston v. Barnes*, and whether the party who began succeeded or not, or of any other particulars connected with that case we are not informed, which, in so important a matter, if we are to act upon that authority, should have been the case. Upon principle, allowing it to be settled that the devisee has a right to begin when the heirship is admitted, still that state of things is not analogous here, because here the defendants do not admit all that is relied upon as the title of the plaintiff. When the plaintiff is heir-at-law, his case is "I am heir and my ancestor died seised;" the other party says, "I admit all that." In this case the plaintiff says, "I am devisee;" the other party says, "No, I am devisee, you are not." The defendants say, "There is a will revoking your will, and therefore the will under which you claim is not in operation." Surely, then, the case they admit is no case at all; there is and can be no case, unless you import into it the fact that the will continued down to the time of the death: that which is called the admission of the defendants is a mere negative assertion—"You are not devisee." If you expand the statement on the record, as in special pleading, it is equally apparent that the plaintiff must begin at the trial. The plaintiff would state, "I am devisee;" the

decide who shall begin. The plaintiff's counsel refused to do so at the trial, except in the usual and ordinary way, namely, by going to the jury. The plaintiff's counsel was prevented from so doing, and the defendants' counsel was then allowed to state the plaintiff's case, who was compelled to adopt a case which the counsel for the defendants chose to say was the plaintiff's case. The consequence was that a material difference was made in the proper position of the parties, and thus the case of the plaintiff was throughout substantially and injuriously affected. But in truth the admission made by the defendants was no admission at all. The plaintiff's case was an affirmative one; it involved no negation, it supported a continuing devise. The plaintiff's case was simply this: I am entitled as devisee under the *last* will and testament of the testator. If the defendants do not admit that, they do not admit the plaintiff's case, and the issue is upon him. The defendants do not admit that case or anything like it: they say, "The lessor of the plaintiff is not devisee, and the will under which you claim is as if it had never been made, because we set up a subsequent will, under which we are devisees, and by which all former wills are revoked." In order to entitle the defendants to begin, they should have admitted the whole case on the part of the plaintiff. It was an unimportant part of the case to admit the fact that a document was executed at some previous time; but that document did not become a will till the death of the testator, and if it was revoked before he died it never existed as a will, and the lessor of the plaintiff was never devisee.

[MAULE, J.—If the plaintiff begins and proves a first will only, and then the defendants set up a second will, can the plaintiff give evidence of expressions on the part of the testator to shew the impossibility, and inconsistency of the supposition of his having executed the later will?]

It is apprehended that he could not, as the expressions would not amount to a republication of the will. In this case it was the intention of the plaintiff to have given some evidence of that nature in laying his case before the jury. In the case between heir-at-law and devisee, the defendant admits the whole case of the plaintiff

when he admits the pedigree, and that the lessor of the plaintiff died seised, and on that ground he is held entitled to begin. There are two or three *Nisi Prius* decisions which apparently seem to favour the argument, that in such a case as this the defendant shall begin; but when investigated they are not authorities to that extent, nor can hasty decisions at *Nisi Prius* be allowed to controul the indefeasible right of a plaintiff to begin, or to confer on a Judge at the trial a power of entering into a scrutiny of conflicting rights, of compelling admissions to be accepted, and of deciding which party is to begin. The case of *Doe d. Chamberlayne v. Lloyd* will serve to shew how inconvenient such a practice would be; for as between landlord and tenant, the right to begin would shift according to the admissions. Take a defendant (as tenant) who admits the plaintiff's (his landlord's) title, and relies upon a demise. The defendant then begins; but the landlord admits the demise and relies upon a forfeiture; whereupon the plaintiff recovers his right to begin, of which he is again deprived by the defendant admitting the forfeiture and relying upon a waiver. The case of *Goodtitle d. Revett v. Braham* is not satisfactory; it may be taken to decide that in a question between heir-at-law and devisee, if the heirship be admitted the defendant begins; but the rule there laid down as to the defendant's right to reply generally, would not at this day be contended for, and was overruled in *Doe d. Pill v. Wilson* (10). The point really decided in *Doe d. Warren v. Bray* is against the defendants, and the expressions of Vaughan, J., in giving judgment, cannot be supported to their full extent. The case of *Doe d. Wollaston v. Barnes* was wrongly decided according to the reasons there given; the issue was properly on the plaintiff, but as he obtained the verdict, the ruling was never questioned.

[MAULE, J.—We cannot consider that case immaculate in point of law.]

The circumstances of the case mentioned to have been tried at Nottingham are not anywhere recorded; it may be that the plaintiff there obtained the verdict, or consented to the course adopted at the trial. *Doe d. Corbett v. Corbett* was decided upon the authority of *Goodtitle d. Revett v. Bra-*

*mand of M. & Co. took the said hops, &c., which is the same conversion, &c. Replication de injuriâ :—Held, that on the issue raised by de injuriâ, the plaintiff could give in evidence a valid sale of the hops by M. & Co. to S. B. through whom the plaintiff derived his title.*

*On motion for a new trial for misdirection by the Judge in telling the jury that if there was a valid sale to S. B. the plaintiff was entitled to recover,—Held, that the plea must be taken, after verdict, to import a continuing title in Mayor & Co. down to the time of the conversion, which fact being material was put in issue by the replication de injuriâ, and so the evidence was admissible and the direction right : or, that the plea was immaterial for not containing such allegation ; and in either case that the defendants were not entitled to a new trial.*

Trover for 200 pockets of hops.

The defendants pleaded twelve pleas, of which the following are material. Second plea, that the plaintiff was not at the said time when, &c., in the declaration mentioned, possessed as of his own property of the said goods and chattels in the declaration mentioned, or of any or either of them, or of any part thereof, in manner and form, &c. Fifth plea, as to parcel of the goods in the declaration mentioned, to wit, as to forty of the said pockets of hops, the defendants say that before and thence until the plaintiff became possessed of such last-mentioned goods, and until and at the time of such sale thereof to him as hereinafter mentioned, certain persons carrying on trade under the name, style and firm of Mayor & Co. were possessed of the same as of their own property, and being so possessed, &c. afterwards and before the plaintiff became possessed thereof, to wit, on the 5th day of January 1847, casually lost the same out of their possession, and immediately thereupon and before the plaintiff first became possessed thereof, to wit, on the day and year last aforesaid, the same came, by finding, into the possession of one Thomas Eyre, who immediately thereupon and just before the same time when, &c., in the declaration mentioned, sold and delivered the same to the plaintiff, who thereupon became and was thereof possessed as in the declaration alleged, whereupon imme-

diately and at the said time when, &c., the defendants, as the servants and at the command of the said Mayor & Co., seized and took the said goods out of the possession of the plaintiff, and retook possession thereof to and for the use of the said Mayor & Co., and with the intent to deprive and divest the plaintiff of the property therein, and to revest the same in the said Mayor & Co., as they, the defendants, then did, and as they lawfully might for the cause aforesaid, which is the said conversion in the declaration mentioned, so far as the same relates to the said parcel of goods in the introductory part of this plea mentioned. Tenth plea, as to parcel of the said goods in the declaration mentioned, to wit, as to the said forty pockets of hops, the defendants say that before the plaintiff was possessed thereof, certain persons carrying on business under the name, style and firm of Mayor & Co., were possessed thereof as of their own property, and being so possessed, afterwards, to wit, on the 5th day of January 1847, casually lost the same out of their possession, and the same thereupon came, by finding, to the possession of one Samuel Bradley, who thereupon immediately lost possession of the same, and the same came, by finding, to the possession of one Thomas Eyre, who thereupon immediately and just before the said time when, &c., to wit, on the day and year last aforesaid, sold and delivered the same to the plaintiff, who thereupon and thereby became and was possessed thereof, whereupon immediately and at the said time when, &c., in the declaration mentioned, the defendants, as the servants and at the command of the said Mayor & Co., seized and took the said goods out of the possession of the plaintiff, and retook possession of the same on behalf and to the use of the said Mayor & Co., with intent to divest and deprive the plaintiff of all property or possession thereof and therein, and revest the same in the said Mayor & Co., as they, the defendants, then did, and as they lawfully might for the cause aforesaid, which is the said conversion in the declaration alleged, so far as the same relates to the said parcel of goods in the introductory part of this plea mentioned.

The plaintiff joined issue on the second plea ; and replied to the fifth plea, that

the defendants of their own wrong and without the cause by them in the said plea mentioned, committed the grievances in the declaration alleged, so far as the same relate to the parcel of goods in the introductory part of that plea mentioned. To the tenth plea a similar replication. Upon these issues were joined.

It appeared at the trial, before Lord Denman, C.J., at the Spring Assizes, 1847, for the county of Surrey, that Mayor & Co. were originally possessed of the hops; that they then came into the possession of Bradley, then into the possession of Thomas Eyre, and that Thomas Eyre sold them to the plaintiff. The plaintiff relied upon a *bond fide* sale by Mayor & Co. to Bradley, by Bradley to Thomas Eyre, and by Thomas Eyre to the plaintiff. The defendants' case was, that Bradley fraudulently obtained the hops from Mayor & Co.; that Thomas Eyre received them of Bradley with notice of that fraud; and that they were bought by the plaintiff with knowledge of the frauds of Thomas Eyre and of Bradley.

The learned Judge told the jury that if there was a valid sale of the hops to Bradley, the plaintiff was entitled to recover. The jury found a verdict for the plaintiff.

*Manning, Serj.*, in Easter term, 1847, obtained a rule *nisi* for a new trial, on the ground of misdirection.—He contended that the questions raised by the fifth and tenth pleas were:—were Mayor & Co. at any time possessed of the hops? and were the defendants acting as the servants of Mayor & Co. at the time of the alleged conversion? and further, that evidence of the plaintiff's title acquired subsequently to the possession of Mayor & Co. should not have been received, as such title was not specially replied.

*Watson, Montagu Chambers and Kennedy*, shewed cause.—There is no misdirection complained of on the second plea, which is "not possessed" as to the whole of the hops, and under that plea the plaintiff could shew his title to them. But it is submitted there was no misdirection at all, and that the replication ought not to have been special. The fifth plea alleges that Mayor & Co. were possessed of the hops before and until the time of the sale to the plaintiff; that before such sale they lost the hops; that the hops were immediately found by Thomas

Eyre, and that Thomas Eyre immediately sold the hops to the plaintiff, who then became possessed thereof, whereupon the defendants immediately, as servants of Mayor & Co., retook the hops, &c. The tenth plea alleges that Mayor & Co. were possessed of the hops before the plaintiff was possessed; that they lost the hops, which came by finding into the possession of Bradley; that Bradley immediately lost possession of the hops, which came by finding into the possession of Thomas Eyre, who immediately sold the hops to the plaintiff, who then became possessed thereof, whereupon the defendants immediately, as servants of Mayor & Co., retook the hops, &c. These two pleas are very similar in form; in substance they mean the same thing; and as the same arguments apply to both it is only necessary to allude to the tenth plea. The defendants contend that the only important question raised by that plea is, were Mayor & Co. possessed of the hops before the plaintiff was possessed of them? It is said the intermediate findings and sale are express colour which cannot be traversed by *de injuriâ*, and that if the defendants can shew that Mayor & Co. were possessed at any time before the plaintiff was possessed they would be entitled to the verdict. It is admitted that express colour in a plea cannot be traversed by the replication *de injuriâ*, and hence it is not material to discuss the cases of *Comyns v. Boyer* (1), *Chambers v. Donaldson* (2), and *Cary v. Holt* (3), referred to in moving for this rule, though so far as they go they are not authorities for the defendants. The plea of a defendant in trover in order to be a justification, must set up a good title at the time of the conversion. The tenth plea, if it be worth anything, must mean that Mayor & Co. were possessed at the time of the conversion; and though express colour be given, the party pleading must set up a good title at the time of the conversion—*Leyfield's case* (4), *Stephen on Pleading*, p. 239. The replication *de injuriâ* puts in issue everything which is material in the plea; if therefore the title of Mayor & Co. is alleged in the plea to have existed at the time of the conversion, that

(1) Cro. Eliz. 485.

(2) 11 East, 65.

(3) *Ibid.* 70, n.

(4) 10 Rep. 91, a.

*mand of M. & Co. took the said hops, &c., which is the same conversion, &c. Replication de injuriâ:—Held, that on the issue raised by de injuriâ, the plaintiff could give in evidence a valid sale of the hops by M. & Co. to S. B. through whom the plaintiff derived his title.*

*On motion for a new trial for misdirection by the Judge in telling the jury that if there was a valid sale to S. B. the plaintiff was entitled to recover,—Held, that the plea must be taken, after verdict, to import a continuing title in Mayor & Co. down to the time of the conversion, which fact being material was put in issue by the replication de injuriâ, and so the evidence was admissible and the direction right: or, that the plea was immaterial for not containing such allegation; and in either case that the defendants were not entitled to a new trial.*

Trover for 200 pockets of hops.

The defendants pleaded twelve pleas, of which the following are material. Second plea, that the plaintiff was not at the said time when, &c., in the declaration mentioned, possessed as of his own property of the said goods and chattels in the declaration mentioned, or of any or either of them, or of any part thereof, in manner and form, &c. Fifth plea, as to parcel of the goods in the declaration mentioned, to wit, as to forty of the said pockets of hops, the defendants say that before and thence until the plaintiff became possessed of such last-mentioned goods, and until and at the time of such sale thereof to him as hereinafter mentioned, certain persons carrying on trade under the name, style and firm of Mayor & Co. were possessed of the same as of their own property, and being so possessed, &c. afterwards and before the plaintiff became possessed thereof, to wit, on the 5th day of January 1847, casually lost the same out of their possession, and immediately thereupon and before the plaintiff first became possessed thereof, to wit, on the day and year last aforesaid, the same came, by finding, into the possession of one Thomas Eyre, who immediately thereupon and just before the same time when, &c., in the declaration mentioned, sold and delivered the same to the plaintiff, who thereupon became and was thereof possessed as in the declaration alleged, whereupon imme-

diately and at the said time when, &c., the defendants, as the servants and at the command of the said Mayor & Co., seized and took the said goods out of the possession of the plaintiff, and retook possession thereof to and for the use of the said Mayor & Co., and with the intent to deprive and divest the plaintiff of the property therein, and to reave the same in the said Mayor & Co., as they, the defendants, then did, and as they lawfully might for the cause aforesaid, which is the said conversion in the declaration mentioned, so far as the same relates to the said parcel of goods in the introductory part of this plea mentioned. Tenth plea, as to parcel of the said goods in the declaration mentioned, to wit, as to the said forty pockets of hops, the defendants say that before the plaintiff was possessed thereof, certain persons carrying on business under the name, style and firm of Mayor & Co., were possessed thereof as of their own property, and being so possessed, afterwards, to wit, on the 5th day of January 1847, casually lost the same out of their possession, and the same thereupon came, by finding, to the possession of one Samuel Bradley, who thereupon immediately lost possession of the same, and the same came, by finding, to the possession of one Thomas Eyre, who thereupon immediately and just before the said time when, &c., to wit, on the day and year last aforesaid, sold and delivered the same to the plaintiff, who thereupon and thereby became and was possessed thereof, whereupon immediately and at the said time when, &c., in the declaration mentioned, the defendants, as the servants and at the command of the said Mayor & Co., seized and took the said goods out of the possession of the plaintiff, and retook possession of the same on behalf and to the use of the said Mayor & Co., with intent to divest and deprive the plaintiff of all property or possession thereof and therein, and reave the same in the said Mayor & Co., as they, the defendants, then did, and as they lawfully might for the cause aforesaid, which is the said conversion in the declaration alleged, so far as the same relates to the said parcel of goods in the introductory part of this plea mentioned.

The plaintiff joined issue on the second plea; and replied to the fifth plea, that



The tenth plea, divested of all that is immaterial for the purposes of this argument, alleges that Mayor & Co. were possessed of forty pockets of hops before the plaintiff became possessed of them; it then gives colour (shewing a bad title in the plaintiff as against Mayor & Co. the rightful owners), which is not traversable, and states that the plaintiff became possessed of the said hops (under a bad title), whereupon the defendants, as servants of Mayor & Co., retook them. The title is shewn to be in Mayor & Co. before the plaintiff was possessed, and he ought therefore to have set out his title, how derived from Mayor & Co., and have specially replied a sale to Bradley, and so on to himself. Whenever a defendant has pleaded giving colour, the plaintiff must set out his title in the replication—*Vin. Abr.* tit. 'Colour,' *Fenner v. Fisher* (12).

[MAULE, J.—Down to what time do you say the title of Mayor & Co. is alleged in the plea? Is it not necessarily to be implied from the plea that they were entitled at the time of the conversion?]

The replication *de injuriâ* is negative only; it operates as a denial of the title of Mayor & Co. as expressly alleged in the terms of the plea, "that they were possessed before the plaintiff became possessed." That is what the plaintiff denies by his replication; and on a traverse negating the title set up by the defendants, he cannot shew affirmative matter, such as how his own title accrued. The plea does impliedly allege Mayor & Co.'s right of possession down to the time of the conversion, but the form of the replication does not put that in issue. He also referred to the *Year Book*, Easter term, Hen. 8. fol. 7. pl. 7, *Rockwood v. Feasar* (13), and *Pim v. Grazebrook* (14).

COLTMAN, J.—Notwithstanding the laborious argument in support of the rule, I think this is a very plain case. The tenth plea contains an allegation of title in Mayor & Co. before the conversion, and then it is said that the plea gives title to the plaintiff by way of colour; but unless the plea is to be understood as containing a statement of title in Mayor & Co. down to the time of the

conversion, then it contains nothing but colour. There is some difficulty in saying what is colour and what is substance in these pleas. The rule is universal that the replication *de injuriâ* puts in issue all material allegations in the plea. The only material allegation that could avail the defendants here would be that Mayor & Co. were entitled at the time of the conversion: that therefore was put in issue, and has been found against the defendants by the jury. As to the question, whether the tenth plea was demurrable, we need not consider that now. It is conceded that the tenth and the fifth pleas are substantially the same, and the decision on one involves both. The verdict was right, and the rule must be discharged.

MAULE, J.—I also think the verdict is right. The same question is raised by the fifth and tenth pleas; and if they raise any question at all, that question must be, whether, at the time of the conversion the plaintiff was entitled to the hops? because if the plaintiff was, Mayor & Co. were not. If the tenth is a good plea, then the right of possession of the hops at the time of the conversion is put in issue. There may be a question whether the plea is good—whether it does allege, in unambiguous language, that Mayor & Co. were entitled at the time of the conversion? But if it does not state that, then it contains no justification at all, but is a mere statement of immaterial facts from the beginning to the end. Even in that case, the replication *de injuriâ* would put the whole of the facts alleged in the plea in issue, because where nothing is material, you cannot say one thing is more material than another; and the defendant would not be entitled to the verdict unless he proved the whole plea. I think the plea cannot now be taken to mean nothing; and then we must consider that it does contain the allegation that Mayor & Co. were entitled at the time of the conversion, and that is a good plea. Then, after being replied to you may throw overboard all the immaterial matter, and the plea is in substance "that at the time of the conversion Mayor & Co. were entitled to the goods, and authorized the defendants to take them." The plaintiff says, by his replication, that the defendants converted the goods without the cause alleged in their plea, and that

(12) Popham, 1.

(13) Cro. Eliz. 262.

(14) 2 Com. B. 445; s. c. 15 Law J. Rep. (N.S.) C.P. 32.

replication is found for him by the jury. Now, that replication puts in issue everything material that is affirmed by the plea, whether it be matter of title or authority derived from the plaintiff. Whether they be facts of that class which would have rendered the replication demurrable, is of no consequence now; its operation is to put everything which is material in issue, and nothing more. My Brother Manning says, that the plaintiff cannot shew title in himself through Bradley, because that would be setting up affirmative matter under a negative replication. That is sometimes true; but the right test, as to the matter proposed to be proved being affirmative or not, is this: the replication being merely negative, the plaintiff can only shew matters which (whether affirmative or negative,) negative the matters alleged by the defendant in his plea. The distinction is not between affirmative and negative matters, but between matters in confession and avoidance of, and matters which negative, the plea. Take the case of an action of trespass; plea, a right of common invaded; replication *de injurid*,—the plaintiff could not, under that, shew he had a right of common also, but he might shew that the defendant had none. So if the plea set out title to land; replication *de injurid*, not demurred to,—the plaintiff under that form of replication could not shew a grant or right of way derived out of the estate of the defendant by way of confession and avoidance without pleading it; but he might shew that before the trespass complained of in the declaration, the defendant had parted with his estate in the land. It is the taking title out of the defendant rather than the shewing it in some one else, that is material. So here, the plaintiff may take the property out of Mayor & Co., which is a material allegation in the plea put in issue by the replication. He may shew that it is out of them by any media of proof he pleases, and the most effectual way of shewing that Mayor & Co. had not the hops at the time of the conversion, was by shewing they had parted with them before. That is affirmative matter certainly, but it is not matter in confession and avoidance; it negatives the averment contained in the defendants' plea. Taking it either way, the verdict in this case is right. If the plea is bad, and

does not contain the allegation, then the plea amounts to nothing at all; if the plea is good, and does contain the allegation, that allegation was material, was put in issue by the replication, and was disproved, and so the rule must be discharged.

CRESSWELL, J.—I am of the same opinion. If the plea is bad, it offers no justification for the act complained of, and cannot affect the verdict; if the plea be good, then it involves an allegation that Mayor & Co. were possessed at the time of the conversion; such allegation being material was put in issue by the replication, and disproved by the evidence.

WILLIAMS, J.—I am of the same opinion.

*Rule discharged.*

1848. }  
Jan. 11, 18. } BOOZEY v. TOLKIEN.

*Copyright—Pleading—Several Counts—Statute 5 & 6 Vict. c. 45.*

*In an action for the infringement of a copyright, the plaintiff will not be allowed a count on the statute 5 & 6 Vict. c. 45, in conjunction with a count for the infringement of the same copyright at common law.*

*Under a count on the above statute for infringing a copyright, setting forth the requisitions of the statute, and concluding contra formam statuti, the plaintiff may set up his common law right, if he fail to bring himself within the operation of the statute.*

Case for the infringement of a copyright. The declaration contained three counts: the first count stated, that before and at the time of the committing of the grievances by the defendant, thereafter mentioned, the plaintiff was, and from thence hitherto has been, and still is, the proprietor of the copyright of and in a certain book, to wit, a musical composition, called "Tutto è sciolto, eh di funesto, Scena ed aria nell' opera, La Sonnambula, del M. Bellini," and also of the copyright of and in a certain other book, being a musical composition, called "Tutto è gioja, tutto è festa, Cavatina nell' opera, La Sonnambula, del M. Bellini;" which said several books had been and were, and each of them had been and was first printed

1848. }  
Jan. 22. } BATTY v. MARRIOTT.

*Practice—Enlarged Rule, Service of.*

*In this Court, the party moving to enlarge a rule should serve the rule for enlarging it on the other party. And when a rule is enlarged by consent, the party whose interest it is to keep it alive must serve the enlarging rule on his adversary.*

In this case a rule, which had been previously enlarged, was, on the last day of Michaelmas term 1847, further enlarged by consent. That rule was not served, and no one having appeared to shew cause against it, it was made absolute.

*H. Hill* moved to revive the rule, on the ground that there was some doubt as to the practice of this Court with regard to the service of enlarged rules, viz., whether it was necessary to serve them at all, and if so, which party was bound to do so. In *Chit. Archb.* p. 1191, it is said not to be the practice to serve enlarged rules, because both parties are before the Court.

WILDE, C.J.—As I understand the practice in this court, it is the duty of the party who moves to enlarge a rule to serve the rule for enlarging it on the other party; and that if the rule is enlarged by consent, the party whose interest it is to keep it alive should serve the enlarging rule on his adversary. If the party enlarging the rule does not serve a rule for that purpose, he is taken to have abandoned it. As in the present case there was a mistake with regard to the practice, the Court think that the rule may stand revived till a further day in term.

*Rule revived.*

1848. }  
Jan. 25. } STREETER v. BARTLETT.

*Evidence—Insolvent's Schedule—Attesting Witness.*

*An insolvent's schedule which was offered in evidence as containing an admission by the insolvent of a debt, consisted of several sheets, each of which was signed by the insolvent, and the first one only (which was not the sheet containing the admission) was also signed by an attesting witness:—*

*Held, that the attestation applied to the signature of all the sheets, and that the schedule was not admissible without the evidence of the attesting witness.*

Debt, for money lent, for interest, and on an account stated.

*Plea—Nunquam indebitatus.*

The particulars of demand accompanying the declaration claimed the sum of 25*l.* 10*s.* 11*d.*, due on two I O Us, and for interest, and for money lent. The venue was laid in Middlesex, then changed to Sussex, and afterwards brought back to Middlesex, on the usual undertaking, by the plaintiff, to give material evidence there. The defendant gave the plaintiff notice to prove the consideration of the I O Us.

At the trial, before Coltman, J., the plaintiff, for the purpose of proving that the I O Us had been given for money lent, offered in evidence a schedule of the defendant's, produced from the Insolvent Court in Middlesex, which contained in one sheet an admission of the debt for money lent on the I O Us. There were several sheets in the schedule, all of which were signed by the defendant, but the first only (which was not the one containing the admission), was signed by the attorney for the defendant, as attesting witness, and he was not called to prove the signature by the defendant. The Judge thought that the schedule was not admissible without the evidence of the attesting witness. A verdict was found for the plaintiff, but leave was reserved to the defendant to move to enter a nonsuit, on the ground that the plaintiff had not fulfilled his undertaking.

A rule nisi having been obtained accordingly,—

*Lush* now shewed cause.—The objection raised is, that the attesting witness to the schedule, required by 1 & 2 Vict. c. 110. s. 69, and by the general order of the Insolvent Court (Nov. 1, 1842), rule 4, was not called at the trial, and that therefore the schedule was inadmissible in evidence. The case of *Bailey v. Bidwell* (1) is directly in point. There, under a rule of the Court of Bankruptcy, similar to the rule in the Insolvent Court, the Court held

(1) 13 Mee. & Wels. 73; s. c. 13 Law J. Rep. (N.s.) Exch. 264.

it to be unnecessary to call the attesting witness. The schedule is offered here only as an admission by the defendant.

[CRESSWELL, J.—Is there anything here to shew that the Insolvent Court had acted on this schedule? In the case in the Exchequer, the Court proceeded on the ground that the Bankruptcy Court had acted upon the document.]

There are memoranda on the schedule shewing the date of the petition, of the filing of the schedule, of the vesting order, and of the day appointed for the hearing. Proof that the document came from the Court, and proof of the defendant's handwriting, would have sufficiently established the admission by the defendant without calling the conventional witness. The first sheet only is signed by the attesting witness, and the plaintiff relied upon an independent sheet signed by the defendant.

[MAULE, J.—I think you would have some difficulty in getting on without the beginning of the schedule. I think it must be incorporated with what follows, and that the attestation on the first sheet must apply to the whole of the schedule.]

It is submitted that the case in the Court of Exchequer above cited governs the present.

[MAULE, J.—In *Bailey v. Bidwell* the allegation sought to be proved was, that the defendant had presented a petition the contents of which were not material, and not that he had made any admission. The Court there put their decision on the ground that the Court of Bankruptcy had acted upon the petition, which must have been evidence that the petition had been presented. In the present case it is necessary for you to prove more than that the defendant filed his schedule: you must prove some of its contents. Suppose the attesting witness had been called, and had said that a material part had been concealed from him, or that he was blind or illiterate.]

There is *prima facie* evidence without him, though he might be called in contradiction. It appears from the fact that a day had been appointed for the hearing, that the schedule had been filed, and the Court had acted on it.

*Hawkins*, in support of the rule.—The schedule only amounts to a proposal to take the benefit of the 1 & 2 Vict. c. 110. There

are no provisions in the statute requiring the memoranda mentioned to be indorsed on the schedule.—(He was then stopped by the Court.)

MAULE, J.—I think, in this case, that the subscribing witness ought to have been called. In the case which occurred in the Court of Exchequer, the Court thought it was proved that the petition had been presented. That decision does not apply to the present case. The memoranda upon the schedule referred to by Mr. Lush were clearly no part of the proceedings, and it, therefore, must be assumed that they were never acted upon at all. It was necessary for the plaintiff to shew that this parchment had been signed by the defendant; and it was, therefore, most material that the circumstances under which the signature had taken place should appear, in order that it might be seen whether the statement had been made in such a manner as to make it evidence against the defendant. That is the object for which the attestation of a subscribing witness is required. The rule of the Insolvent Court directs, that there should be a subscribing witness, and describes what sort of person he should be. It directs that the schedule shall be signed by the petitioner in the presence of, and shall be attested by, his attorney. This shews that the law relating to subscribing witnesses ought to apply; that the matter was not to be left to the option of the parties, but that the document should have the particular safeguard specified in the rule. The natural consequence of the rule of court requiring such a signature is, that the ordinary practice should apply.

CRESSWELL, J.—I also am of opinion that this rule should be made absolute. It is quite clear, that Mr. Lush's application to receive this schedule was a departure from the ordinary rules of evidence. The only reason adduced for making that application was founded on the case in the Court of Exchequer; but that case is distinguishable from the present. The Insolvent Court have made a rule that the schedule of the petitioner should be verified by an attesting witness, and there are no circumstances here to induce us to receive the schedule without one.

WILLIAMS, J. concurred.

*Rule absolute.*

1848. } ENGSTROM AND OTHERS v.  
Jan. 26. } BRIGHTMAN AND OTHERS.

*Practice—Special Case, under the 3 & 4 Will. 4. c. 42. s. 25.—Special Verdict.*

*The Court will not hear a special case in which the parties have agreed that the Court may draw such inferences from the facts as a jury might draw, and that the case may be turned into a special verdict.*

A special case was stated in this action, after issue joined and before trial, by consent of the parties, by order of Erle, J., under the 3 & 4 Will. 4. c. 42. s. 25. At the end of the case there was a clause empowering the Court to draw any inferences from the facts which a jury might have drawn, and reserving to either party the right of turning the special case into a special verdict.

*Channell, Serj. and Peacock* appeared for the plaintiffs; and

*Kinglake, Serj., with M. Smith*, for the defendants.

MAULE, J.—I do not think we ought to hear this case. We are called on to decide both the law and the facts, and yet the facts must be found in a special verdict, so that a court of error would have to give judgment on a state of facts different from that on which we decide.

CRESSWELL, J.—Does the statute which authorizes special cases, also authorize special verdicts? How are the facts to be found? We may all agree to find for the plaintiffs or for the defendants, and yet we may draw different inferences of fact from the case.

MAULE, J. added—The act studiously avoids the mention of special verdicts. There is not here any absolute consent to a special case under the 25th section of the Law Amendment Act(1). It is only conditional. The parties have believed themselves to be under an agreement which does not exist; the case must therefore be passed over until they come to an agreement on which the Court can act.

(1) The 3 & 4 Will. 4. c. 42. s. 25. provides, "That it shall be lawful for the parties in any action or information after issue joined, by consent, and by order of any of the Judges of the said superior courts, to state the facts of the case in the form of a special case, for the opinion of the Court, and to agree that a judgment shall be entered for the

*APPEALS from the Courts of Revision, under 6 Vict. c. 18.*

1847. }  
Nov. 18. } ALLWORTH v. DORE.  
1848. }  
Jan. 20. }

*Parliament—Notice to Respondent, under 6 Vict. c. 18. s. 64.*

*When an appeal from the decision of a revising barrister is called on, and the respondent does not appear, the appellant must prove the service of a ten days' notice on the respondent, or shew a sufficient excuse for the omission; otherwise the appeal must be struck out.*

This was a consolidated appeal from the decision of the revising barrister for the borough of Abingdon. The case was called on in Michaelmas term, when the respondent did not appear.

*Alexander*, for the appellant (Nov. 18).—I have no affidavit of service, as the appellant was given to understand that the respondents would appear. There are some special facts connected with the service of the notice, and the Court under the authority of *Newton v. Moberley* (1) will postpone the case, and this will enable the appellant to be prepared with an affidavit.

[WILDE, C.J.—The case may stand over till the next day for hearing appeals.]

*Alexander* (Jan. 20) produced an affidavit, which stated that the ten days' notice required by the 64th section of 6 & 7 Vict. c. 18. had not been given in point of fact, but that the service of such notice had been waived by the respondents who had agreed to appear in support of their case.

WILDE, C.J.—It does not appear from the affidavit that anything was consented to be waived, except some formal matters which occurred before the revising barrister. The appellant now comes before us as if this were the first day for hearing appeals, and he asks for judgment in his favour, because the respondent does not appear.

plaintiff or the defendant, by confession, or of *non prosequi*, immediately after the decision of the case, or otherwise, as the Court may think fit, and judgment shall be entered accordingly."

(1) 2 Com. B. 203; s. c. 15 Law J. Rep. (N.S.) C.P. 154.

He does not shew that the ten days' notice required by the act has been given to the respondent, and therefore the appeal must be struck out.

MAULE, J.—The proviso at the end of the 64th section of the 6 Vict. c. 18. gives the Court power to adjourn the hearing of the appeal upon reason assigned. When the Court is induced to depart from its usual course of proceeding, it always requires some good and valid reasons to be given for such departure; and with respect to this act of parliament, the grounds must be very substantial. Here there is no ground whatever for the application, and we must adhere to the terms of the act.

CRESSWELL, J.—Assuming the circumstances to be the same now, and considering the case as if it were the first day when it was called on last term (when I was not present) the first thing the appellant must do is to bring himself within the proviso of the 64th section, to be able to ask for a postponement; the affidavit produced is not sufficient to warrant the Court to grant a postponement; and, therefore, the appellant cannot be heard.

WILLIAMS, J. concurred.

*Appeal struck out.*

1848. }  
Jan. 20. } WATSON v. PITT.

*Parliament—6 Vict. c. 18. s. 17.—Borough Voter—Service of Notice of Objection.*

*The service of a notice of objection on a borough voter was stated by the revising barrister to have been made, by putting the notice and leaving it within the entrance door of the voter's place of abode between nine and ten o'clock of the night of the 25th of August:—Held, that the time and mode of service were insufficient; and that whether a notice of objection had been properly served is a question of fact to be determined by the revising barrister.*

This was an appeal from the decision of the revising barrister for the borough of Bewdley, who stated the following

#### CASE.

At the Court, held on Thursday, the 20th of October, before the revising barrister for the borough of Bewdley, Charles Watson,

of Bridge Street, in Stourport, within the said borough, objected to the name of Francis Pitt being retained on the list of persons entitled to vote in the election of a member to serve in parliament for the said borough, in respect of a house and land in the hamlet of Wribbenhall. The facts of the case were as follows:—William Taylor, on behalf of the objector, went to the house of the said Francis Pitt between nine and ten o'clock in the evening of the 25th of August last. He knocked at the door of the house several times and no person answered, he thereupon put a due notice of objection, signed by the said Charles Watson, within the house; and this was the only occasion on which he attempted to serve the said notice. I decided that this was not a sufficient service of notice of objection within the meaning of the 17th section of the stat. 6 & 7 Vict. c. 18, and therefore that the said Charles Watson was not entitled to call upon the said Francis Pitt to prove that he was entitled to be retained on the list of voters for the said borough, by reason whereof the name of the said Francis Pitt was retained on the list of voters for the said borough.

If the Court should be of opinion that the service was sufficient, then the name of the said Francis Pitt is to be expunged from the said list. But if the Court should be of opinion that the service was not sufficient, then the name of the said Francis Pitt is to be retained on the list. Signed by the revising barrister.

"I appeal from this decision.

"Charles Watson,

"Bridge Street, Stourport."

The case came on to be argued, in Michaelmas term last, when the Court were of opinion that the matter of appeal was not sufficiently stated to enable them to give judgment, and, under the power given by the 65th section of 6 & 7 Vict. c. 18, remitted the statement to the revising barrister that the case might be more fully stated.

The revising barrister thereupon returned,—“The above statement having been remitted by the Court to me the said, &c. to be more fully stated as to whether the service of the said notice of objection was made at the voter's place of abode mentioned in the list, and whether the said notice was left there, and also as to

the ground on which I came to the conclusion that the facts found by me did not establish a sufficient service of such notice, I hereby find the following additional facts: namely, that the service of the said notice was made at the voter's place of abode mentioned in the list; that the said notice was put inside the said door which was the usual entrance door of the said house, and was left there. And I state and submit to the Court that the following was the ground of my said decision, namely, I was of opinion that the time and mode of the service of the said notice were unreasonable, and that some further attempt to leave the said notice with some person at the said house of the said F. Pitt ought to have been proved in order to satisfy the provisions of the said statute.

*Gray*, for the appellant.—The notice was properly served in compliance with the 17th section of the 6 & 7 Vict. c. 18. The words of the act are that a person objecting "shall give or cause to be left at the place of abode." It prescribes no particular mode of leaving; and the case as amended finds that the notice was left at the place of abode, and that is sufficient. The notice is to be served on the 25th of August: that means at any time on that day; and the revising barrister had no power to limit the hours of the day, the whole of which is given by the act. If there had been any suggestion of fraud on the part of the objector, the service could not have been considered a good service; but there is nothing of that kind here.

*Byles, Serj.*, for the respondent.—The Court are concluded by the finding of the revising barrister, who states as a fact that the service of the notice was an unreasonable service, and that is the same thing as no service at all. If it be a question which the Court will entertain, they will look at all the surrounding circumstances, and decide in accordance with the meaning and intention of the act of parliament. The words "left at the place of abode" do not mean any leaving: if it did, putting the notice down the chimney or in a drawer in the voter's house would be sufficient. The meaning is, that the notice shall be left in such a reasonable time and manner that the presumption is the voter will receive it. Neither was done here. The time was after business hours, when the voter was probably

in bed; the mode, viz. putting it inside the door, was an improper mode; it might have been put under the door-mat. Notice of dishonour of a bill or a notice to quit, if served in the way here described, would not be held to be sufficient service. If it does not appear from the facts stated that the decision of the revising barrister was wrong, such decision must be affirmed—*Watson v. Cotton* (1).

*Gray*, in reply, contended that the facts as stated shewed that the service was not unreasonable. A service by the post is sufficient, and the delivery of letters is often after 9 o'clock at night.

*WILDE, C.J.*—The decision of the revising barrister must be affirmed. The 17th section of 6 & 7 Vict. c. 18. enacts, that service of the notice of objection will be sufficient if "left at the place of abode" of the party objected to. What does that mean? How must it be left? A bare leaving would not be sufficient; otherwise it might be put into a drawer, or left in an infinite variety of ways which the act would not sanction as any service at all. Clearly the notice must be left at the place of abode at such time and in such mode as to afford (at least) a cogent presumption that the person objected to will have a reasonable chance of receiving it. This being so, we are then driven to consider the time at, and the mode in, which the notice of objection was left in this case. Now the facts are, that the objector, between 9 and 10 o'clock, (beyond the hours when people are about,) put the notice inside the door of the voter's place of abode, as described in the list (and this may not have been his actual place of residence). There is nothing more done or attempted to be done by the objector. There is no proof by him that no person was in the house; probably there was, and then the notice should have been left with that person. The revising barrister says, he thought the time and mode of service were unreasonable, and we are of the same opinion. I also think that the sufficiency of the service was a question of fact for the decision of the revising barrister.

*MAULE, J., CRESSWELL, J. and WILLIAMS, J.* concurred.

*Decision affirmed, with costs.*

(1) *Ante*, p. 68.

it to be unnecessary to call the attesting witness. The schedule is offered here only as an admission by the defendant.

[CRESSWELL, J.—Is there anything here to shew that the Insolvent Court had acted on this schedule? In the case in the Exchequer, the Court proceeded on the ground that the Bankruptcy Court had acted upon the document.]

There are memoranda on the schedule shewing the date of the petition, of the filing of the schedule, of the vesting order, and of the day appointed for the hearing. Proof that the document came from the Court, and proof of the defendant's handwriting, would have sufficiently established the admission by the defendant without calling the conventional witness. The first sheet only is signed by the attesting witness, and the plaintiff relied upon an independent sheet signed by the defendant.

[MAULE, J.—I think you would have some difficulty in getting on without the beginning of the schedule. I think it must be incorporated with what follows, and that the attestation on the first sheet must apply to the whole of the schedule.]

It is submitted that the case in the Court of Exchequer above cited governs the present.

[MAULE, J.—In *Bailey v. Bidwell* the allegation sought to be proved was, that the defendant had presented a petition the contents of which were not material, and not that he had made any admission. The Court there put their decision on the ground that the Court of Bankruptcy had acted upon the petition, which must have been evidence that the petition had been presented. In the present case it is necessary for you to prove more than that the defendant filed his schedule: you must prove some of its contents. Suppose the attesting witness had been called, and had said that a material part had been concealed from him, or that he was blind or illiterate.]

There is *prima facie* evidence without him, though he might be called in contradiction. It appears from the fact that a day had been appointed for the hearing, that the schedule had been filed, and the Court had acted on it.

*Hawkins*, in support of the rule.—The schedule only amounts to a proposal to take the benefit of the 1 & 2 Vict. c. 110. There

are no provisions in the statute requiring the memoranda mentioned to be indorsed on the schedule.—(He was then stopped by the Court.)

MAULE, J.—I think, in this case, that the subscribing witness ought to have been called. In the case which occurred in the Court of Exchequer, the Court thought it was proved that the petition had been presented. That decision does not apply to the present case. The memoranda upon the schedule referred to by Mr. Lush were clearly no part of the proceedings, and it, therefore, must be assumed that they were never acted upon at all. It was necessary for the plaintiff to shew that this parchment had been signed by the defendant; and it was, therefore, most material that the circumstances under which the signature had taken place should appear, in order that it might be seen whether the statement had been made in such a manner as to make it evidence against the defendant. That is the object for which the attestation of a subscribing witness is required. The rule of the Insolvent Court directs, that there should be a subscribing witness, and describes what sort of person he should be. It directs that the schedule shall be signed by the petitioner in the presence of, and shall be attested by, his attorney. This shews that the law relating to subscribing witnesses ought to apply; that the matter was not to be left to the option of the parties, but that the document should have the particular safeguard specified in the rule. The natural consequence of the rule of court requiring such a signature is, that the ordinary practice should apply.

CRESSWELL, J.—I also am of opinion that this rule should be made absolute. It is quite clear, that Mr. Lush's application to receive this schedule was a departure from the ordinary rules of evidence. The only reason adduced for making that application was founded on the case in the Court of Exchequer; but that case is distinguishable from the present. The Insolvent Court have made a rule that the schedule of the petitioner should be verified by an attesting witness, and there are no circumstances here to induce us to receive the schedule without one.

WILLIAMS, J. concurred.

*Rule absolute.*



work at them till July 1845, when he went away and left them. Before leaving, the plaintiff applied to the defendant for bricks to continue the work with, there being a few bricks and some rag stones then on the premises. The bricks were not supplied, and the use of the rag stones would not have been advantageous to the plaintiff. The defendant a few days after requested the plaintiff to return to the work. He refused to do so, alleging there were not any proper materials to carry on the work with.

The defendant contended that there was a mistake in the agreement in describing the houses as situate in South Street *and* Southampton Street, and that the word *and* had been inserted by mistake. He produced a receipt signed by the plaintiff, but written by himself, for payment for work done to houses in South Street, Southampton Street. The learned Judge left it to the jury to say on the first issue, whether the insertion of the word "*and*" in the agreement was a mistake, and whether the parties meant to describe the houses as situate in South Street, Southampton Street, or in South Street *and* Southampton Street. The jury found a verdict for the defendant on all the issues. A rule nisi for a new trial for misdirection had been obtained (1).

*Pigott* shewed cause.—The verdict on the second and third issues is decisive of the action, and therefore no new trial will be granted; but it is submitted that the jury were rightly directed on the first issue. It was necessary to give evidence to shew the particular locality to which the contract applied. The agreement by itself would apply to South Street in London or York. It was also competent for the defendant to shew that he had no houses in Southampton Street. Evidence of such a fact is not inconsistent with, or in contradiction of, the agreement, but in explanation of it, and it devolves upon the jury to say, considering all the circumstances before them, what was the real intention and meaning of the agreement—*Hutchins v. Scott* (2).

[MAULE, J.—You may shew that the

(1) A new trial was granted on other points; but the direction of the Judge and the finding of the jury on the second and third issues were admitted in argument to have been correct.

(2) 2 Mee. & Wels. 809; s. c. 6 Law J. Rep. (n.s.) Exch. 186.

parties meaning to use the words they did use were mistaken in the situation of the houses, but can you shew *and Southampton Street* was a mistake? Must you not seek relief in equity?]

In *Rose v. Sims* (3) it is said that Lord Tenterden allowed evidence to be given to shew that a bill of exchange for 13*l.* 19*s.* mentioned in an agreement, really meant a bill for 14*l.* 19*s.*

[MAULE, J.—Can you leave it to a jury to say whether there is a mistake in a written agreement?]

Lord Abinger says in *Hutchins v. Scott*, if No. 35 was intended, I am clearly of opinion that parol evidence was receivable to shew that the 38 was a mistake.

[MAULE, J.—But can you strike out anything altogether? What you have just read is only a dictum of Lord Abinger's.]

In cases under the Usury Laws, you may shew that too much or too little interest was inserted—*Booth v. Cooke* (4).

*Humfrey and Partridge*, contra.—It is a general proposition that parol evidence is not admissible to explain a written contract. It was shewn that the land in Southampton Street was "to let" at the time the contract was made. The body of the receipt was written by the defendant, and the jury ought not to have been asked to put a construction upon the clear and unambiguous words of an agreement. It is not for the jury, but for the Judge, to expound the contract; the only exception being when a particular sense is sought to be given to words of a generally received import—*Neilson v. Harford* (5). It is no answer to say that the Judge was of the same opinion as the jury, because the plaintiff might have tendered a bill of exceptions to the ruling of the Judge, and thus have got the judgment of a court of error on the construction of the instrument, whereas a court of error could now only decide whether the Judge should have left the question of construction to the jury. If wrongly left, it is a misdirection, and can only be remedied by a new trial.

(3) 1 B. & Ad. 522, n. b; s. c. 9 Law J. Rep. K.B. 85.

(4) Freem. 264.

(5) 8 Mee. & Wels. 806; s. c. 11 Law J. Rep. (n.s.) Exch. 20.

[MAULE, J.—In *Richards v. Murdoch* (6), it was said that the Judge ought to have decided without evidence of opinion, as the jury decided after hearing such evidence, (which evidence ought not to have been admitted,) and the rule for a new trial was discharged on that ground.]

It is difficult to say that the insertion of the word “and” was a mistake; and it is not competent for a defendant to strike that word out of the agreement when trying an issue raised upon it. Suppose an action on a bond and *non est factum* pleaded, the bond is produced and agrees exactly with the declaration, could the defendant say the word “and” was inserted by mistake, and I am entitled to the verdict for a variance?

[MAULE, J.—Giving effect to all the words, may it not be said that evidence is admissible to shew that the words, though existing, fairly apply to the houses in South Street only?]

The plaintiff, at all events, is entitled to a verdict on the first issue, for he has proved the contract.

WILDE, C.J.—On further consideration, I think the question on the first issue should not have been left to the jury in the terms it was left to them, and that the verdict on that issue should be found for the plaintiff. There are many cases in which evidence may be admitted to shew what parties mean by their agreement; but there was no ambiguity requiring it in this case. It was proved that at the date of the agreement the defendant had houses in South Street only, and it was really unnecessary to leave to the jury any question of mistake in the agreement, for the language therein used is reconcileable to the intention of the parties; and construing the agreement as it stands, it means the houses in South Street. This rule will, therefore, be discharged without costs, on the defendant's consenting the verdict being entered for the plaintiff on the first issue.

MAULE, J., CRESSWELL, J., and WILKINS, J. concurred.

*Rule accordingly.*

(6) 10 B. & C. 527; s. c. 8 Law J. Rep. K.B.210.

1847. }  
May 24; } DOE d. HARRISON v. HAMPSON.\*  
June 12. }

*Ejectment—Consent Rule—Personal Undertaking—Costs; Administrator's Right to*  
—1 & 2 Vict. c. 110. s. 18.

*In an action of ejectment, in which the ordinary consent rule had been entered into, the defendant obtained a verdict. In March 1846, a rule nisi for a new trial was obtained, and discharged in January 1847. The defendant died intestate in November 1846, and C. H, the defendant's son, was appointed administrator in March 1847. Afterwards, in the same month, judgment in the action was ordered by a Judge at chambers to be signed as of the 21st of April 1846, and on the 24th of April 1847, a rule nisi was obtained, calling upon the lessor of the plaintiff to pay to C. H, the defendant's administrator, the taxed costs of the action:—Held, that the consent rule in ejectment is a personal undertaking only; that the statute 1 & 2 Vict. c. 110. s. 18. does not alter its personal character, and therefore the right to costs upon such rule does not survive to the personal representatives of the successful party.*

*Ejectment.* The declaration was of Hilary term, 1846. The consent rule was in the usual form, and dated the 5th of February, in the 9th year of Queen Victoria.

The cause was tried, at the Spring Assizes for the county of Somerset, 1846, when the jury found a verdict for the defendant. In Easter term, 1846, a rule nisi was obtained for a new trial; and the case was argued on the 1st of June 1846. In November 1846 the defendant died; and on the last day of Hilary term 1847 the Court discharged the rule for a new trial. The defendant's attorney, notwithstanding the defendant's death, immediately signed judgment and gave notice of taxation of costs; but the Master, after hearing the parties, refused to tax the costs. On the 18th of March 1847 letters of administration were granted to C. H, the son of the defendant. On the 20th of March the defendant's attorney took out a summons before a Judge at chambers, to shew

\* Decided in Trinity term, 1847.

cause "why the judgment signed herein on the 10th of February last should not be struck out, and re-signed as of the 21st day of April last (1846), and why it should not be referred to the Master to tax the defendant's costs of this suit; [and why the lessor of the plaintiff should not pay the amount of such costs when taxed to C. H., the administrator of the defendant]." The learned Judge made an order in the terms prayed, as far as the word "suit," and wrote on the summons, "the part within brackets should be ground of motion in court for a rule."

An order was drawn up to tax the costs of the defendant, and the Master's allocatur for 68*l.* 12*s.* was obtained.

A copy of the consent rule and allocatur was served on the lessor of the plaintiff on the 17th of April 1847, and a demand of payment made, which not being complied with, a rule was obtained on the 24th of April as follows:—Upon reading the record of *Nisi Prius* in this cause, &c., it is ordered that the lessor of the plaintiff shew cause why he should not forthwith pay to C. H., as administrator of the defendant, the sum of 68*l.* 12*s.*, the amount of the Master's allocatur for the defendant's costs in the cause.

In Easter term, 1847, (May 24),—

*Butt* shewed cause.—The terms of the consent rule are personal only: "If upon the trial of the said issue the defendant shall not confess lease, entry and ouster, &c., the defendant shall pay costs to the plaintiff's lessor in that case, to be taxed by the Master. If, upon the trial of the said issue, the verdict shall be found for the defendant, then the lessor of the plaintiff shall pay the costs in that case to be adjudged." Thus it appears that on both sides there is only a personal obligation. The defendant relies upon the 1 & 2 Vict. c. 110. s. 18, but that statute does not create any new liability; it only gives a more summary and extensive method of obtaining execution. *Goodright v. Holton* (1) was the only authority cited for the defendant, and that case can only be supported on the ground that there the costs were taxed *by consent* and by agreement of the parties. It is so explained in *Adams on Eject-*

*ment*, p. 296, 4th edit., and *Thrustout v. Bedwell* (2) is a direct authority in my favour. The case in *Barnes* is always cited with the words "*by consent*" printed in Italics, shewing that those words are most material to explain the reason of the decision.

[MAULE, J.—In the *Books of Forms*, the rule is called "the common rule *by consent*." The latter words are necessary to describe the rule, and need not mean *taxing by consent*.]

[WILDE, C.J.—The judgment in the case in *Wilson* is given partly upon the ground that no action could be brought; but here, there was a judgment during the defendant's life upon which an action could have been brought.]

It is submitted that no action could have been brought here; and the reason of that case is therefore with me.

[WILDE, C.J.—The costs are taxed upon the consent rule, and the allocatur is made thereupon during the defendant's life: why would not that be a good foundation for an action by the administrator?]

The question is, is not the consent rule *itself*, which is the foundation of the liability, a mere personal obligation and nothing more? Subsequent circumstances cannot affect it. Judgment may be entered up for the defendant, but he cannot obtain his costs; for the judgment is not against John Doe, and the lessor of the plaintiff is therefore not liable to costs as upon a judgment—*Williams on Executors*, p. 1430, 2nd edit. *Doe d. Pain v. Grundy* (3) decides that the consent rule is merely personal, and the judgment in that case is the plaintiff's argument in this. (*Hullock on Costs*, p. 647, *Tidd's Practice*, p. 1243, 12th edit., and *Wms. Saunders*, vol. 2. p. 720, note a., were also referred to on this point.)

The case of *Newton v. Walker* (4) decides that a rule of court made against an intestate will not warrant an attachment against an administrator; and if the consent rule be a mere personal obligation, the 1 & 2 Vict. c. 110. does not apply. The 18th section enacts, "that all decrees and orders of courts of equity, and all rules of courts of common law, &c., whereby any sums or

(2) 2 *Wilson*, 7.

(3) 1 B. & C. 284; s. c. 1 *Law J. Rep. K.B.* 18

(4) *Willes*, 315.

(1) *Barnes's Notes*, 119.

money or any costs, &c. shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, &c. shall be payable, shall be deemed judgment creditors." But such enactment does not alter the nature of the liability, which was personal when created, and must ever remain so. If it be otherwise, it would be necessary, on a rule of this nature, to enter into the question whether or no the administrator had assets; and a decision on that question in this form would not bind the other creditors. Suppose there had been no death, and this were an application under this statute by the defendant himself, the rule could not be made absolute, because the consent rule is not within the act of parliament.

[MAULE, J.—The consent rule says, that in the event of the defendant not confessing, &c., he shall pay costs, to be taxed; and that in the event of the defendant's obtaining the verdict, the lessor of the plaintiff shall pay costs, to be adjudged. That means adjudged by the Master. The judgment would be against John Doe, but the rule steps in, and says the lessor of the plaintiff shall pay.]

*Jones v. Williams* (5) and *Hodgson v. Paterson* (6) are authorities to shew that as the money to be paid is not expressed in the consent rule itself, it is not a rule within the act. Lastly, the person against whom the application is made, is not a party to the record. This is not an application under a judgment, and, therefore, the applicant must proceed by *scire facias*, in the usual way—see the note to *Underhill v. Devereux* (7).

*Montague Smith*, in support of the rule.—The Court, in order to meet the justice of the case, will, if possible, make this rule absolute. The form of the judgment is, that John Doe take nothing by his suit, &c., and that the defendant recover against John Doe his costs, to be adjudged.

[MAULE, J.—If this were a common action a *scire facias* would be necessary.]

Yes; in order to make the lessor of the

plaintiff a party to the record, and this is an analogous proceeding. Some application must be made to the Court under present circumstances, as the consent rule is a consent to pay, and no attachment can issue against a dead man. In the case of *Thrustout v. Bedwell*, the plaintiff died before the assizes; therefore the action abated, and then there could be no pretence for the defendant to recover. Besides, the judgment in that case is loose and unsatisfactory: it states the Court were of that opinion; but it does not say of which opinion urged in argument, and it was sufficient in that case to refuse costs, because the action had abated.

The explanation of the words "by consent" in *Adams on Ejectment*, on citing the case from *Barnes, Goodright v. Holton*, is not to be assented to: they do not mean taxed by consent, but taxed on the consent rule. If this rule be granted, a writ of *fi. fa.* will be issued at the suit of the administrator against the lessor of the plaintiff, and thus the defendant will get the benefit of the statute 1 & 2 Vict. c. 110, which was passed to enlarge the powers of the Court in granting a remedy in cases of this nature.

[MAULE, J.—In *Thrustout v. Bedwell* the Court thought the contract was personal between the defendant and the lessor of the plaintiff; they thought that the true construction, and that it was so intended between the parties: but here there was a right to costs within the restriction of that case, as costs were adjudged in the lifetime of the parties.]

Just so: the Court have jurisdiction over the parties, and as judgment is entered *nunc pro tunc* the personal contract is satisfied. But it might be urged, looking to the subject-matter of this contract, that there is nothing to restrict it to mere personalty, because its intention is to give costs to the winning party, and in this view it is material to remember that in *Thrustout v. Bedwell* the party died before judgment. In *Newton v. Walker* the Court refused to grant an attachment against an administrator, but that decision does not interfere with the course now proposed to be adopted. It is a different case altogether, and possibly there is no method of obtaining costs against an administrator. That is not the question now before the Court; and there seems to be no reason and no principle against granting

(5) 8 Mees. & Wels. 349; s. c. 10 Law J. Rep. (N.S.) Exch. 253.

(6) 4 Man. & Gr. 333; s. c. 11 Law J. Rep. (N.S.) C.P. 289.

(7) 2 Saund. last edit. 720, n.

them now, and in the way asked for by this rule.

*Cur. adv. vult.*

The following judgment was now (June 12,) delivered by—

WILDE, C. J.—This was a rule obtained by the defendant, calling upon the lessor of the plaintiff to shew cause why he should not pay to the defendant's administrator the costs, according to the terms of the consent rule in an action of ejectment, wherein the verdict passed against him.—[His Lordship recapitulated the facts of the trial, &c. as above mentioned, and proceeded]—It is settled by many cases that the liability of parties to pay costs on the consent rule is a personal liability which can be enforced by attachment, and the cases of *Thrustout v. Bedwell* and *Doe v. Grundy*, as also the books of practice, were referred to as establishing that position. A case reported in *Barnes* appeared, however, to be an authority the other way. The original documents in that case have been searched out by the direction of the Court, and it is found that that was not an application to the Court on the ordinary consent rule. The law was therefore settled prior to the statute of 1 & 2 Vict. c. 110; but it was contended that the 18th section of that act authorized this application. We think, however, that statute has no such effect: it gives no new power to the Court; nor does it render any persons liable to costs who were not so previously. That statute confers a new mode of enforcing the consent rule itself, but does not alter its personal character, and clearly gives no such authority as is here contended for. The terms of the consent rule give to a successful defendant the costs to be adjudged; and if that rule has not the effect of a judgment, the Court here has no power to order costs. When a rule of court has been obtained by which a certain sum of money is ordered to be paid, such rule has the effect of a judgment, as the cases of *Jones v. Williams* and *Doe v. Amey* (8) sufficiently shew; but a consent to pay costs, though expressed in a Judge's order, cannot be treated as a judgment—*Thorne v. Neal* (9). Where a

party has simply undertaken to pay costs, such an undertaking cannot by the course now proposed be made equivalent to a judgment; but when there is an order of the Court in existence, such order can be made available against the party affected thereby, and enforced to its full extent. It has been before shewn that the act of 1 & 2 Vict. c. 110. imposes no new liability for costs, and we cannot make the order as prayed for by this rule.

*Rule discharged.*

1847. }  
Jan. 27. } WEST v. NIBBS AND WINDLEY.

*Trespass—Distress by Landlord—Retainer and Sale of Distress after Acceptance of Rent in arrear—Pleading—New Assignment—Departure.*

*Trespass for seizing and taking away goods. Plea, that the defendant had demised a house to the plaintiff; that rent was in arrear; that the plaintiff fraudulently removed the goods to prevent a distress, and that no sufficient distress being left, the defendant seized the goods in question. The plaintiff new assigned, that after the defendant had seized the goods as in the plea mentioned, and after the plaintiff had paid the defendant the arrears of rent and costs of distress, and after the defendant had received the same in full satisfaction and discharge, and after the defendant ought to have restored the goods distrained, the defendant retained possession of the goods, and afterwards sold and disposed of them:—On special demurrer, held, that the new assignment did not sufficiently allege an act of trespass; that as the new assignment did not state that the acceptance of the rent took place before the impounding of the goods, it must be considered to have taken place afterwards; and that where a landlord after a lawful distress and impounding accepts the rent in arrear and costs of distress, he is not liable as a trespasser for retaining possession of the goods distrained, and selling and disposing of them.*

*The declaration was against two defendants, who severally in their pleadings; the new assignment was against one only, but was not specially demurred to as being a departure from the declaration on that ground:—Held, that such an objection could only be taken upon special demurrer.*

(8) 8 Mee. & Wels. 565; s.c. 10 Law J. Rep. (N.S.) Exch. 466.

(9) 2 Q.B. Rep. 726; s.c. 11 Law J. Rep. (N.S.) Q.B. 93.

*The plea alleged under a videlicet 4l. 16s. to be the rent in arrear. The new assignment alleged, also under a videlicet, a payment of 4l. 15s., which was averred to be a sufficient sum to discharge arrears and costs, and to have been received in full satisfaction, &c.:—Held, a sufficient averment of the payment of the rent in arrear and costs.*

**Trespass.** The declaration stated that the defendants on the 5th of February 1846, with force and arms, &c. seized, took and carried away certain goods, chattels and effects, to wit, ten bedsteads, &c. and twenty other utensils there found and being, of the plaintiff, of great value, to wit, of the value of 100*l.*, and converted and disposed of the same to their own use, and other wrongs to the plaintiff then did, against the peace of our Lady the now Queen, and to the damage of the plaintiff of 100*l.*

The second plea, pleaded by the defendant Nibbs alone, set out the defendant's title to a house; that he had demised the house to the plaintiff to hold for a quarter of a year, and so on from quarter to quarter, so long as the defendant and the plaintiff should respectively please, at the rent of 20*l.* 16*s.*, to be paid by thirteen equal payments in the year, one such payment to be made every four weeks; that by virtue of this demise the plaintiff entered into and continued in possession of the house until twelve weeks' rent became due, on the 19th of January 1846, and from then until the fraudulent removal hereinafter mentioned; that just before the said time when &c., and during the continuance of the demise to the plaintiff, to wit, on &c., a large sum of money, to wit, the sum of 4*l.* 16*s.* for the rent aforesaid, for three periods of four weeks each of the said demise, ending &c., became and was due and payable from the plaintiff to the defendant, and continued due, in arrear, and unpaid; and that just before the said time when &c., and after the day on which the said rent became and was due and payable, and when the same was actually due, in arrear, and unpaid, and during the continuance of the said demise, and within thirty days next before the said time when &c., to wit, on the 1st day of February, A.D. 1846, the plaintiff fraudulently conveyed away, and carried off and from the said premises so then held and enjoyed by

the plaintiff, as such tenant thereof to the defendant W. Nibbs as aforesaid, the said goods and chattels and effects in the said declaration mentioned, being the proper goods and chattels and effects of the plaintiff, to prevent the defendant W. Nibbs from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid, the said goods and chattels and effects being then liable to be distrained for the said arrear, and for that purpose conveyed away and abstracted the said goods and chattels and effects in the declaration mentioned, without leaving any other goods or chattels on the said premises so held by the plaintiff as aforesaid, whereon the defendant could or might distrain for such arrear of rent as aforesaid; for which reason and because the said rent still remained due, in arrear, and unpaid, and because there was no sufficient distress upon the said premises so held by the plaintiff as aforesaid whereon the said defendant W. Nibbs could distrain for such arrear of rent, the defendant W. Nibbs in his own right, afterwards, and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said goods and chattels had been so fraudulently conveyed away and carried off as aforesaid, and during the continuance of both the said demises respectively, to wit, on the day and year in the declaration mentioned, did take and seize and carry away the said goods and chattels and effects in the declaration mentioned, as a distress for the said arrear of rent, the same being then unpaid and in arrear, and did impound the same as such distress at a near and convenient place, as the defendant W. Nibbs lawfully might for the cause aforesaid, which are the trespasses whereof the plaintiff has above complained against the defendant W. Nibbs. Verification.

To this plea the plaintiff new assigned; and the new assignment stated that the plaintiff issued his writ, and commenced his said action thereupon, not for the said trespasses in the said second plea mentioned and thereby attempted to be justified, but for that after the defendant W. Nibbs had taken, seized, and carried away the said goods, chattels, and effects as in the said second plea is mentioned, and for the purpose in that plea mentioned, and after the

plaintiff had paid to the said defendant W. Nibbs, to wit, on the 9th of February, in the year aforesaid, in satisfaction and discharge of the said arrears of rent in the said second plea mentioned, and of the costs and charges of the said distress in that plea mentioned, a large sum of money, *to wit, the sum of 4l. 15s.*, the same being then a sufficient sum to satisfy and discharge the said arrears of rent in the said second plea mentioned, together with all the costs and charges of the said distress in that plea mentioned; and after the defendant W. Nibbs had accepted and received the said sum of money in full satisfaction and discharge of the said arrears of rent in the said second plea mentioned, and of the costs and charges of the said distress in that plea also mentioned; and after the defendant W. Nibbs ought to have given up and restored to the plaintiff the said goods, chattels, and effects, so by the said defendant W. Nibbs seized, taken, and distrained, as in the said second plea is mentioned, and after the said 9th of February in the year aforesaid, the said defendant W. Nibbs *retained possession of the said goods, chattels, and effects* in the said declaration and second plea respectively mentioned for a long space of time, to wit, two days after the said 9th of February in the year aforesaid; and also after the said 9th of February in the year aforesaid, sold and disposed of the said goods, chattels, and effects in the said declaration and second plea respectively mentioned; which said trespasses above newly assigned are other and different trespasses from the said trespasses in the said second plea mentioned and thereby attempted to be justified. Verification.

Special demurrer, on the ground that the new assignment is a departure from the declaration, inasmuch as the acts of trespass charged in the declaration are only seizing, taking and carrying away, and the grievances newly assigned are only retaining possession, selling, and disposing; and also that it is doubtful whether the grievances newly assigned are a seizing, taking, and carrying away; and also that an act of trespass is an injury to the plaintiff's possession, and that the grievances newly assigned clearly imply that the defendant had the possession, because the grievance is

that the defendant retained possession; and also that the grievances newly assigned are not substantive trespasses, but rather grounds for an action of detinue or trover, or on the case; and also that it is doubtful whether the new assignment intends to new assign the same trespasses as are mentioned in the declaration, or different trespasses.

*Bramwell* (Jan. 22, 1847), in support of the demurrer.—The declaration is against two defendants, but the new assignment is against one only. The new assignment therefore does not support the declaration. If a writ appears false by a plaintiff's own shewing it abates without a plea—*Com. Dig. tit. 'Abatement,'* (L). Suppose the cause goes down to trial, and the pleas of both defendants are found against them, is judgment to be entered up against the other defendant, or against this defendant, or against both?

[WILLIAMS, J.—Are you not tied down to the ground stated in your special demurrer? Would this be a ground of general demurrer? see *Evans v. Elliott* (1)].

[WILDE, C.J.—If the Court cannot give judgment on the declaration incorporating the new assignment, then it would seem clear it must be a cause of general demurrer.]

Secondly, as to the departure pointed out by the demurrer. The declaration complains of a trespass by "seizing, taking, and carrying away;" the new assignment by "retaining possession, selling, and disposing:" simply retaining goods is not a trespass.

[WILDE, C.J. referred to *Evans v. Elliott*.]

The statement in the declaration that the defendant took them could not be made, because the goods were in the custody of the law; the "selling and disposing" is not a trespass, and is a departure from the declaration. Again, the plea states that 4l. 16s. was in arrear and unpaid: the new assignment says, "after the plaintiff had paid the defendant in satisfaction and discharge of the arrears of rent, and of the costs &c. a large sum, to wit, the sum of 4l. 15s." That is a less sum than is in the plea alleged to be due; there was therefore no legal satisfaction of the rent due, and the agreement of the parties would not prevent the right of distress. Again, the plaintiff was

(1) 6 Nev. & Man. 606; a. c. 5 Ad. & El. 142; 6 Law J. Rep. (N.S.) K.B. 259.

not possessed of the goods; they were in the custody of the law, and an action of trespass will not therefore lie—*Gulliver v. Cosens* (2), which refers to *Ancomb v. Shore* (3). Though an unlawful detention may be an act of trespass, yet, in the present case, it could not, because the goods were impounded, and were therefore in the custody of the law.

[CRESSWELL, J. — The new assignment does not deny the impounding.]

*Dowling, Serj. contra.*—There has been no departure. In actions of tort, which are joint and several, a jury may find one defendant guilty, and the other not. The defendants here have severed in their pleas. The declaration comprised both a joint and several trespass. It is said that the new assignment shews only a detention; that it is a mere allegation of a continuance of possession, and does not constitute a trespass; but to keep a distress an unreasonable time is a trespass—*Evans v. Elliott, Griffin v. Scott* (4), *Winterbourne v. Morgan* (5), *Ladd v. Thomas* (6). Here, the new assignment states further, that the defendant sold and disposed of the goods, and this fact is admitted by the demurrer. The custody of the law ceased when the defendant received the rent.

[WILDE, C.J.—The resolution in *The Six Carpenters' case* (7) seems not to square with the cases you cite.]

With respect to the objection that 4l. 15s. is alleged to have been paid in satisfaction of 4l. 16s., the amounts in each case are not material. Both sums are laid under a *vide licet*; and as the defendant would not be bound by the precise sum he has named, neither is the plaintiff. A new assignment is not to be taken as admitting the facts stated in the plea—*Brancher v. Molyneux* (8).

*Bramwell*, in reply.—The goods were clearly in the custody of the law—*Turner v. Ford* (9).

(2) 1 Com. B. 788; s. c. 14 Law J. Rep. (N.S.) C.P. 215.

(3) 1 Taunt. 261.

(4) 2 Ld. Raym. 1424.

(5) 11 East, 395.

(6) 12 Ad. & El. 117; s. c. 9 Law J. Rep. (N.S.) Q.B. 345.

(7) 8 Rep. 146.

(8) 1 Man. & Gr. 710; s. c. 10 Law J. Rep. (N.S.) C.P. 310.

(9) 15 Mee. & Wels. 212; s. c. 15 Law J. Rep.

(S.S.) Exch. 215.

[WILDE, C.J.—It is not in dispute that they were once in the custody of the law.]

[WILLIAMS, J.—I have some doubts whether on the pleadings it appears that the payment took place after the impounding.]

If there is any ambiguity, it ought to be taken most strongly against the plaintiff.

[WILLIAMS, J.—Suppose the impounding was all a fable, what course ought the plaintiff to pursue? A traverse of that fact would be an immaterial traverse.]

He might have said "before the supposed impounding." If after the impounding the goods are in the custody of the law, the defendant is not obliged to take them out of that custody. He also cited *Com. Dig. tit. 'Pleader,' 3, (K) 23, 1 Wms. Saund. 347, b.* It is said that the allegation of what is due is immaterial; it may be so, but the conclusion that it was a sufficient sum is an erroneous conclusion of law. There is no allegation by which the defendant could put in issue that it was a sufficient sum.

[WILDE, C.J.—The general principles of law appear to us to lead to the conclusion that the demurrer is sustainable. There is some difficulty in saying that a mere non-feasance can be made the subject of trespass. Here, the new assignment goes somewhat further, because it states that the defendant "sold and disposed of" the goods. *Evans v. Elliott*, however, appears to lay down that a wrongful detention amounts to a trespass. We will look into that case, but the present impression of the Court is, that the action is not maintainable for the mere detention, but that where the goods are held to be in the custody of the law the party must first take legal means to take them out of that custody. Trover or detinue might have been maintained, and therefore it was not essential to the party to bring his action of trespass.]

[WILLIAMS, J.—As to the new assignment not being a departure, on which the Court are agreed, it is to be borne in mind that all that is said is, that the declaration and new assignment may be read together, as the one explains the other. Here, all that is meant by the plea is, "I suppose you mean by your declaration the time when I took the goods by way of distress;" the plaintiff then says, "No; I mean the trespass by you and the other defendant, when you detained the goods after the payment in satisfaction."



The plaintiff is, therefore, just in the position in which he was before: it may happen he may be put to his election at the trial. I believe the Court is also unanimous in the opinion that the averment of the payment of the 4*l.* 15*s.* is sufficient.]

*Cur. adv. vult.*

The judgment of the Court (10) was now delivered by—

CRESSWELL, J.—This is an action of trespass, in which the declaration charges the defendants with seizing, taking, and carrying away certain goods of the plaintiff, and converting and disposing of the same to their own use. The defendant Nibbs pleaded separately: first, that the goods were not the plaintiff's; secondly, that he had demised a house to the plaintiff at a certain rent; that a certain amount of such rent was in arrear; that the plaintiff fraudulently removed the goods in the declaration mentioned from the demised premises to prevent a distress for such arrears, whereupon, there being no sufficient distress on the demised premises, the defendant Nibbs took, seized, and carried away the said goods as a distress for the said arrears and impounded the same at a near and convenient place. As to the first plea, the plaintiff has joined issue. As to the second plea, he has now assigned that he brought his action not for the trespasses mentioned in the second plea, but for that after the defendant Nibbs had taken, seized, and carried away the goods as in the second plea mentioned, and for the purpose there mentioned, and after the plaintiff had paid the defendant Nibbs, to wit, on the 9th of February in the year aforesaid, in satisfaction and discharge of the said arrears and of the costs of the said distress, a certain sum, which was sufficient to satisfy and discharge the said arrears and costs, and after the defendant Nibbs had accepted and received the same sum in full satisfaction and discharge of the said arrears and costs, and after the defendant Nibbs ought to have given up and restored to the plaintiff the said goods so taken and distrained as in the second plea mentioned, and after the said 9th of February, the defendant Nibbs retained possession of the said goods for a long time, to wit, two days after the said

9th of February, and also after the said 9th of February sold and disposed of the said goods. To this new assignment the defendant Nibbs has demurred.

In support of the demurrer several objections to the new assignment were urged on the argument, and amongst them one which we think well founded, viz. that the grievances newly assigned do not constitute any ground for an action of trespass. The new assignment alleges that the payment and acceptance of the rent in arrear took place after the distress, but it does not aver that it took place before the impounding of the goods distrained; and we think, therefore, that it must be considered to have taken place afterwards. The question then is, whether, if a landlord, after a lawful distress and impounding, accepts the rent in arrear and the charges of the distress, he is liable as a trespasser for merely retaining possession of the goods distrained, and selling and disposing of them. As to the selling and disposing of them, although, under certain circumstances, the assuming a right to dispose of the goods of another may amount to a conversion of them sufficient to sustain an action of trover, yet it seems to us impossible to maintain that a man becomes a trespasser by the act of selling and disposing of the goods of another without authority, unless such sale and disposition be accompanied by some act of removal of the goods either by the vendor or vendee.

It remains therefore to consider only, whether the merely retaining possession of the goods as alleged amounts to an act of trespass. In *The Six Carpenters' case*, "it was resolved *per totam Curiam*, that not doing cannot make the party who has authority or licence by the law a trespasser *ab initio*, because not doing is no trespass; and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c. and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*." If then a landlord, who refuses a proper tender, is not to be regarded as a trespasser merely by reason of his non-feasance in failing to deliver up the distress, he being required so to do, it appears to us to follow that a landlord who has accepted the rent in arrear, &c. after the impounding,

(10) Argued before Wilde, C.J., Cresswell, J., and Williams, J.

cannot be treated as a trespasser merely because he retains possession of the goods distrained (although his refusal to deliver them up to the tenant may amount to a conversion, sufficient to make the landlord liable in an action of trover). The case of *Evans v. Elliott* was relied on in the argument by the counsel for the plaintiff; but, although that case is an authority for the proposition, that where there has been a tender between the taking and the impounding, a detention after the tender is sufficient to satisfy the usual allegation in a declaration in replevin that the defendant took, &c. and detained, &c.; yet we do not consider that case as deciding that the mere retaining by the landlord of the goods distrained, after the tenant has gained a right to have them delivered up to him, will render the landlord liable to an action of trespass. Nor do we consider our present decision as conflicting with the case of *Vertue v. Beasley* (11). There a tender of the rent and costs had been made after the distress, but before the goods were impounded or removed. The landlord refused to accept it, and afterwards removed the goods, and it was held by Parke, J. that he was liable to the tenant in trespass for such removal. In that case the cause of action was not the mere retaining possession, but the wrongful removal of the goods after the tender. On the whole, we think the demurrer sustainable on the ground that the new assignment does not sufficiently allege any act of trespass. It therefore has become unnecessary to decide on the other grounds taken during the argument in support of the demurrer.

*Judgment for the defendants.*

1848. }  
Jan. 18. } KINGDOM v. COX.

*Contract, Construction of — Part Performance.*

*The defendant agreed to supply the plaintiff with 150 tons weight of iron girders, at a certain price per ton, and according to plans to be furnished by the plaintiff. Plans were furnished within a reasonable time from the date of the agreement, and at the same time fourteen tons weight of girders were*

*ordered. Four months after the date of the agreement the fourteen tons were demanded; and other plans were furnished, and orders given for sixty tons more girders. The defendant then repudiated the contract:—Held, that the contract was entire; and that as the plaintiff had not furnished plans for the whole 150 tons within a reasonable time from the date of the agreement, he could not recover for the non-delivery of the fourteen tons, for which plans had been furnished within a reasonable time from such date.*

*Assumpsit.* The declaration stated, that whereas on the 28th of November 1844, in consideration that the plaintiff would, at the request of the defendant, accept, receive and pay for the goods thereafter mentioned, upon the terms, &c. in that behalf mentioned, the defendant, by a certain memorandum in writing, then promised the plaintiff to supply him with cast-iron girders of the various sizes to be shewn in drawings to be provided by the plaintiff's architect, and to deliver the same perfect, at a price therein mentioned, and to use his (the defendant's) best endeavours to deliver fifty tons of the said girders on or before the 31st of December 1844, fifty tons more on or before the 28th of January 1845, and fifty tons more on or before the 31st of March 1845, provided the drawings for the first fifty tons were sent to the defendant within a certain time then agreed upon between them, to wit, within three days after the receipt of the said memorandum, and the drawings for the remainder within three weeks after the receipt of the said memorandum, payment to be made, &c. Averment, that although the plaintiff had always been ready and willing to receive and pay for the said cast-iron girders, and although the plaintiff did, within a reasonable time after the making of the said agreement, to wit, on &c., duly and according to the said agreement, provide and deliver to the defendant, who then received the same, fifty drawings specifying and shewing the numbers and sizes respectively of the girders which the plaintiff then required, &c.; and although a reasonable time had since elapsed, yet the defendant did not nor would within such reasonable time, or at any time before or since, supply the plaintiff with the said girders, &c.

Pleas—First, that the defendant did not promise in manner and form, &c. Issue thereon. Secondly, that the plaintiff did not, within a reasonable time after the making of the said agreement, provide or deliver to the defendant drawings specifying or shewing the numbers and sizes respectively of the cast-iron girders, which he, the plaintiff, required of and from the defendant in manner and form, &c. Issue thereon.

The cause was tried, before Cresswell, J., at the sittings for Middlesex, after Michaelmas term, 1847. It appeared at the trial, that a contract as set out in the declaration was entered into between the plaintiff and the defendant on the 28th of November 1844; that some plans were sent to the defendant on the 5th of December, and that on the 16th of December 1844, the plaintiff gave him an order for thirty iron girders, about fourteen tons weight. The receipt of this order was acknowledged on the 19th of December, as follows:—

“19th Dec. 1844.

“Sir,—We duly received yours of the 16th, ordering two 12 ft. 6 in. girders for each house, making in all thirty, which will be finished on Saturday night. Be good enough to write us further instructions as to the next on receipt of this, as we shall be standing on Monday, as the pattern has to be altered we presume. Yours, &c.,

“W. C.”

There was some correspondence between the plaintiff and the defendant in February 1845, but nothing further took place till the 4th of March 1845, when the defendant wrote to the plaintiff, and declined to proceed under the contract. On the 13th of March the plaintiff's solicitors sent the defendant some new plans, an order for some more girders, about fifty tons weight, and required him to deliver the thirty girders which had been ordered on the 16th of December 1844. The defendant refused to comply. The price of iron in the market was much higher in March 1845 than in December 1844. The learned Judge left the following question to the jury: “Was the delivery of the plans to the defendant on the 13th of March 1845 a delivery within a reasonable time?” The jury found a verdict for the defendant.

*Channell, Serj.* moved for a new trial, on the ground of misdirection.—There were two

orders given, one on the 19th of December, the other on the 13th of March. The learned Judge should have made a distinction with respect to the two orders in his summing up; the plans and drawings were delivered within a reasonable time, as far as regards the first order, and it was a misdirection to leave the question of reasonable time as an entire question to the jury. There is no objection to the ruling of the learned Judge, or to the finding of the jury on the second order; but as there is no plea of performance, the contract and breach of it are admitted; and if the plaintiff had a right to the girders ordered in December, he is entitled to a verdict on the second issue.

[*WILDE, C.J.*—The plaintiff never asked for those girders till March.]

The defendant assumes that a delivery of all the plans is a condition precedent to the plaintiff's right to demand any of the girders, whereas the true meaning of the contract is this,—the plaintiff is to deliver plans by a certain time, and then the defendant is to deliver girders by a certain time,—or, if the plans are not delivered at the specified time, then the girders are to be delivered within a reasonable time after the plans are received by the defendants—*Kingdom v. Cox* (1). The contract may be divided into three parts. The first part imposes an imperative obligation on the defendants to supply the plaintiff with goods according to plans to be provided by his architect. The second part shews the quantity of goods to be delivered, and fixes a time for the delivery, provided the plans are furnished at a given time. The third part fixes the mode and time of payment, &c. The first part of the agreement does not mention the quantity of iron girders to be delivered; the whole quantity comprised in the plaintiff's two orders would be about seventy-five tons, and there is no defence whatever in respect of the fourteen tons first ordered.

[*MAULE, J.*—Why do you divide the contract so scientifically into three parts? Let it speak for itself,—and then the defendant contracts to deliver 150 tons of iron at a wholesale price. Can the plaintiff enforce that as a contract for fourteen tons (a retail quantity) at the same price?]

(1) 2 Com. B. 661; s. c. 15 Law J. Rep. (N.S.) C.P. 95.

cannot be treated as a trespasser merely because he retains possession of the goods distrained (although his refusal to deliver them up to the tenant may amount to a conversion, sufficient to make the landlord liable in an action of trover). The case of *Evans v. Elliott* was relied on in the argument by the counsel for the plaintiff; but, although that case is an authority for the proposition, that where there has been a tender between the taking and the impounding, a detention after the tender is sufficient to satisfy the usual allegation in a declaration in replevin that the defendant took, &c. and detained, &c.; yet we do not consider that case as deciding that the mere retaining by the landlord of the goods distrained, after the tenant has gained a right to have them delivered up to him, will render the landlord liable to an action of trespass. Nor do we consider our present decision as conflicting with the case of *Vertue v. Beasley* (11). There a tender of the rent and costs had been made after the distress, but before the goods were impounded or removed. The landlord refused to accept it, and afterwards removed the goods, and it was held by Parke, J. that he was liable to the tenant in trespass for such removal. In that case the cause of action was not the mere retaining possession, but the wrongful removal of the goods after the tender. On the whole, we think the demurrer sustainable on the ground that the new assignment does not sufficiently allege any act of trespass. It therefore has become unnecessary to decide on the other grounds taken during the argument in support of the demurrer.

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*Assumpsit.* The declaration stated, that whereas on the 28th of November 1844, in consideration that the plaintiff would, at the request of the defendant, accept, receive and pay for the goods thereafter mentioned, upon the terms, &c. in that behalf mentioned, the defendant, by a certain memorandum in writing, then promised the plaintiff to supply him with cast-iron girders of the various sizes to be shewn in drawings to be provided by the plaintiff's architect, and to deliver the same perfect, at a price therein mentioned, and to use his (the defendant's) best endeavours to deliver fifty tons of the said girders on or before the 31st of December 1844, fifty tons more on or before the 28th of January 1845, and fifty tons more on or before the 31st of March 1845, provided the drawings for the first fifty tons were sent to the defendant within a certain time then agreed upon between them, to wit, within three days after the receipt of the said memorandum, and the drawings for the remainder within three weeks after the receipt of the said memorandum, payment to be made, &c. Averment, that although the plaintiff had always been ready and willing to receive and pay for the said cast-iron girders, and although the plaintiff did, within a reasonable time after the making of the said agreement, to wit, on &c., duly and according to the said agreement, provide and deliver to the defendant, who then received the same, fifty drawings specifying and shewing the numbers and sizes respectively of the girders which the plaintiff then required, &c.; and although a reasonable time had since elapsed, yet the defendant did not nor would within such reasonable time, or at any time before or since, supply the plaintiff with the said girders, &c.

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The cause was tried, before Cresswell, J., at the sittings for Middlesex, after Michaelmas term, 1847. It appeared at the trial, that a contract as set out in the declaration was entered into between the plaintiff and the defendant on the 28th of November 1844; that some plans were sent to the defendant on the 5th of December, and that on the 16th of December 1844, the plaintiff gave him an order for thirty iron girders, about fourteen tons weight. The receipt of this order was acknowledged on the 19th of December, as follows:—

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[*WILDE, C.J.*—The plaintiff never asked for those girders till March.]

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[*MAULE, J.*—Why do you divide the contract so scientifically into three parts? Let it speak for itself,—and then the defendant contracts to deliver 150 tons of iron at a wholesale price. Can the plaintiff enforce that as a contract for fourteen tons (a retail quantity) at the same price?]

(1) 2 Com. B. 661; s. c. 15 Law J. Rep. (N.S.) C.P. 95.

**WILDE, C.J.**—This rule is moved for on the ground, that admitting the verdict to be right, which finds that the delivery of the plans on the 13th of March was unreasonable in point of time, still the verdict was not right, inasmuch as the non-delivery of the girders, for which plans were furnished in December, constituted a breach of the contract. It appears to me that no distinction can be made between the two orders. There is but one contract, the several parts of which are materially and mutually influenced by the quantity of goods contracted for, the time fixed for the delivery, and the price to be paid. No person can doubt, on reading it, that this is an entire contract. Then, may one side call on the other to execute such a contract in part, and complain of a breach of that part which he does call for, when he does not call, and does not intend to call, for the performance of the remainder of it? It is true that the plaintiff furnished some plans and ordered some girders in December 1844, but he did not furnish other plans within the stipulated time. The effect of that neglect was to discharge the defendant from the performance of the contract altogether. The plaintiff then calls for the delivery of the girders and orders more girders; but how can he call on the defendant to deliver girders and perform work under a contract at a time when the contract has ceased to exist? If a party contracts to deliver a whole quantity of goods at a certain price by a certain time, he cannot sue for the price till the whole is delivered; but if he delivers part, and such part is retained, he may sue for the price when the time for the delivery of the whole has expired—*Waddington v. Oliver* (2), *Walker v. Dixon* (3). So, here, this being an entire contract, the second issue means,—Did the plaintiff, or did he not, deliver plans within a reasonable time for the whole quantity of goods to be supplied according to the contract? The question left by the learned Judge to the jury was quite right, and no rule can be granted.

**MAULE, J.**—I am of opinion that the verdict ought not to be disturbed, and that it is right both in fact and law. Justice in this case coincides with the law, and both pro-

nounce in favour of the defendant. The contract as I understand it is, that the defendants are to deliver not less than 150 tons of iron within a reasonable time, from the time when the plaintiff gives orders and furnishes plans for the articles to be supplied. The defendant is to have a reasonable time to execute the contract; the plaintiff is to have a reasonable time to give orders and to furnish plans, that is, a reasonable time from the date of the agreement. The defendant cannot be compelled to furnish any less quantity than that agreed upon. To suppose that they must deliver ten or twenty tons *only* at the same price for which they agreed to deliver 150 tons, would not be an enforcement of this contract, and would be an unreasonable and unjust construction of its terms. The contract is not to be artificially divided into parts, as the plaintiff contends; it must be taken altogether.

**CRESSWELL, J. and WILLIAMS, J.** concurred.

*Rule refused.*

1848. }  
Jan. 22. } **WEBB v. INWARDS.**

*Venue, Change of—Banker's Cheque.*

*The venue in an action on a banker's cheque cannot be changed on the common affidavit.*

The declaration in this case contained a count on a banker's cheque, and a count for goods sold and delivered. The venue was laid in London, and on the 4th of January it was changed from London to Bedfordshire on the common affidavit.

*Talfourd, Serj.*, having (Jan. 12) obtained a rule *nisi* to discharge the rule for changing the venue,—

*Byles, Serj.* now shewed cause.—It is contended on the other side that the venue cannot be changed in an action on a banker's cheque. The rule formerly was, that when the action was upon a written instrument, the venue could not be changed on the common affidavit. But that rule has been qualified in modern cases. In the case of *Mondel v. Steele* (1), Parke, B.,

(2) 2 New Rep. 61.

(3) 2 Stark. N.P.C. 281.

(1) 8 Mee. & Wels. 640; a. c. 11 Law J. Rep. (n.s.) Exch. 91.

lays down the rule thus: "In this state of the authorities, we think that it cannot be laid down as a general proposition that the venue is not to be changed in actions on contracts appearing by the declaration to be in writing. There does not seem to be any principle and but little precedent in support of so extensive an exception to a general rule, which, in conformity with the statute law, is, that actions should be tried where the causes of action arise, and the exceptions to that rule should not be too readily extended. We think that in all actions on contracts, though in writing, except on specialties, bills and notes, the venue may be changed upon the usual affidavit being made." The question therefore is, whether a banker's cheque is a bill or note within the meaning of that rule. In *Slade v. Trew* (2), the venue was changed on the common affidavit, though the action was on a written agreement to pay a sum of money on a day certain, and if not then paid, to secure the same by mortgage. In *Roberts v. Wright* (3), the action was on an I O U, and the venue was changed on the usual affidavit.

[MAULE, J.—A banker's cheque is subject to the same rules as a bill of exchange.]

WILDE, C.J.—I think that the rule for changing the venue was irregularly obtained, and that the present rule should be made absolute. In *Martin v. Daws* (4), the Court of Exchequer refused to change the venue, upon the ordinary affidavit, in an action upon an award.

*Rule absolute.*

1848. }  
Jan. 28. } FINNEY v. TOOTEL.

*Stamp.—55 Geo. 3. c. 184.—Evidence.*

*In an action for money had and received, the defendant put in evidence the following document, written by the plaintiff, on the back of an unstamped receipt: "Balanced up to this day, as per cash-book, 19th of November 1845":—Held, that this document*

*was admissible in evidence without being stamped.*

*Such a document is good primâ facie evidence to shew that, up to the day of its date, there was no debt existing between the parties.*

Debt, for money had and received, goods sold and delivered, and on an account stated.

Pleas—*Nunquam indebitatus*; payment; and set-off. The cause was tried, before Maule, J., at the sittings for Middlesex, in Easter term, 1846, when it appeared that the defendant was servant to the plaintiff, who sought to recover the amount of various sums received by the defendant, on account of his master (the plaintiff). The defendant tendered in evidence a receipt for 18*l.*, signed by the plaintiff, which overtopped the sum proved by the plaintiff to be due to him. The receipt was objected to for want of a stamp, and was not admitted in evidence. The defendant then gave in evidence the following memorandum, in the handwriting of the plaintiff, on the back of the receipt:—

"Balanced up to this day, as per cash-book, November 19, 1845, S. F." (Signed by the plaintiff.) This memorandum was also objected to, for want of a stamp. The learned Judge overruled the objection; the memorandum was read in evidence, and the defendant obtained the verdict.

*Kennedy* had obtained a rule *nisi* for a new trial, on the grounds that the above document had been improperly admitted and that the verdict was against the evidence.

*Joyce* shewed cause.—The document is not a receipt for money, and does not require a stamp. Its effect is a simple acknowledgment that the accounts have been balanced, and it may have been that the defendant received money on that balance. The words of 55 Geo. 3. c. 184. sched. part 1. 'Receipt,' relied upon on the other side, do not include such a memorandum as this: "Any receipt or discharge, note, memorandum, or writing whatever, given to any person, for or upon the payment of money, which shall contain, import, or signify any general acknowledgment of any debt, account, claim, or demand, &c., whereof the amount shall not be therein specified, having been paid, settled, balanced, or otherwise discharged or satisfied, or whereby any sum of money, therein mentioned, shall be acknowledged to be received in full, or in discharge or satis-

(2) 1 Cr. & M. 584; s. c. 2 Law J. Rep. (n.s.) Exch. 240.

(3) 1 Cr. & Jer. 547.

(4) 11 Mee. & Wels. 734; s. c. 12 Law J. Rep. (n.s.) Exch. 472.

faction of any such debt, account, claim, or demand, &c., and whether the same shall be signed or not with the name of any person, shall be deemed to be a receipt for the sum of 1,000*l.* or upwards, and shall be charged with the duty of 10*s.*" An admission of payment made on an account current does not require a stamp—*Clark v. Hougham* (1). A memorandum at the foot of an account that it is correct was admitted without a stamp in *Wellard v. Moss* (2). It may be urged that the cash-book should have been produced; but that is in the plaintiff's possession, and if anything required explanation it was for him to make it clear. There was no evidence of any receipt of money after the 19th of November 1845; and the memorandum was fair and legitimate evidence to shew that up to that date everything had been adjusted.

*Kennedy*, in support of the rule.—The document objected to was a receipt, or else it proved nothing at all. If it be not a receipt, then there is no evidence to support the verdict, and there must be a new trial on that ground. The word "balanced" refers to something which does not appear in the memorandum itself: it referred to the cash-book, or possibly to what was written on the other side of the paper. If it referred to the cash-book, that should have been produced as the best evidence of the state of the account; and if it referred to the receipt, then it forms part of the receipt itself, and was inadmissible. If the document be receivable at all, it should only have been admitted *de bene esse*, and as requiring something to be added to make it a perfect document. No further evidence was given, and as it stands, *per se*, and unexplained, there is nothing to shew that it relates in any way to the cause of action declared upon.

*WILDE, C.J.*—I am of opinion that this rule must be discharged. There is nothing on the face of the document admitted in evidence to shew that it was given to any person as a receipt for the payment of any money, and, therefore, it did not require a stamp. As to the objection that there was nothing to prove that it related to the cause of action, there was only one account between the parties, and the plaintiff might

have shewn (if such were the fact) that it referred to money transactions other than those declared upon. In the absence of any such evidence on the part of the plaintiff, the correct inference is, that the document does relate to the cause of action, which is the only matter to which it can be applied. The word "balanced" is ambiguous; it may mean "the sum due is ascertained," it may mean "the sum due is paid," or it may mean "the accounts between the parties are adjusted, and nothing is due:" and there was no evidence of any receipt of money by the defendant after the 19th of November 1845. It was for the jury to say what was the meaning of the word "balanced" in this document, and it was properly left to them by the learned Judge. There has been no affidavit of surprise; and I make no doubt that the conclusion arrived at by the jury was just.

*MAULE, J.*—I am of the same opinion.

*CRESWELL, J.*—I agree. The memorandum did not require a stamp; it is not a receipt, but merely states that an account has been balanced up to a certain day, and the jury seem to me to have been well warranted in construing it as they have done. It is then said that the memorandum is connected with and forms part of the receipt written on the other side of it. It however appears to me that the juxtaposition of the two writings forms the only connexion between them.

*WILLIAMS, J.* concurred.

*Rule discharged.*

1848. }  
Jan. 31. } *SMITH v. THOMPSON.*

*Pleading—Several Counts—Reg. Gen. Hil. Term, 4 Will. 4. r. 5.—Contract.*

*Where two counts appearing to be on the same agreement are introduced into a declaration for the evident purpose of removing a difficulty as to the legal effect of the agreement, one of the counts ought to be struck out.*

*The first count was upon an agreement, by which the defendant undertook to take the plaintiff into his service for six months, and at the expiration thereof, if no just cause was shewn, to enter into a fresh agreement for two years. First breach, that*

(1) 2 B. & C. 149; s. c. 1 Law J. Rep. K.B. 249.

(2) 1 Bing. 134; s. c. 1 Law J. Rep. C.P. 18.



*though no just cause was shewn at the expiration of the six months, the defendant would not enter into a further agreement for two years.*

*The second count stated that whereas the plaintiff had been six months in the defendant's service, the defendant agreed to continue him in the service for two years. Breach, that the defendant would not continue him in the service.*

*A rule nisi to rescind an order for striking out so much of the first count as related to the first breach, as being in violation of rule Hil. term, 4 Will. 4. No. 5, was discharged.*

**Assumpsit.** The first count of the declaration stated that whereas theretofore and before the commencement of the suit, to wit, on the 28th day of September, in the year of our Lord 1846, by a certain agreement then made by and between the plaintiff and the defendant, it was agreed that the defendant should take the plaintiff into his, the defendant's service, as clerk, to conduct his, the defendant's, business of a custom-house and shipping agent, at Southampton, for the space of six calendar months, for the sum of 60*l.*, being after the rate of 120*l.* for the year; and should also pay to the plaintiff at the expiration of each three months from the date thereof a sum of money equal to 50*l.* per cent. on the gross profits of all and any business the said plaintiff should introduce or cause to be introduced, through his connexion, to the defendant's business; and that at the expiration of the six months from the date thereof, should there be no just cause shewn to the contrary, the defendant thereby agreed to enter into a further agreement with the plaintiff, for a further engagement for the term of two years, at the annual salary of 150*l.* for the first of such two years, and 160*l.* for the second of such two years, and also to pay to the plaintiff a sum of money equal to 50*l.* per cent. on the gross profits on any business the plaintiff should have introduced, or should thereafter introduce to the defendant's business; and it was thereby further agreed that should there be any just cause shewn why a further agreement should not be entered into between the parties, the defendant should continue to pay to the plaintiff for the space of twelve months from the date of

the said agreement (though the plaintiff should not be in the service of the defendant after six months from the date of the said agreement,) a sum of money equal to 50*l.* per cent. on the gross profits of the business introduced by the plaintiff; and it was thereby further agreed, that all sums of money received from the said business introduced by the plaintiff should be considered profits, except upon payments which had been actually made in reference to the business itself, office rent, clerks' salaries, or any other expenses but those named, not to be deducted from the profits. And the plaintiff further says, that afterwards, and within one calendar month after the making of the said agreement, to wit, on the 22nd day of October, in the year of our Lord 1846, the terms thereof were by another agreement made on the day and year last aforesaid by and between the plaintiff and the defendant altered and varied in manner following; that is to say, it was by the last-mentioned agreement agreed that, with the exception of such overland agency business as the defendant was then in possession of, the defendant should pay to the plaintiff a sum of money equal to 50*l.* per cent. on the gross profits, without reduction for expenses except as aforesaid on all such baggage business, as was then in the defendant's possession as aforesaid, and the defendant also thereby gave his free consent to the plaintiff to permit him, the plaintiff, to conduct the wine agency business of one Henry Fenner, trading under the name, firm, and description of Messrs. Henry Fenner & Co. of London, on his, the plaintiff's, own account; and it was thereby further agreed that the defendant was not to receive any part of the profits which should arise therefrom; and it was also thereby further agreed, that the plaintiff should pay to the defendant one-half of the office rent, to take date from the 24th day of December then next, the rent of which was then 50*l.* per annum. And the plaintiff says, that theretofore and after the making of the last-mentioned agreement, to wit, on the day and year last aforesaid, in consideration that the plaintiff at the request of the defendant then promised the defendant to perform and fulfil all things in the said first-mentioned agreement contained, except so far as the same was altered by the second-mentioned agree-

ment, and all things in the second-mentioned agreement contained on his part to be performed and fulfilled, the defendant then promised the plaintiff to perform and fulfil all things in the said first-mentioned agreement contained, except so far as the same was altered by the second-mentioned agreement, and all things in the said second-mentioned agreement contained on his part to be performed and fulfilled; and the plaintiff further says, that he did after the making of the first-mentioned and before the making of the second-mentioned agreement, to wit, on the day and year first aforesaid enter into the service of and become clerk to the defendant, at and upon the terms in the said first agreement mentioned and therein contained, until the making of the agreement secondly above mentioned, and from thence until the expiration of six calendar months from the date of the first-mentioned agreement (which had elapsed before the commencement of this suit), he continued in the said service upon the terms in the said agreements respectively contained, except so far as the said first-mentioned agreement was varied by the agreement secondly above mentioned, to wit, until the 28th day of March, in the year of our Lord 1847, and although he, the plaintiff, at the expiration of the said space of six calendar months from the date of the said first-mentioned agreement (to wit), on the day and year last aforesaid, was ready and willing and offered to enter into such further agreement for two years, at and upon the terms hereinbefore in that behalf mentioned, and then requested the defendant to enter into such further agreement, and although no just cause was then shewn to the contrary, and although the gross profits of the baggage business, insurance agency business, and other business transacted by the defendant, at Southampton aforesaid, other than such overland agency business as the defendant was in possession of at the time of making the said second agreement, from the said 22nd day of October, in the year of our Lord 1846, up to the expiration of the said term of six months, amounted to a large sum, to wit, the sum of 500*l.*, yet the defendant, not regarding his said promise, did not nor would when requested as aforesaid, or at any time afterwards, enter into such further agreement

as aforesaid, but on the contrary thereof then wholly refused so to do; and the plaintiff further says, that the defendant did not nor would, though requested so to do, pay to the plaintiff 50*l.* per cent. upon the aforesaid gross profits, nor any part thereof.

The second count stated that whereas also theretofore, and at the time of making the agreement thereafter mentioned, the plaintiff had been for the space of six calendar months, and then was in the service of the defendant as clerk, and as such clerk had conducted, and was then conducting the defendant's business of a custom-house and shipping agent at Southampton, thereupon afterwards, to wit, on the 29th day of March, in the year of our Lord 1847, in consideration that the plaintiff, at the request of the defendant, would continue in the service of him, the defendant, as clerk, to conduct his, the defendant's, business of a custom-house and shipping agent at Southampton aforesaid, for the term of two years, he, the defendant, then promised the plaintiff to continue him in such service for the said term of two years, and to pay him the annual salary of 150*l.* for the first year, and 160*l.* for the second year's service, and (with the exception of such overland agency business as the defendant was then in possession of,) also to pay to the plaintiff a sum of money equal to 50*l.* per cent. on the gross profits (without deduction for expenses, except when payments should have been actually made in reference to the business itself) on all baggage business, insurance agency business, and on all and every business whatsoever transacted by the defendant at Southampton aforesaid, during such term of two years as aforesaid, save and except only on such overland agency business as was then in the defendant's possession as aforesaid; and although the plaintiff, confiding in the said promise of the defendant, did continue in the service of him, the defendant, as clerk, upon the terms aforesaid, for a long space of time, to wit, until the 13th day of August, in the year of our Lord 1847, which had elapsed before the commencement of this suit, and although the plaintiff has always been ready and willing, and then offered to continue in the service of the defendant for the residue of the said term of two years, upon the terms aforesaid; yet the defendant, not regarding his said

promise, did not nor would continue the plaintiff in the service of him, the defendant, as clerk for the said term of two years, but, on the contrary thereof, afterwards, to wit, on the day and year last aforesaid, and before the expiration of the said term of two years, then wholly refused so to do, and then discharged him, the plaintiff, therefrom, and hath from that time hitherto wholly neglected and refused to retain or employ the plaintiff in his said service, and by means thereof he, the plaintiff, hath lost and been deprived of all the salary, profits, and advantages which he otherwise might and would have derived and acquired from being continued in the said service of the defendant for the residue of the said term of two years, and the plaintiff hath been and is by means of the premises still wholly unemployed.

On the 8th of January 1848, an order was made, by Coltman, J., to strike out so much of the first count as refers to the first breach, at the costs of the plaintiff, on the ground that that part of the first count and the second count were for the same subject-matter.

A rule *nisi* having been granted to rescind that order,—

*Peterson* now shewed cause.—The order ought to stand. In this case there is a violation of the rule of Hilary term, 4 Will. 4, No. 5, as both counts evidently refer to the same agreement. *James v. Bourne* (1) may be relied upon on the other side; but in that case there were two distinct causes of action, the one on a sea risk, the other on the common law liability of carriers to take care of goods at a wharf.

*Lush*, in support of the rule.—In recent cases the stringency of the rule as to several counts has been relaxed. *Gilbert v. Hales* (2) is an example. In trover, counts for conversions before and after a bankruptcy have been allowed. Counts on a warranty of a horse, and for money had and received, have also been allowed. *James v. Bourne* is a decision in favour of the present application.

MAULE, J.—In that case the two counts could not be said to contain but one contract; but in the present case there might have

been but one. On the whole, I think that the order of Mr. Justice Coltman was right.

CRESSWELL, J.—I am of the same opinion. We cannot help taking notice that the two counts are for the same subject-matter, and introduced in order to avoid a difficulty with regard to the legal effect of the agreement.

WILLIAMS, J. concurred.

*Rule discharged.*

1848. { COX AND ANOTHER v. GLUE.  
Jan. 13, 18. { THE SAME v. SAINT.  
                  { THE SAME v. MOUSLEY.

*Trespass—Subsoil—Surface—Possession—“Close.”*

*The plaintiffs were seised in fee of a close, but other persons had the right to the exclusive possession of the surface of it during a portion of the year:—Held, that the plaintiffs, as owners of the subsoil, might maintain trespass against persons who had dug holes through the surface into the subsoil during that portion of the year:—but that for an injury committed during such portion of the year, which affected the surface only, the plaintiffs could not maintain trespass.*

*The word “close” in a declaration in trespass includes the subsoil as well as the surface.*

These were actions of trespass, and the pleadings were the same in all of them.

The first count of the declaration stated, that the defendant, on the 10th day of October, A.D. 1846, and on divers other days, &c., with force and arms, &c. broke and entered *certain soil* of the plaintiffs, the said soil being the soil of and belonging to a certain close, called the Siddals, situate in the parish of St. Peter, in the county of Derby, and with feet in walking and with divers horses, mares, and geldings, and also with the wheels of divers carriages, carts, and waggons then subverted, trampled upon, tore up, damaged, and spoiled the said soil of the plaintiffs, and also then made divers, to wit, 100 holes in the said soil of the plaintiffs, and then forced divers, to wit, 100 posts, 100 tent-pegs, and 100 stakes into the said soil of the plaintiffs, and there in the said soil of the plaintiffs, then fixed the same posts, pegs, and stakes.

(1) 4 Bing. N.C. 420; s. c. 7 Law J. Rep. (N.S.) C.P. 187.

(2) 2 Dowl. & L. P.C. 227.

and then put, placed, and erected divers, to wit, ten wooden erections, ten tents, ten stalls, ten booths, and ten tables, upon, and affixed the same to the said soil of the plaintiffs, and kept and continued the said posts, tent-pegs, stakes, erections, tents, stalls, booths, and tables, so there respectively forced, fixed, put, placed, or erected and affixed as aforesaid, without the leave or licence, and against the will of the plaintiffs, for a long space of time, to wit, for the space of six hours next following the said time of the fixing, forcing, putting, placing, erecting, and affixing of the same respectively as aforesaid, and thereby and therewith, during all the time aforesaid, greatly incumbered the said soil of the plaintiffs, and hindered and prevented the plaintiffs from enjoying the same. Second count, that the defendant afterwards, on the 23rd day of October, in the year of our Lord 1845, with force and arms broke and entered a *certain close* of the plaintiffs, the same close being the said close called the Siddals, situated and being in the parish aforesaid, and subverted the earth and soil of the said close, and made holes and forced posts in, and affixed booths, &c. to the said close, &c. and thereby, &c.

Pleas—First, not guilty; second, to the first count, that the said *soil* of and belonging to the said close, &c. was not the soil of the plaintiffs, &c.; third, to the first count, that the said soil in which, &c. was at, &c. the soil and freehold of the mayor, aldermen, and burgesses of the borough of Derby, wherefore the defendant, as their servant, broke and entered, &c.; fourth, to the second count, that the said close in which, &c. was not the close of the plaintiffs; fifth, to the second count, that the said close, &c. in which, &c. was the close, soil, and freehold of the mayor, aldermen, and burgesses of the borough of Derby, wherefore the defendant, as their servant, broke and entered, &c.

The replication joined issue on the first, second, and fourth pleas, and traversed the third and fifth.

The causes were tried, at the Spring Assizes for Derbyshire, in 1846, before Patteson, J. and a special jury. It appeared that the close in question, called the Siddals, was within the manor of Derby, and that the plaintiffs, and those through whom they claimed, had from time immemorial taken

the fore-crop of grass, and had the exclusive possession of the close from the 14th of February to the 6th of July in every year; and that from the 6th of July to the 14th of February the burgesses of the borough of Derby turned in their cows, sheep, calves, and horses upon the close, and occupied it exclusively during that period. The plaintiffs had gates, with locks, which they removed from the close on the 6th of July, and which were replaced by other gates, belonging to the burgesses, which remained there till the 14th of February. It was further proved that the corporation had been in the habit of giving permission for holding the county races on the close between the months of July and February. The races were discontinued for some years, but were revived in August 1845, when the defendants, in the actions of *Cox v. Glue* and *Cox v. Saint*, with the consent of the corporation, erected booths, the posts of which went through the surface of the close into the subsoil. The plaintiffs claimed to be seised in fee of the soil and freehold, and so entitled to maintain an action of trespass. For the defendant it was contended that the soil and freehold were in the corporation, and that the plaintiffs were only entitled to take the forecrop of grass, and, at all events, that they had not, at the time of the trespass, sufficient possession to enable them to maintain trespass. The learned Judge directed the jury (in the first action), that the soil and freehold were in the plaintiffs, and asked them to say whether the burgesses had exclusive possession from the 6th of July to the 14th of February. The jury found a verdict in these terms: "The parties in occupation respectively, namely, the Coxes, from the 14th of February to the 6th of July, and the burgesses for the remainder of the year have the power of bringing their action for trespass; but if any damage is done to the freehold, we consider the plaintiffs have sufficient possession to bring an action at any time." The facts in the case of *Cox v. Saint* being exactly similar to those in *Cox v. Glue*, a verdict for the plaintiffs with 40s. damages was entered by consent, leave being reserved to the defendant in each of those actions to move to enter a verdict in his favour on the second and fourth issues. In the case of *Cox v. Mousley*, it appeared that the defendant had merely gone to the races on horse-

back. It was agreed that the learned Judge should decide the question, whether the defendant had committed any trespass affecting the soil below the surface of the land; and his Lordship being of opinion that he had not, a verdict was entered for the defendant on the plea of not guilty as to the first count, and on the second and fourth issues, and for the plaintiffs on the other issues.

In the two first cases a rule *nisi* having been obtained to enter a verdict for the defendant, pursuant to the leave reserved,—

*Whitehurst* and *Humfrey* (Jan. 13), shewed cause.—The direction of the learned Judge was right. There could be no doubt that the plaintiffs were seised of the fee, and the only difficulty was, whether at the time of the trespass they had sufficient possession of the subsoil to enable them to bring trespass. The burgesses had only a "*profit à prendre*," and not an estate in the land. They had only a right to take the herbage by the mouths of particular cattle.

[MAULE, J.—The jury have found that the corporation had an exclusive right of possession so as to exclude the plaintiffs themselves, and that in respect of that right they could bring an action of trespass.]

If the burgesses entered for any other purpose than feeding their cattle, would not an action lie? The real question is whether, supposing the corporation to have exclusive possession of the surface, the landlord may not maintain trespass for an injury to the subsoil. It has been held in several cases that where a person has exclusive possession of a *profit à prendre*, it amounts only to an easement—*Pitt v. Chick* (1). The cases on this point are collected in the notes to *Potter v. North* (2).

[*M. D. Hill*, *contra*.—If the defendants had merely a *profit à prendre*, I admit they have no case.]

The case of *The King v. Churchill* (3) shews that this is only a *profit à prendre*. What estate do the burgesses claim? They cannot have a right to exclude the owner of the fee for all purposes. For instance, in case of a flood and damage to the close, as they are not bound nor entitled to repair, could they exclude the owner from going on the land to do so?

- (1) Hutton's Rep. 45.
- (2) 1 Wms. Saund. 353.
- (3) 4 B. & C. 750.

[MAULE, J.—If I have a field, and you have a right of way over it, have I not exclusive possession of it?]

*M. D. Hill, Clarke, Serj.*, and *Waddington*, *contra*.—The two counts of the declaration are in effect the same. The close and the soil of the close are the same thing; and as the jury have found that the plaintiffs were not possessed of the soil of the close, they cannot retain their verdict. It is not enough that they had a partial right. If a party claims a close and proves only a right to *prima vestura*, the issue must be found against him—*Stammers v. Dixon* per Lord Ellenborough (4). The case of *The King v. Churchill* cited on the other side is no authority here. The decision there was, that commoners were not individually rateable to the poor in respect of their privilege to put cattle on the common; but that does not decide that the corporation might not have been rated. The case of *The King v. the Mayor, &c. of Sudbury* (5) was one where a corporation was rated under similar circumstances. The latter decision is in accordance with the older authorities. In *Burt v. Moore* (6) Lord Kenyon says, "I am perfectly satisfied, that although the defendant was restrained by the agreement to a certain mode of occupation, he is to be considered as the occupier of the land; and being entitled to the sole use of the land is also entitled to maintain trespass." So also, in *Wilson v. Mackreth* (7) and *Hoe v. Taylor* (8), cited there by Aston, J., in which latter case it was assigned for error that trespass *quare clausum fregit* would not lie because the soil was not granted, and the Court held that it did lie in respect of *herbagium* and *pastura*. In *Lewis v. Branthwaite* (9) it was held, that the tenant of mines had possession so as to maintain trespass against a party who broke through the subsoil without breaking through the surface. Lord Tenterden there says, "He who has the surface has the subsoil. It seems to me that the copyholder has possession of the subsoil, although he has no property in it."

(4) 7 East, 207.

(5) 1 B. & C. 389.

(6) 5 Term Rep. 329.

(7) 3 Burr. 1824.

(8) Moore, 355.

(9) 2 B. & Ad. 437; s. c. 9 Law J. Rep. (N. K.B. 263.

[MAULE, J.—Lord Tenterden does not mean to say that possession of the surface and possession of the soil may not both subsist separately.]

*Primá facie* the possessor of the surface has the possession of the subsoil, although some one else may shew that he has property in it.

[MAULE, J.—*Primá facie* possession of the surface is evidence of possession of the soil; but the present argument is, that if nothing but the possession of the surface appeared, the jury should have been directed to find that the fee was in the corporation.]

In the case of *Cox v. Mousley* a rule nisi having been obtained to enter a verdict for the plaintiff on all the issues,—

*M. D. Hill and Waddington* now (Jan. 18,) shewed cause; and—

*Whitehurst* appeared in support of the rule.

WILDE, C.J.—With regard to the cases of *Cox v. Glue* and *Cox v. Saint*, in which it was found that the defendants were entitled to the exclusive possession of the surface, but that the plaintiffs were entitled to the subsoil, it seems to me that the ruling of the learned Judge was right. The possession of the surface may be in one person, and the possession of the subsoil in another. The question of possession is one of fact, which may have to be decided from various circumstances. It may be derived under a grant, or it may be inferred from long enjoyment, which would presume a grant. In the present cases it is found that the burgesses had the right to take the herbage by the mouths of certain cattle, and it is not found that they had any other right whatever. It was unnecessary, therefore, for the owner of the soil to part with more than the possession during the time of the enjoyment of such right. If, then, the owner can grant possession for a certain time and a certain limited enjoyment, and can at the same time retain all the right to the possession of the subsoil, what are the materials here from which to draw the conclusion that the plaintiffs have granted more than was necessary for such limited enjoyment. Here, all that the burgesses ever enjoyed was the possession for a portion of the year, and there is no fact to shew that the owner of the soil ever granted more. There is no doubt that

different strata of the soil may be the subjects of different rights. It may sometimes be a question of difficulty to determine to what depth different parties may be entitled; but that difficulty does not arise here, because it must be taken that the jury have found that the holes were made to such an extent as to interfere with the subsoil which remained in the plaintiffs. What is there, then, to prevent the owner of the subsoil from bringing an action of trespass? He had both the fee and the possession,—the latter, because all that he had not granted remained in him, and there was nothing to shew that he had granted more than the herbage, reserving all other rights as full, and open to the same remedies, as if he had never made any grant at all. On the whole, therefore, I think the Judge was quite right, and taking the finding of the jury to be that the exclusive possession was in the burgesses for the purpose of enjoying the herbage, and the exclusive possession of the subsoil in the lord, it seems to me that the verdict was properly entered for the plaintiffs, and that the rule in the first two actions should be discharged. The other case of *Cox v. Mousley* is much more free from doubt. Trespass is an action for an interference with the possession. Here, it is expressly found that the right of possession of the surface at the time of the trespass was out of the plaintiffs, and it was therefore quite clear, that they could not maintain any such action in respect of the defendants having trampled down the surface of the field. There was no evidence of the defendant having done any injury except to the surface. The verdict, therefore, was rightly entered for the defendant, and the rule in this case also ought to be discharged.

MAULE, J.—I also am of opinion that the rules ought to be discharged. In the first two actions there was evidence to shew that the seisin in fee was in the plaintiffs, but there was also evidence on behalf of the defendants, on which it was insisted that for a portion of every year the corporation was entitled to the possession of the surface at any rate. The conclusion of the jury was, that the plaintiffs were seised in fee of the subsoil at all events, and that the corporation was entitled to the exclusive possession of the surface for a particular portion of the year.

The learned Judge at the trial directed that under these circumstances a verdict should be entered for the plaintiffs, and decided, as it appears to me, that if a person is entitled to the subsoil, and another person digs holes in that soil, the former is entitled to a verdict on a count stating that the defendant broke and entered the close of the plaintiffs. The description "close" was sufficient to include the subsoil as well as the surface; and in an action of tort, generally speaking, the plaintiff is entitled to a verdict if he prove a part only of the tort alleged. Here then, as the plaintiff had the exclusive possession of the subsoil he was entitled to recover in trespass, although the corporation had the right of possession of the surface. The case of *Cox v. Mousley* is very clear. The question raised there is, whether the plaintiffs can maintain trespass against the defendants for simply riding on the surface which is in the possession of other persons. The terms of the finding are quite clear to shew that the exclusive possession of the surface was in other persons, and that the plaintiffs themselves might be excluded. The plaintiffs, therefore, could not maintain trespass under those circumstances.

CRESSWELL, J.—In *Cox v. Glue* and *Cox v. Saint* the substantial question was, whether the jury were warranted in finding that the plaintiffs were in possession of the subsoil. It is true that the Judge seems to have led the jury to that conclusion; but there appeared quite evidence enough to support that finding. The jury also found that the trespass committed was a trespass to the subsoil, and therefore, the plaintiffs were clearly entitled to maintain the action. As to the only other question, namely, whether the plaintiffs were entitled to recover on the present declaration, I entirely agree with my Brother Maule that the declaration is sufficient. With respect to *Cox v. Mousley* there seems to me to be no doubt at all, the jury having found that the plaintiff was not in possession of the surface at the time when the trespass was committed.

WILLIAMS, J.—I am of the same opinion. In the first two cases a question is raised as to the nature of the estate of the burgesses in the land, and it seems to me it must be taken to be equivalent to the right to *prima*

*vestura*, or *prima tonsura*. That being so, the question is, whether the owner of the soil may not bring an action for the digging of holes into the subsoil. I think he clearly can, and the only action he can maintain for such an injury is trespass *quare clausum fregit*. As to the other case there can be no doubt, and I agree with the Court that the rules ought to be discharged.

*Rules discharged.*

1848. } PILBROW v. PILBROW'S ATMOSPHERIC RAILWAY AND  
Jan. 19, 21. } CANAL PROPULSION COMPANY.

*Pleading—Deed—Covenant—Company; Incorporation of, under 7 & 8 Vict. c. 110.—Issue—Matter of Law.*

The first count stated that by a deed made between the plaintiff and the defendants, who were described as a "company registered and incorporated after a deed of settlement had been executed under the 7 & 8 Vict. c. 110," the defendants agreed to pay the plaintiff 15,000*l.* as soon as conveniently could be out of the money raised by the first calls or instalments on the shares of the company. Breach—That although divers instalments were paid, out of which the company might have paid the money, they had not done so. The second count set out articles of agreement stating that the plaintiff had sold his patents to the company, and contained a covenant that the company should pay him 15,000*l.* in cash as soon as conveniently could be done out of the money raised on the first instalments or calls on the shares. Breach—That though the company could have raised the money, and a reasonable and convenient time for paying it had elapsed, yet they had not paid the plaintiff.

3rd plea to the first count—That the deed of settlement was obtained by the fraud of the plaintiff.

4th plea to the first count—That the registry and incorporation were obtained by fraud.

8th and 18th pleas—That the company was formed under a deed of settlement in which the plaintiff was a party, by which it was agreed that the plaintiff was to be paid out of the first instalments after paying the necessary expenses of the company, and that

no instalments, &c. had been received sufficient to pay the expenses and the 15,000*l*.

*21st plea*—That the company was not incorporated by charter or act of parliament, nor was the same "duly and lawfully" registered and incorporated.

*22nd*—That at the time when the company obtained a certificate of complete registration, the company was not formed by deed or writing under the hands and seals of the shareholders as required by the statute:—

*Held*, that the 2nd count was good on general demurrer, and the breach properly assigned; that the 3rd, 4th, 8th and 18th pleas were bad on demurrer; that the 21st plea was bad, because the defendants were estopped from denying the fact of incorporation, and if that fact was not in issue, then the plea was bad because it raised a question of law; that the 22nd plea was bad for similar reasons.

**Covenant.** The first count of the declaration stated that, theretofore, to wit, on the 11th of June A.D. 1845, by a certain deed then made between the plaintiff of the one part, and the said company therein described as registered and incorporated in pursuance of an act of parliament made and passed in the seventh and eighth years of the reign of her present Majesty Queen Victoria, intituled, "An act for the registration, incorporation, and regulation of joint-stock companies," of the other part, which said deed was then sealed with the seal of the said company, and was then signed by three of the directors of the said company, to wit, the Right Hon. Arthur Algernon, Earl of Essex, George Buckley Bolton, and Francis John Lambert, reciting that her present Majesty Queen Victoria, by letters patent, under the Great Seal of the United Kingdom, bearing date the 17th of May 1844, granted unto the plaintiff, his executors, administrators and assigns, the sole and exclusive licence, power, privilege and authority of making, using, and vending for the term of fourteen years an invention in "certain improvements in the machinery for a new method of propelling carriages on railways and common roads, and vessels on rivers and canals within England and Wales, and Berwick-upon-Tweed;" and that in pursuance of a proviso contained in the said letters patent, a specification of the said invention was duly in-

rolled by the plaintiff in her Majesty's High Court of Chancery, on the 16th of November 1844, and that by letters patent under the seal appointed by the treaty of union to be kept and used in Scotland instead of the Great Seal thereof, bearing date the 13th of November 1844, the like exclusive privileges in respect of the use of the said invention were granted to the said plaintiff, his executors, administrators and assigns, to be enjoyed and exercised by him and them within Scotland, and that by letters patent under the Great Seal of Ireland, bearing date the 16th of January 1845, the like privileges in respect of the use of the said invention were granted to the said plaintiff, his executors, administrators and assigns, to be enjoyed and exercised by him and them within Ireland; and that in pursuance of provisoes respectively contained in the said several letters patent for Scotland and Ireland, specifications of the said inventions had been or were intended to be forthwith duly made and inrolled by the plaintiff; and further reciting that the said company had been duly formed under a deed of settlement, bearing date the 22nd of May then last past, for among other things the working of the said several patents for the United Kingdom, and the said company had been registered and incorporated under the provisions of the aforesaid act, and the capital of the same consisted of 600,000*l*. divided into 60,000 shares of 10*l*. each; and further reciting that it had been agreed between the plaintiff and the said company that the plaintiff should grant to the said company a licence for the exclusive use of the said several patents for the United Kingdom, during the remainder of the several terms of years of such patents respectively in manner thereafter mentioned, and should also enter into such covenants as were thereafter contained for granting to the said company licence to use and practise all other improvements in the invention aforesaid, which should be made or invented by the plaintiff, and whether the plaintiff should obtain a patent or patents for such inventions or not; and that in consideration of such grant and covenant the sum of 15,000*l*. in cash should be paid to the plaintiff, so soon as conveniently could be after the execution of these presents, out of the money raised by the first instalments



or calls on the shares of the said company, —it was witnessed, that in pursuance of the said agreement in that behalf, and in consideration of the premises, the plaintiff did thereby give and grant unto the said company and their successors full and freeliberty, licence, power, privilege, and authority to use, exercise, and put in practice the said patent invention throughout the United Kingdom of Great Britain and Ireland during all the remainders then to come and unexpired of the respective terms of years granted by the said respective patents for England, Scotland, and Ireland, for their use and benefit; and the said company, for themselves and their successors, did thereby covenant with the plaintiff, his executors and administrators, that they the said company, or their successors, should and would pay, or cause to be paid, to the plaintiff the said purchase-money of 15,000*l.* *out of the money raised* by the first instalments or calls on the shares of the said company, as aforesaid, as by the said deed, reference being thereunto had, will, among other things, more fully appear; and the plaintiff says, that although he hath at all times since the making of the said deed, performed and fulfilled all things therein contained on his part and behalf to be performed and fulfilled, and although divers instalments or calls on the shares of the said company were, before the commencement of this suit (to wit) on the 1st day of July, A.D. 1845, paid to the said company, out of which the said company might and ought to have paid the said sum of 15,000*l.*, and the said company, in part performance of their said covenant, have paid to the plaintiff a small part thereof, to wit, 1,000*l.*, and although a convenient and reasonable time for the payment of the residue of the said sum of 15,000*l.*, since the making of the said deed and since the payment of the said instalments or calls to the said company had elapsed before the commencement of this suit, yet the said company, not regarding their said covenant, have not paid the said residue of the sum of 15,000*l.*, or any part thereof, but have hitherto wholly refused and still do refuse to pay the same or any part thereof.

Second count—that whereas also afterwards, to wit, on the 12th day of June, A.D. 1845, by certain articles of agreement in writ-

ing then made between the plaintiff of the one part, and the said company therein described as registered and incorporated in pursuance of an act of parliament made and passed in the seventh and eighth years of the reign of her Majesty Queen Victoria, intituled, 'An act for the registration, incorporation, and regulation of joint-stock companies,' of the other part, which articles were then sealed with the seal of the said company, and were then signed by three of the directors of the said company, the said Earl of Essex, George Buckley Bolton, and Francis John Lambert, reciting that her present Majesty, Queen Victoria, by letters patent, &c., granted unto the plaintiff, his executors, administrators, and assigns, the sole and exclusive licence, power, privilege and authority of making, using, and vending for the term of fourteen years an invention, &c., within England and Wales, and Berwick upon-Tweed; and that, in pursuance of a proviso contained in the said letters patent, a specification of the said invention was duly inrolled by the plaintiff in her Majesty's High Court of Chancery, on the 16th day of November 1844; and that, by letters patent under, &c., bearing date, &c., the like exclusive privileges in respect of the use of the said invention were granted to the plaintiff, his executors, administrators and assigns to be enjoyed and exercised by him and them within Scotland; and that by letters patent, &c., the like privileges in respect of the use of the said invention were granted to the plaintiff, his executors, administrators, and assigns, to be enjoyed and exercised by him and them within Ireland; and that in pursuance of provisoes respectively contained in the said several letters patent for Scotland and Ireland, specifications of the said inventions had been or were intended to be forthwith duly made and inrolled by the plaintiff; and further reciting that the said company had been duly formed under a deed of settlement, bearing date the 22nd day of May then last past, for the purchase and working of the said several patents for the United Kingdom, and any other patents which could or might be obtained for the invention aforesaid, in any foreign country, place, or kingdom, and for the granting licences for the use of all such patents at home and abroad; and the said company had been registered

and incorporated under the provisions of the aforesaid act, and the capital of the same consisted of 600,000*l.* divided into 60,000 shares of 10*l.* each; and further reciting that the plaintiff had offered to sell absolutely to the said company the said several patents for the United Kingdom, and the benefit and advantage of the same respectively, free from incumbrances, at or for the price or sum of 15,000*l.* in cash, and 4,500 shares in the said company, upon each of which shares the full sum of 10*l.* was to be considered as paid up, and the said company were willing to purchase such patents upon the terms aforesaid, so soon as the same could by law be effected and an act of parliament should have been obtained authorizing the said purchase by the company; and that in the mean time, and until such act of parliament could be obtained, it had been proposed that the plaintiff should grant to the said company a licence for the exclusive use of the said several patents during the remainder of the several terms of years of such patents respectively, which had been done by an indenture of licence, bearing date and duly executed the day before the date of the said agreement; and further reciting that the plaintiff and the said company were desirous of entering into such agreement, in respect of the premises, as was thereafter contained,—it was witnessed that for effectuating the said desire, it was thereby agreed and declared between and by the parties to those presents, and the plaintiff did for himself, his heirs, executors, and administrators (but so far only as the covenants and agreements thereafter contained, were to be observed or performed by or were applicable to the plaintiff or his heirs, executors, or administrators), thereby covenant with the said company and their successors, and the said company did, for themselves and their successors (but so far only as the covenants and agreements thereafter contained were to be observed or performed by or were applicable to them or their successors), covenant with the plaintiff, his executors and administrators in manner following; that is to say, that whensoever the said company or their successors should apply for an act of parliament to enable them to purchase and take a conveyance of the said several letters patent for the United

Kingdom, then the plaintiff, his executors or administrators, should and would upon the request of the said company or their successors, and whether such application to parliament should be made in the next session thereof, or at any time thereafter, join and concur with the said company or their successors in the said application, and sign the petition for the said intended act, and testify his consent thereto, and to all such other acts and deeds for facilitating and promoting the success of such application and assisting the said company and their successors therein, and procuring the said intended act to be passed into a law, as by the said company and their successors, or their counsel in the law, should be advised or desired and required, and should and would immediately after the said intended act should be passed, and so soon as the same could or might lawfully be done, convey, and assure the said several patents for the United Kingdom unto the said company and their successors; or at the option of the said company, the said patents might, without any further consent of the plaintiff, his executors or administrators, be vested by the said act, in the said company and their successors, for their absolute use and benefit, and that the sum of 15,000*l.* in cash should be paid to the plaintiff as soon as conveniently could be done, after the execution of the said articles, *out of the money raised by the first instalments or calls on the shares in the said company*, as by the said articles, reference being thereunto had, will (among other things) more fully appear. Breach, that although the plaintiff hath at all times, since the making of the said articles, performed and fulfilled all things therein contained on his part and behalf to be performed and fulfilled, and although the said company, within a convenient and reasonable time after the execution of the said articles of agreement (to wit), on the 1st day of September, A.D. 1845, *could and might by calls and instalments on the shares of the said company have raised the said last-mentioned sum of 15,000*l.**, and a convenient and reasonable time for raising the said money, and paying the same in cash to the plaintiff, from and after the execution of the said articles of agreement had elapsed long before the commencement of this suit, and

although the said company have, in part performance of their last-mentioned covenant, paid to the plaintiff a small part of the last-mentioned sum of 15,000*l.* (to wit), 1,000*l.*, yet the said company, not regarding their last-mentioned covenant, have not paid the residue of the said last-mentioned sum of 15,000*l.*, or any part thereof, but have hitherto wholly refused, and still do refuse to pay the same or any part thereof, &c.

Pleas—Third, to the first count, that the said deed of settlement in that count mentioned and referred to, was obtained by the fraud, covin and misrepresentation of the plaintiff and others in collusion with him. Verification. Fourth, to the first count, that the registry and incorporation of the said company, recited in the said deed in that count mentioned, were obtained by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Verification. Eighth, to the first count, that the said company was formed by and under a certain deed of settlement in the said first count mentioned and referred to, and that such deed of settlement bears date (to wit) the 22nd day of May, in the year of our Lord 1845, and was and is made between the several persons whose names are thereunto subscribed, and whose seals are thereunto affixed, and one of which said persons was and is the said plaintiff of the first part, the Right Hon. Arthur Algernon, Earl of Essex, and George Buckley Bolton of the second part, and Francis John Lambert of the third part, (profert); and that thereby, after reciting as therein is recited, each of them the said parties whose names and seals were thereunto respectively set and affixed, save only the parties thereto of the second part, did for himself and herself, and his and her heirs, executors, and administrators respectively, and as to and concerning only the acts, deeds, and defaults of himself and herself respectively, and his and her heirs, executors, and administrators, covenant, declare and agree with and to the said parties thereto of the second part, as trustees on behalf of the said company in manner expressed, among others, in the several clauses thereafter and hereinafter contained, that is to say, that a capital of 600,000*l.* be raised by the issue of 60,000 shares of 10*l.* each;

that the directors might proceed and carry on the business of the said company although all the said 60,000 shares had not been subscribed for; that to carry on the business of the company it should be lawful for the directors from time to time as they might deem expedient, to make such call or calls on the shareholders for the payment of such instalment on their shares in the capital of the company, beyond any call or calls then already paid, as the directors should from time to time think necessary, until the whole thereof should be paid, and which instalment or instalments each and every of the parties thereto, his executors and administrators should duly pay accordingly; provided, nevertheless, no more than 1*l.* per share should be called for at any one time, and that after any calls should have been made, twenty-one days at least should elapse before any further calls should be made; that none of the shareholders in the said company should in any way interfere or intermeddle in the affairs or concerns thereof, except so far as they might be authorized so to do by virtue of the said deed of settlement; that the directors should as soon as conveniently could be after the complete registration of the said company cause to be satisfied out of the funds of the said company all the costs, charges, and demands upon the said company for business already done on account of the said company, and which on the day of the date of the said deed of settlement should remain unsatisfied, including the costs and charges incidental to the formation of the said company, and the costs and expenses of and relating to the preparing and executing the said deed, and should also pay or cause to be paid to the plaintiff with and out of the money received from the first calls on the shares of the said company, after providing thereout a sufficiency to meet the necessary expenses of the said company, the said sum of 15,000*l.* in cash. Averment, that from the time of the execution of the said deed of settlement hitherto, no calls or instalments on the shares of the said company have been raised, or paid to, or received by the said company, or by any persons on their account, sufficient to satisfy the necessary expenses of the said company, according to the true intent and meaning of the said

deed and the said sum of 15,000*l.*, or any part thereof. Verification. Eighteenth plea, a similar plea to the second count. Twenty-first plea, that the said company was not incorporated by any charter or act of parliament, nor was the same duly and lawfully registered and incorporated according to the form of the statute in such case made and provided, and in the said deed and articles of agreement respectively mentioned, at the respective times of the making of the said deed and articles of agreement in the declaration mentioned or either of them. Verification. Twenty-second plea, that the said company was a company requiring a certificate of complete registration within the true intent and meaning of the said act of parliament in the declaration firstly above mentioned, and that at the time of the obtaining a certificate of complete registration by the said company, the said company was not formed by a deed or writing under the hands and seals of the shareholders therein, or any of them, in pursuance of the provisions of the statute in such case made and provided, and in the said declaration firstly above mentioned, nor was there at any time any such deed of settlement of the said company as is required by the said statute. Verification.

General demurrer to the third and fourth pleas.

Replication to the eighth plea, *de injuriâ*.

Special demurrer to the eighteenth, twenty-first, and twenty-second pleas.

Special demurrer to the replication to the eighth plea.

*F. Robinson* (Jan. 19), for the plaintiff.—The third and fourth pleas, which allege that the deed of settlement and the registration and incorporation of the company were obtained by fraud, are bad. They do not shew on whom the fraud was practised; and in order to make them good answers to the declaration it would be requisite to shew that because the plaintiff was implicated with others in fraudulently procuring the deed and the registration and incorporation of the company, the contract declared on, which the company entered into subsequently and for a good consideration, was invalid. [He was then stopped on those pleas.]

As to the eighth and eighteenth pleas, these pleas set out certain stipulations contained in

the deed of settlement, to which the plaintiff was a party, and state that no calls have been raised since the execution of the deed sufficient to satisfy the necessary expenses of the company and the said sum of 15,000*l.* The deed on which the plaintiff has declared cannot be controuled by the antecedent deed of settlement. That principle is recognized in *Patmore v. Colburn* (1). The pleas state only that no sufficient money has been raised since the execution of the deed. Money might have been raised before, and might at that time have been in the hands of the company's bankers.

As to the twenty-first and twenty-second pleas, the twenty-first plea alleges that the company was not incorporated by any charter or act of parliament or *duly and lawfully* registered or incorporated according to the statute. It is confined to the time of the making of the deed and the agreement. There are various objections to it. One of them is decisive. The plea is not one of "*nul tiel corporation*" as it ought to have been been, but traverses certain special means of incorporation. For all that appears, the corporation might be a foreign one; which would be recognized in this country, as in the cases of *The Dutch West India Company v. Van Moses* (2), and *The National Bank of St. Charles v. De Bernales* (3). The plea does not shew that the registration was defective. It alleges that the company was "not duly and lawfully registered," which is a conclusion of law. It should either simply have denied the registration, or have shewn how it was insufficient—*Hume v. Liveredge* (4), *Webb v. James* (5), *Ransford v. Copeland* (6). The defendants seem to insist that a mistake in the registration avoids the incorporation. It is the duty of the registering officer to see that the proper steps mentioned in the statute have been taken before granting a certificate of complete registration. Besides, an irregular-

(1) 1 Cr. M. & R. 65; a. c. 3 Law J. Rep. (n.s.) Exch. 314.

(2) 1 Stra. 612.

(3) Ry. & Moo. 190.

(4) 1 Cr. & M. 322; a. c. 2 Law J. Rep. (n.s.) Exch. 104.

(5) 7 Mee. & Wels. 279; a. c. 10 Law J. Rep. (n.s.) Exch. 89.

(6) 6 Ad. & El. 482; a. c. 6 Law J. Rep. (n.s.) K.B. 170.

city in the registration would not avoid the incorporation. An act of a public officer may be good though done irregularly. In *The Margate Pier Company v. Hannam* (7), where goods were seized under the warrant of a Justice of the Peace who had not taken the proper oaths, it was held that the distress was not void so as to make the parties levying it trespassers. *Cook v. Henson* (8) recognizes the same doctrine. Again, the defendants are estopped from taking this objection, because the deed in question, to which they are parties, expressly recites that the company had been registered and incorporated—*Bowman v. Taylor* (9), *Hill v. the Manchester and Salford Water-works* (10). The twenty-second plea states that there was no deed of settlement at the time of the certificate of complete registration, or at all. The defendants therefore say that they are not now a corporation, which they are estopped from doing, as they have been sued, and are now in court as a corporation—*Bro. Abr.* p. 28, pl. 'Corporation of the Lombards of London.'

*Bovill*, contra (Jan. 21).—As to the third and fourth pleas, without the deed of settlement there could not have been any incorporation under the 7 & 8 Vict. c. 110. s. 7, nor could any deed have been made on which the plaintiff could sue, nor any fund been raised out of which he could be paid. It was impossible to allege that this deed had been obtained from the defendants, because they did not then exist. At all events, the difficulty arising on the third plea as to the parties from whom the deed was obtained, does not apply to the fourth.

[WILDE, C.J.—The company are parties to the fraud, and they now wish to get rid of the deed.]

[MAULE, J.—Your argument is, that the deed and the registration and incorporation founded on it are void. But a deed is not void because it has been obtained by fraud. The party upon whom the fraud has been practised may treat it as void or not, but the party committing the fraud is bound by it.]

(7) 3 B. & Ald. 266.

(8) 1 Com. B. 908; s. c. 14 Law J. Rep. (n.s.) C.P. 295.

(9) 2 Ad. & El. 278; s. c. 4 Law J. Rep. (n.s.) K.B. 58.

(10) 2 B. & Ad. 544.

As to the eighth and eighteenth pleas, the deed of settlement contained a stipulation to pay out of a particular fund. The calls could be raised only by means of that deed; and there is no doubt from the reference contained in the second deed that it was executed for the purpose of carrying out the former one.

[WILDE, C.J.—The second deed might be intended to modify the first, and the second amounts to an undertaking that the calls shall be sufficient to pay the 15,000*l.*]

As to the twenty-first plea, it is said that the parties are estopped by the recital in the deed; but the recital and the allegation in the plea are not quite the same. The plea introduces the words "duly and lawfully," and to create the estoppel strictly the plea and the recital ought to agree substantially. It has been argued that the plea does not shew that this was not a corporation by foreign law, but the recital in the deed states that it was a corporation by act of parliament, and the plea denies that it was such a corporation.

[CRESSWELL, J.—You profess in the plea to deny that there was any sort of incorporation, whether by statute or otherwise, and Mr. Robinson argues that you do not do what you profess.]

The next question is, whether the words "duly and lawfully" were properly introduced into the plea. In the case of *Hume v. Liversedge* the plea was that there was no proper affidavit. That was too general. Other cases were cited on this point, and the objection in them seems to have been on the ground of too great generality in form. In the case of a specification it would surely be a good plea to say that it was not "duly" inrolled; so in the case of an annuity, that a memorial was not "duly" inrolled.

[WILLIAMS, J.—I understand the argument on the other side to be founded not so much on the question of generality, as on the ground that the issue attempted to be raised refers a matter of law to the jury.]

In the instances of a specification and of a memorial there is matter of law left to the jury. In almost every issue there is matter of law involved which requires the direction of the Judge. In *Muntz v. Foster* (11) the declaration, which was for infringing a patent,

(11) 6 Man. & Gr. 734; s. c. 13 Law J. Rep. (n.s.) C.P. 1.

stated the inrolment of the specification; and the plea set out a further specification and the inrolment of it, and stated that there was no other, and that thereby the former specification had become void. The argument for the plaintiff was, that this was an argumentative denial that the specification had been duly inrolled. Maule, J. said, "Suppose the declaration to have set out a good specification, and to have averred that the plaintiff had caused the same to be duly inrolled, and the plea to have set forth another specification, and to have alleged that the defendant had inrolled the latter and no other, would not the plea clearly have been bad?" It would seem, therefore, that "not *duly* inrolled" is the proper plea in such a case. The most ordinary case of a traverse analogous to the present is in actions on bills of exchange, where the common form is that the defendant had not "due notice."

[CRESSWELL, J.—That does not at all advance your case. To make it analogous, you must suppose the averment in the declaration to be one of "notice" only, and that in the plea one of "no due notice."]

[MAULE, J.—Your argument seems to be, that because issues of fact may involve matter of law, therefore you may plead matter of law.]

The statement in the plea is an allegation of fact; and if the traverse had been simple, the same points would have been raised.

[MAULE, J.—The construction of your plea is this, that there was a registration, but that it was not a due registration. Now that is matter of law only.]

At all events, the second count of the declaration is bad. The breach is, that though the company could have raised sufficient money by calls or instalments on the shares, to pay the 15,000*l.* in cash to the plaintiff, they did not pay him that sum. Now, the second deed contains no distinct independent covenant to pay the money, but only shews that there being a probability of a certain fund existing, the plaintiff was to be paid out of that fund when raised. The raising of the money is a condition precedent to the payment—*Pontet v. the Basingstoke Canal Company* (12).

(12) 3 Bing. N.C. 433; s.c. 6 Law J. Rep. (N.S.) C.P. 177.

[MAULE, J.—The words in the covenant are not "money to be raised," but "money raised."]

No covenant to raise sufficient funds can be implied from the deed. The most recent cases as to the implication of covenants are *Aspdin v. Austin* (13), *Dunn v. Sayles* (14), *Gwillim v. Daniel* (15), and *Quarrington v. Arthur* (16). The principle to be derived from these cases is, that where any covenants are expressed, none are to be implied. In actions on policies of insurance, in which the directors stipulate to pay out of the funds of the company, the declaration always alleges the sufficiency of the funds—*Andrews v. Ellison* (17). The deed does not shew that the company had even the power to raise the money. And the declaration should have distinctly shewn how the duty to raise the money had arisen—*Max v. Roberts* (18).

*F. Robinson*, in reply.—As to the twenty-first and twenty-second pleas there is a conclusive answer. It is assumed, in the first place, that if there were informalities in the registration there was no corporation under the act; but the 25th section of the 7 & 8 Vict. c. 110. constitutes the company a corporation on its complete registration. Although the registrar may not have been right in giving the certificate of registration, yet *quod fieri non debet factum valet*. The cases cited as to putting allegations involving matter of law in issue are clearly distinguishable from the present. Here, the question of law is distinctly put in issue. The only real point which remains is, whether the second count of the declaration puts the true construction on the deed. This construction is consistent with the evident and reasonable intention of the parties. There is no necessity for cases on the point. In *Pontet v. the Basingstoke Canal Company*, the party claiming from the company relied on a particular security, and in *Andrews v. Ellison* on

(13) 5 Q.B. Rep. 671; s.c. 13 Law J. Rep. (N.S.) Q.B. 155.

(14) *Ibid.* 685; s.c. 13 Law J. Rep. (N.S.) Q.B. 159.

(15) 2 Cr. M. & R. 61; s.c. 4 Law J. Rep. (N.S.) Exch. 174.

(16) 10 Mees. & Wels. 335; s.c. 11 Law J. Rep. (N.S.) Exch. 418.

(17) 6 B. Moo. 199.

(18) 12 East, 89.

a particular fund. The cases of *Aspdin v. Austin* and *Dunn v. Sayles* were decided expressly on the intention of the parties. The Court always looks to the intention of the parties. In *Otway v. Holdips* (19) it was held that where the condition of a bond was to pay as soon as a bill of costs should have been stated by two attorneys to be chosen by the parties, a refusal to appoint one was a forfeiture. In *The Duke of St. Albans v. Ellis* (20), where a lessee covenanted to plough all, &c., except a rabbit warren, he was held liable in covenant for ploughing the rabbit warren. In *Lord Shrewsbury v. Gould* (21) there was a covenant by the lessee at all seasons of burning lime to supply the lessor and his tenants with lime for improvements at a stipulated price, and it was held that there was an implied covenant to burn at such seasons. It is said that the second count does not shew a duty or breach of duty. The duty declared on is to pay the money, not to raise the fund, and that is very distinctly stated.

WILDE, C.J.—I think that the objection to the declaration in this case cannot be upheld, and that the pleas referred to are bad. The second count, which is the part of the declaration said to be bad, sets out articles of agreement, stating that the plaintiff had offered to sell to the company his patents and inventions, and that this contract was to be executed when an act had passed, which would make the sale legal; but in the mean time that an exclusive licence was to be granted by the plaintiff to the defendants, which had accordingly been done, so that the plaintiff had parted with all his beneficial interest in his patents, and the defendants had received all that they were ever to receive as the consideration for a certain sum of money. The agreement proceeded to set forth a covenant that the sum of 15,000*l.* in cash should be paid to the plaintiff as soon as conveniently could be done out of the money raised on the first instalments or calls on the shares of the said company. A question is made as to the effect of that covenant,—whether it is to be construed as absolutely binding the company

to pay the 15,000*l.* at all events, or whether it is subject to the condition of the money being raised, and creates a liability in that event only. By the deed, which is set out in the second count, it appears that the plaintiff had done all that he had to do. The words of the covenant are to the effect that the company will pay out of the money raised. Does that mean the money to be raised or already raised? It will be observed that the expression used is consistent with the fact of the money being actually in hand; and there is an entire absence of matters which would have been inserted in the agreement, if the money had not been raised? If that had been the case, would not the agreement have shewn by whom and how and whence the money was to be raised? It appears to me that the absence of every circumstance that was necessary to secure to the plaintiff his payment according to the agreement, is very strong evidence to shew that to be the true construction; and there is nothing in the agreement to controul it, for it does not follow, because money was to be raised afterwards by calls, that none had been raised before. But supposing this was a covenant by the company to pay out of money to be raised, how does the case in 2 *Mod.* apply? That was an obligation to pay money on a bill of costs being stated by two persons chosen by the parties, and though no bill was stated, the refusal of one party to appoint an arbitrator was held a forfeiture, making the money payable. It seems, indeed, as if the plaintiff, being uncertain what construction would be put on the deed, introduced this averment to shew that the money had become payable at all events. Collecting the intention of the parties from the contents of the agreement, I think this was an absolute covenant, on the part of the company, to pay out of the money which they had raised, or, at all events, which they ought to have raised. As to the pleas, all but the twenty-first and twenty-second, were disposed of during the discussion. The twenty-first plea states that the company was not incorporated by charter or act of parliament, or duly registered according to the form of the statute. It appears to me that the answers to the argument in support of each plea are complete. The

(19) 2 *Mod.* 266.

(20) 16 *East*, 352.

(21) 2 *B. & Ald.* 487.

declaration states that the company was registered and incorporated according to the act, and the plea is, that it was not duly and lawfully registered and incorporated. For the plaintiff it is said, that if this plea denies the registration and incorporation, the defendants are estopped from making that defence; and, in order to get rid of the estoppel, it is said, on the other side, that the plea does not mean to deny the facts of registration and incorporation, but that they were duly and lawfully done. If that be so, the intention was to raise matter of law, and so the plea is bad in form. I think these are the correct answers. Many cases were cited of facts put in issue, which involved matter of law, but no authority could be cited to shew that matter of law alone can be put in issue. The same objection applies to the twenty-second plea. It is also very ambiguous whether the plea meant to deny the fact of registration, or some one of the many things required by the act previous to registration. Therefore the judgment must be for the plaintiff.

MAULE, J.—I also think that the plaintiff should have judgment. The second count in effect states the sale by the plaintiff to the defendant for 15,000*l.*; and then there is the covenant in question, which it is insisted is not accompanied by a covenant to raise money. I do not think there is such a covenant. But no breach of duty to the plaintiff would have arisen, though the company had not made the calls, if they had paid the plaintiff the money. The impression on my mind is, that the true sense of the declaration is, that there was a simple covenant to pay, and that it points out a fund from which the money is to be paid, but that it does not make the raising of the fund a condition precedent to the payment. A covenant to pay by a banker's acceptance would not be a covenant to obtain a banker's acceptance. The highest this covenant can be put at is, that it is a covenant to pay, provided the company shall be in receipt of money in respect of calls sufficient to pay the 15,000*l.*; and then the case of *Otway v. Holdips* is an authority to shew that it is enough to aver that the defendants could have raised the money if they had thought fit. The 21st and 22nd pleas are so bad that they seem to have no goodness in them. I entirely

concur in what has been said against them by the Lord Chief Justice; and the main ground is, that the one expressly, and the other impliedly, admits that the company had obtained a certificate of complete registration, and that the act of parliament puts that certificate in the same position as a patent incorporating the company. Whether the corporation is by prerogative or by the legislature, there is equally an exercise of creative power. In the present case, there are certain things to be done to guard against the undue issuing of a certificate; but on the issuing of the certificate, the company becomes indisputably a corporation. The pleas are defective in substance for not shewing anything to controvert the effect of the certificate.

CRESSWELL, J.—The question on the declaration is the simplest possible. There is a certain sum of money to be paid out of the calls. The money is not paid at all. The company may please themselves about raising money on the calls; but at all events, they were bound to pay as soon as conveniently might be, and surely a convenient time has elapsed, when they might have raised the money, and have not done so.

WILLIAMS, J. concurred.

*Judgment for the plaintiff.*

1848. }  
Jan. 18. } HODGE v. CHURCHYARD.

*Venue; Change of, before Issue.*

*After plea and before issue joined, the defendant applied to change the venue from L. to D, on the grounds that most of the witnesses resided in D, and that the expenses of trying the cause in L. would be much greater than if it were tried in D:—Held, that the Court will not entertain such an application till the issues to be tried are ascertained.*

Action on the case for slander.

Pleas—First, general issue; second, justification, alleging that the slander is true.

*Greenwood*, for the defendant, applied for a rule nisi to change the venue from London to Devon.—The affidavit alleges special grounds for the motion, viz. that nearly all the witnesses on both sides reside in Devon,



and that the expenses will be extravagantly increased by trying the cause in London. The pleadings have not as yet proceeded farther than the delivery of the pleas, but as the Court cannot fail to see, on looking at the pleadings which are annexed to the affidavits, what the issues will be, this motion will be granted—*Dowler v. Collis* (1), and *Cotterill v. Dixon* (2).

*Per Curiam*.—The rule is, that this motion cannot be made till after issue joined. The reason for it is a good one, for no person can tell what witnesses will be required till the issues to be tried are known. When the pleadings are incomplete, how can a defendant undertake to inform us where the witnesses reside? And how can he expect the Court to act upon such information? This application is manifestly premature.

*Rule refused.*

1848. } CHADDOCK v. WILBRAHAM AND  
Feb. 9. } ANOTHER.

*Conviction—Distribution of Penalty.*

*Justices are empowered by the 27th section of 9 Geo. 4. c. 31. to convict of an assault upon complaint, and the offender, upon conviction thereof before them, is to pay such sum, not exceeding 5l., as shall appear to them to be meet, which sum is to be paid to some one of the overseers of the poor, or to some other officer of the poor of the parish, &c. in which the offence shall have been committed, to be by such overseer or officer paid over to the general use of the rate of the county in which such parish, &c. shall be situate. A conviction, under this section, ordered the party convicted to pay the fine to the treasurer of the county:—Held, that the conviction was bad, and the Magistrates liable to an action of trespass at the suit of the party imprisoned under it.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 79.]

(1) 4 Mee. & Wels. 531; s.c. 8 Law J. Rep. (N.S.) Exch. 47.

(2) 1 Cr. & M. 661.

1847. }  
Jan. 27. } TUNNICLIFFE v. TEDD.

*Assault—Hearing and Dismissal of Charge, Certificate of, under 9 Geo. 4. c. 31.—Bar to Action.*

*Where a party, on being summoned to appear before two Justices, for an assault, appeared, and pleaded "not guilty;" and the prosecutor then withdrew his complaint, and the defendant was accordingly discharged,—Held, that this was a hearing and dismissal, which entitled the defendant to a certificate that the charge had been dismissed as not proved, under the 9 Geo. 4. c. 31. s. 27; and that a plea, stating those facts, and that the certificate had been granted, set forth a good defence, under the 28th section, to an action of trespass for the same assault.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 67.]

1848. }  
Jan. 31. } DOE d. LOVE v. ROE.

*Ejectment—Notice to appear.*

*A notice in ejectment to a tenant in possession to appear in the next term but one is insufficient.*

*Ejectment.* The declaration and notice were served on the tenant in possession on the 1st of November 1847. The notice required the tenant to appear in next Hilary term.

*A. J. Johnston* moved for judgment against the casual ejector. — Although Hilary term was not the next term after the notice, the tenant in possession could not be prejudiced by having further time given him for appearing; and the Court has granted this rule in several cases where a mistake has been made in the notice, which could not mislead the party to whom it was given—*Chit. Arch.* p. 918.

[*CRESSWELL, J.*—In *Doe d. Holder v. Rushworth* (1), a notice, requiring a tenant, to appear in Trinity term, instead of the first day of Trinity term, was held bad.]

*Per Curiam—*

*Rule refused.*

(1) 4 Mee. & Wels. 74; s.c. 7 Law J. Rep. (N.S.) Exch. 280.

1848. }  
Jan. 26. } PETER, CLERK, v. DANIEL.

*Prescription — Pleading — Traverse — Duplicity.*

*Case by reversioner for digging and widening a channel. Plea, that H. and previous occupiers of G. Mill as such occupiers had for twenty years enjoyed a watercourse, and had for twenty years as such occupiers of right scoured and widened the channel as often as was required. Replication, traversing the enjoyment of the watercourse and the scouring and widening of right for twenty years.*

*On special demurrer, the replication was held good, the quasi prescription in the plea not being severable.*

*Semhle—That the plea would have been bad if it had stated the right to scour and widen, without shewing for what purpose it was enjoyed.*

*Case.* The last count of the declaration stated that N. D. was possessed of certain closes as tenant to the plaintiff, the reversion thereof belonging to the plaintiff; and that the defendant dug, excavated and widened a certain channel or leat in and through the said closes, thereby injuring the plaintiff's reversionary interest.

Ninth plea to the last count—That before and at the several times of the committing of the alleged grievances in that count mentioned, William Higman was and still is the occupier of a certain close and tenement called Gimble Mill, near to the said closes, in the said last count mentioned; and that the channel or leat in that count mentioned had been, and was during all the time in this plea mentioned connected with a like channel or leat leading from the said channel or leat in the said last count mentioned, unto, into and through other closes beyond the said closes in the said last count mentioned, and lower down the stream hereinafter mentioned, and thence unto, into and through the said closes and tenement called Gimble Mill, and thence unto, into and through other closes farther down the stream of water hereinafter mentioned, and beyond the last-mentioned close and tenement, and which last-mentioned channel or leat so connected with such first-

mentioned channel or leat during all the time in this plea mentioned remained and were one connected channel or leat. And the defendant further saith, that the water from time to time being and flowing in and along the said channel or leat, in the said last count mentioned, hath run and flowed, and hath been used and accustomed to run and flow, and of right ought to have run and flowed, for the full period of twenty years next before the commencement of this suit, and still of right ought to run and flow without interruption, and as of right, into, through, over and along the said several closes and tenements, and in and along the said one connected channel or leat hereinbefore mentioned, from certain other closes beyond the said closes in the last count mentioned, and higher up the stream of the said water unto, into and through the said channel or leat in other closes beyond the said closes and tenements in the said last count mentioned, and lower down the said stream, and thence unto, into and through the said channel or leat in the said close and tenement called Gimble Mill aforesaid, and thence to other closes and tenements beyond that close and tenement and lower down the said stream. And the defendant further saith, that the said W. Higman, whilst such occupier as aforesaid, and all other prior occupiers for the time being of the said close and tenement called Gimble Mill have, and each of them hath, as of right, and without interruption for the full period of twenty years next before the commencement of this suit, had, used and actually enjoyed, and have been used and accustomed to have and use and actually enjoy as of right and without interruption, and of right ought to have had, used, and actually enjoyed as of right and without interruption, and the said W. Higman at the said several times when, &c. of right ought to have had, and used and actually enjoyed as of right and without interruption, and still of right ought to have and use, and actually enjoy as of right and without interruption for himself and themselves, whilst occupiers of his said close and tenement called Gimble Mill, a stream and watercourse, and the water thereof flowing in, through, along, and over the said several closes and tenement, and in and along the said one connected channel or leat herein-

before mentioned, for the purpose of supplying the said close and tenement called Gimble Mill with water, and for the benefit and advantage of the occupiers of the same close and tenement, and for mining and other useful purposes therein as to the same close and tenement belonging and appertaining. And the defendant further saith, that the said W. Higman, whilst such occupier as aforesaid, and all other prior occupiers for the time being of the same close and tenement called Gimble Mill, have and each of them hath as of right and without interruption for the full period of twenty years next before the commencement of this suit so scoured and amended, and have been used and accustomed as of right and without interruption, and ought as of right and without interruption to scour and amend, and the said W. Higman at the said several times when, &c. as of right and without interruption ought, and still as of right and without interruption ought himself and themselves with his and their servants and agents, whilst occupiers of the same close and tenement called Gimble Mill, to scour and amend, the said stream and watercourse, channel or leat in the said last count mentioned, when and as often as the same required and requires scouring and amending, as to his said close and tenement called Gimble Mill belonging and appertaining. And the defendant further saith, that the said stream and watercourse, channel or leat in the said last count mentioned, being before and at the said several times when, &c. foul, choked up, miry, and out of repair, and then requiring to be scoured and amended, the defendant as the servant of the said W. Higman, and by his command, at the said several times when, &c., being reasonable times in that behalf, scoured and amended the said stream and watercourse, channel or leat, and in so doing, at the said several times when, &c., did necessarily and unavoidably on the occasion aforesaid, and for the purpose of scouring and amending the same stream and watercourse, channel or leat, and because the same could not otherwise have been scoured and amended, a little dig, excavate and widen the said channel or leat in the said last count mentioned, doing no more damage to the reversion of the plaintiff in the last count mentioned, on the occasion aforesaid,

than was necessary and unavoidable for the purpose aforesaid, and without digging, excavating, or widening the same channel or leat beyond the proper size and dimension thereof during the time aforesaid, or more or otherwise than the same had during all the time aforesaid been, and been used and accustomed to be dug, excavated and widened when the same and the said stream and watercourse required scouring and amending, and were scoured and amended as aforesaid during the time aforesaid, which are the same alleged grievances in the said last count mentioned. Verification.

Replication to the ninth plea, that the said W. Higman, whilst such occupier as in the said ninth plea alleged, and the prior occupiers for the time being of the said close and tenement called Gimble Mill, have not, as of right and without interruption for the full period of twenty years next before the commencement of this suit, had, used and actually enjoyed, nor been used and accustomed to have and use and actually enjoy as of right and without interruption, nor of right ought the said W. Higman, at the said several times when, &c., or any of them, to have had and used and actually enjoyed, as of right and without interruption, for himself and themselves, whilst occupiers of the said close and tenement called Gimble Mill, a stream and watercourse, and the water thereof flowing in, through, along, and over the said several closes and tenements in the said ninth plea in that behalf mentioned, or in and along such supposed connected channel or leat, as in that plea mentioned, for the purposes in the said ninth plea in that behalf mentioned, and that the said W. Higman, whilst such occupier as last aforesaid, and the prior occupiers for the time being of the same close and tenement called Gimble Mill, have not, as of right and without interruption, for the full period of twenty years next before the commencement of this suit, scoured and amended, nor been used and accustomed, as of right and without interruption, to scour and amend whilst occupiers of the said close and tenement called Gimble Mill, the said stream and watercourse, channel, or leat, in the said last count mentioned, when and as often as the same required or requires scouring and amending, as to the said close and tenement

called Gimble Mill, belonging and appertaining in manner and form, &c.

Special demurrer on the ground that the replication was double and multifarious.

*T. Jones*, in support of the demurrer.—The ninth plea sets up a justification for the acts complained of in the last count, on the ground that Higman was entitled to the watercourse through the closes, and being entitled to the watercourse was entitled to scour the channel. The replication is double, as it puts in issue both the right to the watercourse and the right to scour the channel. The plaintiff ought not to have put both these allegations in issue, unless he could shew that they were incidental to, or necessarily contained in, each other. There is nothing in the plea to connect them; and they may be quite independent. It would be enough for the defendant to prove the right to scour, and the right to the watercourse would be immaterial.

[MAULE, J.—I think the plea means that the right to the watercourse gives the right to scour. The defendant might have had the right to the watercourse, and to have some other person to scour the channel.]

There are no words connecting the right to scour and amend with the right to the watercourse.

[WILLIAMS, J.—Your construction makes the averment of the right to the watercourse insensible.]

[MAULE, J.—This is a plea under Lord Tenterden's Act, substituted for an allegation of immemorial usage. In the case of a grant of the rights to go on a close and to scour, the grant should be so pleaded.]

In the case of a grant or prescription the plaintiff would reply by denying the deed or prescription. The reason why the plaintiff might dispute everything mentioned in a grant is that the issue would be on *non est factum*, which would put the whole deed in issue. This is a substantial statement of a right to scour.

[MAULE, J.—You must take it as a right to scour as incident to the right to the ditch.]

Where a plaintiff is not in a condition to reply *de injuriâ*, he must select some allegation, and if he put the defendant to the proof of more than is necessary then the

replication is bad, as in *Regill v. Green* (1), *Thurman v. Wild* (2), *Moore v. Boulcott* (3). The right to scour and drain being the substantial right claimed, the defendant ought not, according to the doctrine in those cases, to be put to the necessity of proving his right to the watercourse.

*M. Smith*, contra.—This is an entire prescription; and must be proved as laid, though the allegation be unnecessarily large. If the two parts are separated, the plea has a totally different meaning. This cannot be simply an easement. If the defendant claims the right to scour, independent of the right to the watercourse, then it is a "*profit à prendre*," and the plea should have been one of thirty years' enjoyment under another section of the act.

[MAULE, J.—You can hardly call digging a hole, without taking anything away, a "*profit à prendre*." It is rather a "*perte à souffrir*."]

The case of *Richards v. Fry* (4) shews that you cannot sever a plea of this sort, and take one part as sufficient. In *Bailey v. Appleyard* (5), Little Dale, J. said, that a plea of a right to turn cattle into the *locus in quo*, without saying for what purpose, was bad. Where then the purpose is stated, surely the whole can be traversed. It is admitted, that for many purposes, if immaterial matter be included in a traverse, it will be bad; but here it is necessary to refer to the first part of the plea in order to sustain the second. A contract may consist of many parts, and you may traverse the whole, and so of a prescription. Where the whole of a traverse sets up but one answer, it may put several matters in issue—*Bell v. Tuckett* (6), *Pim v. Grazebrook* (7).

*T. Jones*, in reply.—*Richards v. Fry* only shews that where a plea sets up a right of common in a *que estate*, it cannot be treated as averring only possession of a right

(1) 1 Mee. & Wels. 328; s. c. 5 Law J. Rep. (N.S.) Exch. 177.

(2) 11 Ad. & El. 463.

(3) 1 Bing. N.C. 323; s. c. 4 Law J. Rep. (N.S.) C.P. 21.

(4) 7 Ad. & El. 698; s. c. 7 Law J. Rep. (N.S.) Q.B. 68.

(5) 8 Ibid. 161; s. c. 7 Law J. Rep. (N.S.) Q.B. 145.

(6) 3 Man. & Gr. 785; s. c. 11 Law J. Rep. (N.S.) C.P. 92.

(7) 2 Com. B. 429; s. c. 15 Law J. Rep. (N.S.) C.P. 32.

of common. *Bailey v. Appleyard* is equally inapplicable. Littledale, J. there says only that the plea shewed no purpose for which the cattle were turned on the close.

[CRESSWELL, J.—Here you state a right to scour the ditch, and you should shew for what purpose you scour it.]

The defendant contends he was entitled to have the ditches clean. All that Mr. Justice Littledale says is, that some easement should have been stated, of which definite proof could have been given.

MAULE, J.—I think that the plaintiff is entitled to judgment. It appears to me that the replication properly traverses a *quasi* prescription set up in the plea. The plea must be understood to be a plea of one single prescription; and the rule is, that when a prescription is pleaded, although it may be larger than was necessary to justify the matter complained of, the plaintiff not only may, but must, traverse the whole of it, and upon that traverse the defendant must prove every part of it. A plea of prescription is equivalent to a plea of a grant. In the case of a plea setting up a grant of a number of things, although one of them would constitute a sufficient defence, the defendant must nevertheless prove the whole of the grant as stated. In pleading such grant or prescription, it is not necessary to plead more than is required for the defence, but if more be pleaded the whole must be traversed. That applies to the case of a prescription before Lord Tenterden's Act. To apply the principle to the present case, it seems to me that since Lord Tenterden's Act this plea must be taken to be a plea of the enjoyment of one right. It may consist of a number of things existing by one deed or enjoyment equivalent to the presumption of a deed, and where it is alleged altogether it may be treated as one thing. The present plea is, that certain persons who occupy Gimble Mill enjoy the watercourse as connected with their close, and have also during all the time of their occupation scoured and widened the channel as often as was required as appurtenant to the close. It is said that this is to be understood as a plea of two separate prescriptions, the one of a right to enjoy the watercourse, which is no defence to the action, the other to scour the watercourse as often as it requires

scouring generally without reference to the close. Supposing that to be the possible meaning of the allegation, yet in the present state of the pleading what I understand the plea to mean is, that during twenty years those who have occupied have enjoyed the benefit of the stream of water, and the right of going on the plaintiff's land and clearing out the stream as often as was necessary, as appurtenant to the close, the necessity of repairing being considered in reference to the previously stated right to the watercourse. Apart from the right to the watercourse there would be no assignable limits by which to judge whether the channel required repair or not. That is a strong reason for considering this as all one allegation, and not two separate ones. Supposing a party in justifying a trespass pleaded a right of common for horses, and a right for cattle, and a right for sheep, all that would be but one right. That is much the same as the present case, except that here there is a connexion between the two rights, arising from the allegation of the right to repair as often as was necessary for the occupation of the close. That of itself is enough to shew that the defence relied on is one right.

CRESSWELL, J.—I am of the same opinion. The only difficulty seems to arise from the ambiguity in the plea. It may be construed as setting up one right or two. I think the true construction of this plea is, that the right of scouring is connected with the right of enjoying the watercourse. Therefore the plaintiff was not only right in traversing the whole allegation, but was bound to do so. *Morewood v. Wood* (8) is an authority to that effect.

WILLIAMS, J.—I am of the same opinion. I understand the argument for the defendant to be, that the effect of the replication is to compel the defendant to prove more than he is bound to prove. I agree that, according to the rule of pleading, if it does so the replication is vicious. It is said that the rule is violated, because the sense of the plea is that there was one right, namely, the right to scour, and that the replication calls on the defendant to prove an immaterial allegation. I agree that though idle and

immaterial matter may not be ground for demurrer, yet if two constructions can be put on a plea, one of which gives effect to the whole, and the other rejects a part as idle and immaterial, the former is to be adopted. But I entertain a very strong opinion that if this idle and immaterial matter, as it is now called, had been omitted, the plea would have been bad on special demurrer for not setting out with sufficient certainty the nature of the right, so as to shew whether it was such as the law would allow.

*Judgment for the plaintiff.*

1848. }  
Feb. 12. } ARMSTRONG v. CHRISTIANI.

*Bill of Exchange—Notice of Dishonour.*

*The plaintiff gave the defendant this notice of dishonour:—"I am the holder of a bill drawn by you on L. M. M. for 98l. 15s., which became due yesterday, and is unpaid; and I have to state, that unless the same is paid to me immediately, I shall proceed against you without delay for the amount. Amount of bill 98l. 15s., noting 5s., total 99l."—Held, that the word "noting" must be taken as part of the notice; that it implied presentment and non-payment; and that the notice was therefore sufficient.*

Assumpsit by the indorsee of a bill of exchange against the maker. The material plea was, that the defendant had not had due notice of the non-payment by the acceptor.

At the trial, before Coltman, J., at the Croydon Summer Assizes, 1847, it was proved that the defendant had received the following notice from the plaintiff:—

"20, Lawrence Lane, 5th January 1847.

"I am the holder of a bill drawn by you on L. M. Mendelssohn for 98l. 15s., which became due yesterday, the 4th inst., and is unpaid; and I have to state, that unless the same is paid to me immediately, I shall take proceedings against you without delay for the amount.

"I am, Sir, yours most obediently.

"Amount of bill 98l. 15s. Noting 5s. Total 99l."

The notice was addressed to "Mr. John Christiani, Sherborne Lane;" and it was proved that the clerk who delivered it to the defendant stated, at the time, that it came from the plaintiff.

The jury found a verdict for the plaintiff.

A rule *nisi* having been obtained to set aside the verdict, and to enter a nonsuit.

*Duncan* now shewed cause.—The question in this case is, whether the defendant gave the plaintiff a sufficient notice of the dishonour of the bill. The notice proved gave a sufficient description of the bill, and shewed that it had been presented and not paid, and that the defendant looked to the plaintiff for the amount. The words in the notice sufficiently identify the bill, although it is not stated that the bill was ever accepted—*Shelton v. Braithwaite* (1), *Rowlands v. Springett* (2). In the next place, this notice sufficiently shews that the bill has been dishonoured, and that the holder looks to the defendant for payment under the rule laid down in *Solarte v. Palmer*, per Tindal, C.J. (3), which requires that this information should be given either in express terms or by necessary implication. In *Hedger v. Steavenson* (4), Parke, B. and Alderson, B. said, that if they were to be bound by the precise expression of "necessary implication," a strict construction should not be put upon it. And Parke, B. says (5), "It seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him." In that case a notice that a bill had been "returned unpaid," with a claim of 1s. 6d. for noting, was held sufficient. The word "noting" has a specific meaning among mercantile men, and implies that there has been a presentment and non-payment. In *Grugeon v. Smith* (6), the words, "returned with

(1) 7 Mee. & Wels. 436; s. c. 10 Law J. Rep (N.s.) Exch. 218.

(2) 14 Ibid. 7; s. c. 14 Law J. Rep. (N.s.) Exch. 227.

(3) 1 Cr. & Jer. 417; s. c. 9 Law J. Rep. (N.s.) Exch. 121.

(4) 2 Mee. & Wels. 799; s. c. 6 Law J. Rep. (N.s.) Exch. 189.

(5) Ibid. 805; s. c. 6 Law J. Rep. (N.s.) Exch. 191.

(6) 6 Ad. & El. 499.

charges," were held to give notice of dishonour. A notice that a bill had been returned unpaid, and requesting that the defendant would pay the amount forthwith, was held insufficient in *Boulton v. Welch* (7); but Parke, B., in *Hedger v. Steavenson*, says, that he thinks that case was not rightly determined. The facts in that case, at all events, were different from the present, as there was not there any mention of "noting." In *Messenger v. Southey* (8) a notice that mentioned "expenses" was held insufficient; but, as Alderson, B. observed, in *Bailey v. Porter* (9), in that case there was no intimation given that the defendant would be looked to for payment.

*Montagu Chambers*, in support of the rule.—The notice was bad, in the first place for not sufficiently identifying the bill, nor shewing that it had ever been accepted or indorsed by the defendant, or stating in substance that the defendant was liable to the holder. In *Hartley v. Case* (10), which has never been overruled, Abbott, C.J. took the objection to the sufficiency of the notice, that it did not even say that the bill had been accepted. In modern practice the strictness of the old form of protest has been departed from. The protest set out all the particulars of the bill; but, at all events, it is the duty of the holder to shew in the notice why he calls upon the party to pay. The second is the more important objection. This notice does not give the defendant the requisite information as to the dishonour of the bill. It is quite consistent with the *body* of the notice, that the bill has never been presented and payment has never been refused. In *Hedger v. Steavenson* the words "returned unpaid," and in *Grugeon v. Smith*, the words "returned with charges" were relied on. Here the word "returned" does not occur. In *Phillips v. Gould* (11), a letter stating that a bill of exchange "lies at my office unpaid," was held not to be a sufficient notice.

(7) 3 Bing. N.C. 688; s.c. 6 Law J. Rep. (n.s.) C.P. 243.

(8) 1 Man. & Gr. 76; s.c. 9 Law J. Rep. (n.s.) C.P. 278.

(9) 14 Mee. & Wels. 44; s.c. 14 Law J. Rep. (n.s.) Exch. 244.

(10) 4 B. & C. 339; s.c. 3 Law J. Rep. K.B. 262.

(11) 8 Car. & Pay. 355.

[CRESSWELL, J.—All the Court are of opinion that the word "noting" must be taken as part of the notice.]

It does not follow that the word must mean that expenses had been incurred in consequence of the dishonour of the bill.

COLTMAN, J.—This case cannot be distinguished from *Hedger v. Steavenson* and *Grugeon v. Smith*. The words "with charges" and "noting" must both imply that before the notice was given there had been a presentment and a refusal to pay.

MAULE, J.—I also think that the notice was sufficient. In both the cases of *Hedger v. Steavenson* and *Grugeon v. Smith* it was alleged that charges had been incurred, and that could not have taken place unless there had been a presentment. The proceeding is one well known among mercantile men. Here the word "noting" occurs, and the meaning of it must have been perfectly understood.

CRESSWELL, J.—I think the case is quite free from doubt. A person dealing with bills of exchange must be supposed to know the meaning of the word "noting" as well as of the word "presentment."

WILLIAMS, J. concurred.

*Rule discharged.*

1848. }  
Jan. 26. } HAYWARD v. BENNETT.

*Pleading—Ambiguity—Bond under 1 & 2 Vict. c. 110. s. 8.—Amendment.*

*In an action against a surety upon a bond under the 1 & 2 Vict. c. 110. s. 8. for the payment of a debt by H, or his rendering himself in any action to be brought, the defendant pleaded that the plaintiff had brought an action against H. in the Court of Queen's Bench, and had issued a ca. sa. on a judgment recovered therein, on which H. was taken and detained in custody, according to the practice of the said court, and that from the recovery of the judgment until the arrest, H. was ready and willing to surrender himself according to the practice of the court and the condition of the bond, and*

that by reason of his having been so taken and detained, "he was, by the practice of the said court, exonerated and discharged from rendering himself according to the said condition." On special demurrer, the defendant was allowed to amend; and

Semble—that the plea should either have shewn the practice of the court, and that H. did surrender, if the facts alleged amounted to a surrender by such practice, or that it became impossible for H. to surrender, on account of the act of the plaintiff, and the practice of the Court.

Debt upon a bond given by the defendant and others, under the 1 & 2 Vict. c. 110. s. 8, for the sum of 1,363*l.* 10*s.* 3*d.*

The defendant cravedoyer of the bond and condition. Henry Hales was principal, and the defendant and T. Cope were sureties. The condition of the bond was, "that if the said H. Hales do and shall pay unto the said James Hayward, his executors, administrators, and assigns, such sum or sums of money as shall be recovered against him, the said H. Hales, and John Heffer, or against the said H. Hales, in any action which hath been brought or shall hereafter be brought for the recovery of the said alleged debt, together with such costs as shall be given in the same, or shall render himself to the custody of the gaoler of the court in which such action shall have been brought or may be brought for the recovery of the said alleged debt, according to the practice of such court, or within such time and in such manner as the said Court or any Judge thereof shall direct, after judgment shall have been recovered in such action, then the said obligation to be void; but otherwise the same to stand and remain in full force and effect."

Plea—That after the making of the said writing obligatory, and before the commencement of this suit, &c., the plaintiff brought and commenced an action against J. Heffer and H. Hales in the Court of Queen's Bench, for the recovery of the said alleged debt, &c., and the plaintiff, afterwards, to wit, on the 30th of June 1842, recovered in the said action 924*l.* 1*s.*, for debt and costs; that afterwards, and before the commencement of this suit, and "according to the practice of the said court,"

to wit, on the 29th of October 1842, the plaintiff caused to be issued out a *ca. sa.* against Hales, directed to the sheriffs of London, and returnable on the 15th of November, &c.; that afterwards, and according to the practice of the said court, to wit, on the 29th of October 1842, the said writ was delivered by the plaintiff to the said sheriffs, &c.; and that the said Hales, before the time for rendering himself "according to the practice of the said court and the said condition," to wit, on the 14th of November 1842, was "according to the practice of the said court," taken and arrested by the said sheriffs, under the said writ, and was then kept and detained in execution, in custody, under and by virtue of the said writ, at the suit of the said plaintiff, upon the said judgment so recovered as aforesaid, and according to the practice of the said court, which practice then and before, and at the time of the making of the said writing obligatory, existed until and after the return day of the said writ of *ca. sa.*, for a long space of time thereafter, to wit, hitherto; of all which premises the plaintiff afterwards, &c. had notice, and that from the time of the recovery of the said judgment until the said Hales was so taken and arrested under the said writ of *ca. sa.* as aforesaid, the said Hales was always ready and willing to render himself to the custody of the gaoler of the said court, according to the practice of the said court and the said condition of the said writing obligatory; and that by reason of the said Hales having been so taken and arrested, and kept and detained in execution as aforesaid, and of the premises aforesaid, the said Hales was, "by the practice of the said court, exonerated and discharged from rendering himself to the gaoler of the said court, according to the said condition;" and that the defendant and the said T. Cope, by reason, &c., were as such sureties as aforesaid, "by the said practice of the said court, exonerated and discharged from rendering the said Hales to the gaoler of the said court, according to the said condition," &c. Verification.

Special demurrer, on the ground that the plea was ambiguous, and did not shew a performance of the condition or an excuse for the non-performance.

This plea was pleaded pursuant to leave



granted by the Court (1), after judgment for the plaintiff on demurrer to a former plea. The former plea stated that Hales was always ready to render himself, but was prevented by the plaintiff from so doing, in the manner in the plea stated (2).

*Butt* (*Parnell* was with him), in support of the demurrer.—The plea as now amended is as bad as the original one, and upon similar grounds. In the first place, the practice of the Court of Queen's Bench cannot alter the condition of the bond; and, secondly, if the facts amount to a performance of the condition, performance should have been alleged. The plea is ambiguous and double. The practice of the court, if relied upon, should have been stated. This Court cannot take judicial notice of the practice of another court, as was decided in the previous judgment in the present case. The plaintiff cannot traverse the statements in the plea as now pleaded.

*Talfourd, Serj.* (*Ogle* was with him), in support of the plea.—This purports to be a plea in excuse, shewing that Hales was exonerated from performing the condition of the bond. The former plea was ambiguous, not shewing distinctly whether the defendant relied on a surrender by Hales, or on the ground that Hales was prevented from surrendering.

[*MAULE, J.*—The allegation here is, that by the practice of the Court of Queen's Bench, the defendant was by the arrest exonerated from rendering Hales. You wish to bring the plea under the doctrine in *Co. Litt.* p. 206 *a*, that when the performance of the condition of a bond is rendered impossible by the act of the obligee, then the obligor is exonerated from performing the condition. But does this plea shew that the performance was impossible? It does not allege that it was impossible for Hales to render himself; but that, by the practice of the court, he was not bound to do so.]

The taking of the principal in execution discharged the sureties—*Com. Dig.* 'Sci. Fa.' R, 3.

[*MAULE, J.*—The doubt in the case is,

whether you should not have said that Hales did surrender by the practice of the court, or that the plaintiff, by suing out the writ, made it impossible for Hales to surrender. There is no objection to that, except that which was taken by Mr. Butt, that the practice should have been stated, and this case brought within it. This doubt exists in my mind as to the practice of the Queen's Bench, whether a party taken on a *ca. sa.* could say "I surrender." If you can ascertain the fact, and plead the matter either as a surrender, or as shewing an impossibility to surrender, that may be sufficient. There being a difficulty as to this, perhaps the only plan may be to state that by the practice of the court, and the act of the plaintiff, it became impossible to surrender.]

The Court can see from the plea that it was impossible for Hales to surrender, as he was in the custody of the sheriff.

[*WILLIAMS, J.*—Suppose you had stated the facts in the plea, and proceeded to say, "*per quod* it became impossible for Hales to surrender."]

If that were an inference of law, it would not be traversable. But the Court, on the argument on the former demurrer, held that allegation to be one which might be traversed.

[*MAULE, J.*—A traversable averment does not become less traversable by the introduction of a "*per quod*," but a "*per quod*" may introduce matter of law. In *Pryce v. Belcher* (3), words following the word "whereby" were held to be sufficient averment of matter of fact. But a statement that "thereby it became the duty" would be an allegation of law. I think the defendant ought to have leave to amend on the same terms as formerly. For the sake of making the matter more clear I threw out a suggestion as to the proper form of plea, but that of course was a mere suggestion.]

*Per Curiam.*—The defendant is to have leave to amend, on payment of costs; otherwise, there will be judgment for the plaintiff.

*Amendment accordingly.*

(1) 16 Law J. Rep. (N.S.) C.P. 95.

(2) 3 Com. B. 404; s. c. 15 Law J. Rep. (N.S.) C.P. 315.

(3) 3 Com. B. 58; s. c. 15 Law J. Rep. (N.S.) C.P. 305.

1847. }  
 Jan. 27, 28; } FRANCIS v. DODSWORTH.  
 Feb. 16. }

*Insolvent Debtor*—1 & 2 Vict. c. 110.—  
*Set-off*—*Pleading*—*Replication of Discharge, generally.*

*Debt. Plea, set-off. Replication, that after the set-off had become due, the plaintiff, by an order of the Court for Relief of Insolvent Debtors, was duly discharged, according to a certain act of parliament made and passed in the first and second years of her Majesty, intituled, &c., from the said set-off, without this, that the said order and discharge still remain in full force:—Held, that the order and adjudication and discharge would be a legal answer to the plea of set-off, if properly pleaded. But that the 91st section of the 1 & 2 Vict. c. 110, which allows the discharge to be "pleaded generally," only applies to a plea and not to a replication, and that the replication was therefore bad in form, for not sufficiently shewing that the plaintiff was entitled to his discharge under the statute.*

Debt for the price and value of work done and materials provided, for interest, and upon an account stated. Second plea, set-off of 30*l.* 12*s.* 6*d.* for work and labour as a surgeon and apothecary, and for medicines and other necessary things found, provided, and administered by the defendant for the plaintiff, and for goods sold and delivered, and upon an account stated. Replication, that after the sum of 30*l.* 12*s.* 6*d.*, parcel of the sum of money stated in the second plea of the defendant to be due and owing from the plaintiff to the defendant, had become due and owing from the plaintiff to the defendant, to wit, on the 31st of March, A.D. 1843, by a certain order then made, &c. by the Court for the Relief of Insolvent Debtors, held at the court-house in Portugal Street, Lincoln's Inn Fields, in the county of Middlesex, the plaintiff, then being an insolvent debtor in actual custody, and a prisoner in the debtors prison for London and Middlesex, in the city of London, was duly discharged according to a certain act of parliament made and passed in a certain session of parliament, holden in the first and second years of the reign of our Lady the now

NEW SERIES, XVII.—C.P.

Queen, "for abolishing arrest on mesne process in civil actions, except in certain cases, for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England," of and from the said sum of 30*l.* 12*s.* 6*d.*, parcel, &c., without this, that the said order and discharge still remain in full force. Verification.

Special demurrer, assigning several causes of demurrer, and amongst others, that the replication did not shew how or in what manner the plaintiff was discharged from the said sum of 30*l.* 12*s.* 6*d.*, or that the plaintiff was in any manner entitled to relief under or by virtue of the said act of parliament, or that the plaintiff had in any manner complied with the provisions of the said act, or that the plaintiff had given the proper notices required by the said act, or that the plaintiff had inserted the said sum of 30*l.* 12*s.* 6*d.*, or any sufficient description thereof, or of her debts due and owing to the defendant in his schedule, as such insolvent debtor.

The case was argued in Hilary term, 1847, (Jan. 27 and 28,) by

C. Jones, Serj., for the defendant; and  
 Manning, Serj., for the plaintiff (1).

*Cwr. adv. vult.*

The following judgment was now (Feb. 16) delivered by—

WILDE, C.J.—[His Lordship stated the pleadings, and continued:]—Upon the argument the several grounds of demurrer were discussed, and the defendant also insisted, by way of general demurrer, that the replication was bad in substance, inasmuch as the discharge of the plaintiff, under the Insolvent Debtors Act, had not the effect of extinguishing the debts then owing by him so as to prevent their being available by way of set-off, but that the benefit to which the plaintiff was entitled under the act of parliament, and the order of adjudication and discharge set out in the replication, was his discharge from prison, the protection of his person from future arrest, and the protection of his after-acquired property from liability to seizure under writs of execution founded upon judgments upon debts owing before the

(1) The arguments sufficiently appear in the judgment.

order of discharge; and it was contended, that notwithstanding such order of discharge, the creditors may avail themselves of any legal mode or remedy to obtain satisfaction of their debts, not expressly taken away or prohibited by the statute, and especially that such debts may be pleaded by way of set-off in any action brought to recover any demand which subsequent to the discharge may have accrued due to the insolvent from the creditor.

As the Court is of opinion that the replication is bad, upon the ground urged in the demurrer, that it does not set out the several matters necessary to shew that the plaintiff was entitled to his discharge under the statute, and that he had duly complied with the requisitions of the statute, it will only be necessary to advert to that cause of demurrer, and to the objection taken to the replication in point of substance, that is, that the effect of a discharge under the statute is not to extinguish the debts owing by the insolvent, or to discharge the insolvent from his debt in any sense which precludes the defendant from pleading a set-off in respect of the debt due to him from the plaintiff before his discharge. The effect of the discharge under the Insolvent Act, the 1 & 2 Vict. c. 110, depends upon the construction of sections 75, 87, 90, 91. By section 75. it is enacted,—That after the examination of the prisoner, as in the act directed, it should be lawful for the Court, upon the prisoner's swearing to the truth of his schedule, and executing the warrant of attorney therein mentioned, to adjudge that the prisoner should be discharged, and entitled to the benefit of the act, as to the several debts and sums of money due or claimed to be due to the persons claiming to be creditors, and other persons mentioned in the section, at the time of the making the vesting order before referred to in the act. This section does not give a discharge from the debts, or state what the benefits are to which the debtor is to be entitled. The 87th section enacts,—That before any adjudication shall be made with respect to the prisoner, he shall be required to execute a warrant of attorney to the assignee for the amount of the debts in the schedule, and that if at any time thereafter it should appear to the satisfaction of the Court that such prisoner

should be of ability to pay his debts, or any part thereof, or that he has died leaving assets, that the Court might permit execution upon such judgment to be taken out for such sum of money as, under all the circumstances of the case, the Court should order; such sum to be distributed rateably among the creditors, as directed by the act, and such further proceedings might be had upon such judgment as to the Court should seem fit, until the whole of the debts and costs should be paid and satisfied. By section 90,—No person who should have been adjudged entitled to the benefit of the act should be imprisoned upon such judgment, or with respect to any debt or sum of money or costs, with respect to which such persons should have become so entitled, or for or by reason of any judgment, order, or decree for payment of the same, but that upon every arrest or detainer on any such judgment, or for or by reason of any such debt, judgment, order, or decree for payment of the same, the insolvent was to be discharged by any Judge of the court out of which the process might issue. By section 91. it is enacted,—That no writ of *f. fa.* or *elegit* should issue on any judgment obtained against a prisoner who should have so become entitled to the benefit of the act for any debt or sum of money in respect to which the person should have become so entitled, except upon the judgment entered up under the act; and that if any suit or action should be brought, or *sci. fa.* issued for any such debt or sum of money, or upon any new contract or security for the payment thereof, or upon any judgment obtained against or acknowledged by such person, it should be lawful for such person, his heirs, executors, or administrators, to plead generally that such person was duly discharged according to the act, by the order of adjudication made in that behalf, and that such order remained in force, without pleading any other matter specially, whereto the plaintiffs might reply generally, or reply any matter which might shew that the defendant was not entitled to the benefit of the act, or was not duly discharged under the same.—Such are the sections relating to the discharge of the debtor.

Some ambiguity arises in regard to the extent of the benefit which the statute intended to afford to the insolvent debtor.

It is limited in terms to a discharge from prison, to being exempted from any action in respect of any antecedent debt or judgment, and to the protection of the goods of the debtor from the process of execution in respect of such former debts. But it is to be observed, before the debtor is entitled to his discharge he is required to give a judgment to the assignee of the Court, so that a judgment is in effect obtained for the benefit of every creditor for his debt. It would appear to be somewhat severe to leave the creditors individually in possession of remedies against the future effects of the insolvent, and to leave the insolvent exposed to the fullest remedy against both his person and effects under the judgment in addition. Further, this judgment so given is under the controul of the Court, and can only be made available for the general benefit of the creditors by distribution, and the debtor can only be coerced under the judgment to the extent of his ability to pay, established to the satisfaction of the Court from time to time. It will be observed further, that not only both the insolvent's person and his future effects are protected against actions and judgments in respect of the schedule debts, whether such judgments are obtained before or after the discharge, but also against both actions and judgments founded upon new contracts relating to the schedule debts, and the insolvent is entitled to plead his discharge in a general form in bar of any such action. It appears, therefore, that although the debt is not in terms extinguished on the insolvent's discharge therefrom, yet laborious care seems to have been taken to exclude and bar all means by which the debtor who has given up the whole of his property could, in respect of his former debts, be coerced in any way by the creditors individually, or his future effects in any way made liable to the payment of the scheduled debts. The reasons are obvious for not extinguishing the debt, such as to preserve liens, remedies against sureties, and also to enable the creditors to set off these debts against cross demands on the part of the insolvent debtor; but it is not obvious why so much care should be taken to exclude the remedies expressly mentioned in the act, and all apparent means of creditors obtaining preferences, and that others should be left

open to the creditor, by which the apparent general intention of the statute might be defeated, that is, the protection of the insolvent's future property, and to the exclusion of individual preference out of the insolvent's future effects. It must, however, be admitted, as before stated, that the debt is not extinguished, nor the insolvent in terms discharged from it; and, accordingly, it has been held, that the insolvent's future effects may be distrained for rent which accrued due prior to the discharge.

But although the insolvent is not expressly discharged from his debts, or protected against every possible mode by which payment or satisfaction may properly be obtained, it remains to be considered whether the debt referred to in the plea can be made available by way of set-off. Upon this question it is necessary to refer to the statute by which the right of set-off is given, and the decisions upon it. The statute is the 2 Geo. 2. c. 22. s. 13. It is enacted in that section, "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted upon in evidence, notice shall be given of the particular sum or debt so intended to be insisted upon, and upon what account it became due, or otherwise such matters shall not be allowed in evidence upon such general issue." The judicial construction of this section has been, that no debts can be used by way of set-off under this statute, except such as are recoverable by action, and it has been accordingly held that the Statute of Limitations may be replied to a plea of set-off. It is clear that the debt pleaded by way of set-off in this case could not have been recovered by action, inasmuch as by the 91st section the order or adjudication of discharge might have been pleaded in bar to any such action, and for some purposes the plea of set-off has been considered in

the nature of, or as analogous to, a declaration. In *Chapple v. Durston* (1), it was held, that to a plea of set-off the Statute of Limitations must be specially replied, and it was stated in the judgment that a plea of set-off has ever been considered in the nature of a cross declaration; and in *Ford v. Dornford* (2) Mr. Justice Patteson adopts the case of *Chapple v. Durston*. Therefore, as the debt sought to be set off by this plea is not, under the existing circumstances, a debt for which the defendant could have maintained an action, we are of opinion that it cannot be availably used by way of set-off, and that the order and adjudication of discharge would be a legal answer to the plea, if properly replied. It only remains, therefore, to be considered whether the replication can be sustained against the objections in point of form which have been urged against it; and we are of opinion that the replication cannot be supported in the general form in which it has been pleaded. It is admitted that unless it can be supported under some express or implied authority to be derived from the statute, it is a bad replication at common law, and under the general rules of pleading.

In support of the demurrer, it was urged that as the statute gives authority to plead the order generally only, in a given designated instance, the authority so to plead cannot be extended and applied to other cases than that pointed out by the statute: that the power to plead generally is given to a defendant in answer to a declaration, and that no direct authority has been produced to warrant or sanction the position that a general form of plea given in one instance, may be adopted in all other cases which are supposed to be within the principle or reason which induced the power in question to be granted.

On the part of the plaintiff, it was contended that the general form of plea being given to an insolvent to protect him from being charged in respect of the debts from which he has been discharged, the reason for giving the general plea equally applies to a replication in answer to a plea by which it is sought to do that which the legislature intended to prevent from being

done by giving the general plea; and *Ford v. Dornford* was cited, in which Mr. Justice Patteson is reported, in his judgment, to have said, that although the discharge under the act of parliament in question must be specially replied when it is sought to be used by way of answer to a plea of set-off, yet that the decision of the Court did "not go the length of establishing that it is necessary, in the case of replying a discharge under the Insolvent Act to a plea of set-off, to set out all the proceedings under the Insolvent Act. On the contrary, if the decision in *Chapple v. Durston* amounts to a decision that a plea of set-off is a cross declaration, then it may be that the replication to such a plea might be in the form which the act gives as the form of a plea to a declaration." We have considered this suggestion with all the deference which the Court would ever be disposed to extend to the intimation of an opinion by that learned Judge; but as it is a mere intimation of opinion, and not a decision by him, and as no authority accompanies the intimation, we are not satisfied that such a replication as that suggested can be sustained. It may be correct for some purposes to consider the plea of set-off as a declaration, but we do not feel ourselves called upon or warranted in saying that the analogy exists for all purposes. The matter of set-off may require to be disclosed by the plea so as to shew that the debt sought to be set off is such as would form a cause of action in a declaration; but it does not follow that the rules which would govern the pleadings subsequent to a declaration, regulate those which might follow a plea of set-off. It would be difficult successfully to contend that a plaintiff might reply as many different matters to a plea of set-off as might be pleaded to a declaration for the same matters as those contained in the plea. It is clear that that part of the statute which gives a general form of plea did not contemplate a replication, and that, however inconsistent with the general view of the act it would be to allow a schedule debt to be set off, yet the statute does not provide for the case, and we are not aware of any admitted principle or decision which will sanction the Court in supplying the omission.

The Bankrupt Act of 6 Geo. 4. c. 16.

(1) 1 Cr. & Jer. 1.

(2) 15 Law J. Rep. (N.S.) Q.B. 172.

gives a general plea to the bankrupt in certain cases; and, bankrupts have often found it necessary to set up their certificates by way of answer to actions brought against them not falling within the terms of the act; but, except in the cases in which the general plea is expressly given, it has been the practice to plead the bankruptcy specially by setting out the essential parts of it, and no case has been cited in which it has been even attempted, much less sanctioned, to use the general plea in other cases than those in which it is expressly given. The language of this statute is clear and express as applied to the plea; and in the absence, therefore, of any decision which

warrants such a course of proceeding we are of opinion that the replication is bad, and that the demurrer must be allowed.

Other objections have been urged to the form of the replication, to which it is not necessary to advert, as the judgment must be for the defendant on the objection already stated. As the Court considers that the order of adjudication of discharge under the Insolvent Debtors Act furnishes a substantial answer to the plea of set-off, and that the objection urged to the replication is one of form, we think the plaintiff ought to be allowed to amend, if he thinks fit, upon payment of costs.

*Judgment accordingly.*

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END OF HILARY TERM, 1848.

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charges," were held to give notice of dishonour. A notice that a bill had been returned unpaid, and requesting that the defendant would pay the amount forthwith, was held insufficient in *Boulton v. Welch* (7); but Parke, B., in *Hedger v. Steavenson*, says, that he thinks that case was not rightly determined. The facts in that case, at all events, were different from the present, as there was not there any mention of "noting." In *Messenger v. Southey* (8) a notice that mentioned "expenses" was held insufficient; but, as Alderson, B. observed, in *Bailey v. Porter* (9), in that case there was no intimation given that the defendant would be looked to for payment.

*Montagu Chambers*, in support of the rule.—The notice was bad, in the first place for not sufficiently identifying the bill, nor shewing that it had ever been accepted or indorsed by the defendant, or stating in substance that the defendant was liable to the holder. In *Hartley v. Case* (10), which has never been overruled, Abbott, C.J. took the objection to the sufficiency of the notice, that it did not even say that the bill had been accepted. In modern practice the strictness of the old form of protest has been departed from. The protest set out all the particulars of the bill; but, at all events, it is the duty of the holder to shew in the notice why he calls upon the party to pay. The second is the more important objection. This notice does not give the defendant the requisite information as to the dishonour of the bill. It is quite consistent with the *body* of the notice, that the bill has never been presented and payment has never been refused. In *Hedger v. Steavenson* the words "returned unpaid," and in *Grugeon v. Smith*, the words "returned with charges" were relied on. Here the word "returned" does not occur. In *Phillips v. Gould* (11), a letter stating that a bill of exchange "lies at my office unpaid," was held not to be a sufficient notice.

(7) 3 Bing. N.C. 688; s. c. 6 Law J. Rep. (n.s.) C.P. 243.

(8) 1 Man. & Gr. 76; s. c. 9 Law J. Rep. (n.s.) C.P. 278.

(9) 14 Mee. & Wels. 44; s. c. 14 Law J. Rep. (n.s.) Exch. 244.

(10) 4 B. & C. 339; s. c. 3 Law J. Rep. K.B. 262.

(11) 8 Car. & Pay. 355.

[CRESSWELL, J.—All the Court are of opinion that the word "noting" must be taken as part of the notice.]

It does not follow that the word must mean that expenses had been incurred in consequence of the dishonour of the bill.

COLTMAN, J.—This case cannot be distinguished from *Hedger v. Steavenson* and *Grugeon v. Smith*. The words "with charges" and "noting" must both imply that before the notice was given there had been a presentment and a refusal to pay.

MAULE, J.—I also think that the notice was sufficient. In both the cases of *Hedger v. Steavenson* and *Grugeon v. Smith* it was alleged that charges had been incurred, and that could not have taken place unless there had been a presentment. The proceeding is one well known among mercantile men. Here the word "noting" occurs, and the meaning of it must have been perfectly understood.

CRESSWELL, J.—I think the case is quite free from doubt. A person dealing with bills of exchange must be supposed to know the meaning of the word "noting" as well as of the word "presentment."

WILLIAMS, J. concurred.

*Rule discharged.*

1848. }  
Jan. 26. } HAYWARD v. BENNETT.

*Pleading—Ambiguity—Bond under 1 & 2 Vict. c. 110. s. 8.—Amendment.*

*In an action against a surety upon a bond under the 1 & 2 Vict. c. 110. s. 8. for the payment of a debt by H, or his rendering himself in any action to be brought, the defendant pleaded that the plaintiff had brought an action against H. in the Court of Queen's Bench, and had issued a ca. sa. on a judgment recovered therein, on which H. was taken and detained in custody, according to the practice of the said court, and that from the recovery of the judgment until the arrest, H. was ready and willing to surrender himself according to the practice of the court and the condition of the bond, and*

that by reason of his having been so taken and detained, "he was, by the practice of the said court, exonerated and discharged from rendering himself according to the said condition." On special demurrer, the defendant was allowed to amend; and

Semble—that the plea should either have shewn the practice of the court, and that H. did surrender, if the facts alleged amounted to a surrender by such practice, or that it became impossible for H. to surrender, on account of the act of the plaintiff, and the practice of the Court.

Debt upon a bond given by the defendant and others, under the 1 & 2 Vict. c. 110. s. 8, for the sum of 1,363*l.* 10*s.* 3*d.*

The defendant cravedoyer of the bond and condition. Henry Hales was principal, and the defendant and T. Cope were sureties. The condition of the bond was, "that if the said H. Hales do and shall pay unto the said James Hayward, his executors, administrators, and assigns, such sum or sums of money as shall be recovered against him, the said H. Hales, and John Heffer, or against the said H. Hales, in any action which hath been brought or shall hereafter be brought for the recovery of the said alleged debt, together with such costs as shall be given in the same, or shall render himself to the custody of the gaoler of the court in which such action shall have been brought or may be brought for the recovery of the said alleged debt, according to the practice of such court, or within such time and in such manner as the said Court or any Judge thereof shall direct, after judgment shall have been recovered in such action, then the said obligation to be void; but otherwise the same to stand and remain in full force and effect."

Plea—That after the making of the said writing obligatory, and before the commencement of this suit, &c., the plaintiff brought and commenced an action against J. Heffer and H. Hales in the Court of Queen's Bench, for the recovery of the said alleged debt, &c., and the plaintiff, afterwards, to wit, on the 30th of June 1842, recovered in the said action 924*l.* 1*s.*, for debt and costs; that afterwards, and before the commencement of this suit, and "according to the practice of the said court,"

to wit, on the 29th of October 1842, the plaintiff caused to be issued out a *ca. sa.* against Hales, directed to the sheriffs of London, and returnable on the 15th of November, &c.; that afterwards, and according to the practice of the said court, to wit, on the 29th of October 1842, the said writ was delivered by the plaintiff to the said sheriffs, &c.; and that the said Hales, before the time for rendering himself "according to the practice of the said court and the said condition," to wit, on the 14th of November 1842, was "according to the practice of the said court," taken and arrested by the said sheriffs, under the said writ, and was then kept and detained in execution, in custody, under and by virtue of the said writ, at the suit of the said plaintiff, upon the said judgment so recovered as aforesaid, and according to the practice of the said court, which practice then and before, and at the time of the making of the said writing obligatory, existed until and after the return day of the said writ of *ca. sa.*, for a long space of time thereafter, to wit, hitherto; of all which premises the plaintiff afterwards, &c. had notice, and that from the time of the recovery of the said judgment until the said Hales was so taken and arrested under the said writ of *ca. sa.* as aforesaid, the said Hales was always ready and willing to render himself to the custody of the gaoler of the said court, according to the practice of the said court and the said condition of the said writing obligatory; and that by reason of the said Hales having been so taken and arrested, and kept and detained in execution as aforesaid, and of the premises aforesaid, the said Hales was, "by the practice of the said court, exonerated and discharged from rendering himself to the gaoler of the said court, according to the said condition;" and that the defendant and the said T. Cope, by reason, &c., were as such sureties as aforesaid, "by the said practice of the said court, exonerated and discharged from rendering the said Hales to the gaoler of the said court, according to the said condition," &c. Verification.

Special demurrer, on the ground that the plea was ambiguous, and did not shew a performance of the condition or an excuse for the non-performance.

This plea was pleaded pursuant to leave



granted by the Court (1), after judgment for the plaintiff on demurrer to a former plea. The former plea stated that Hales was always ready to render himself, but was prevented by the plaintiff from so doing, in the manner in the plea stated (2).

*Butt* (*Parnell* was with him), in support of the demurrer.—The plea as now amended is as bad as the original one, and upon similar grounds. In the first place, the practice of the Court of Queen's Bench cannot alter the condition of the bond; and, secondly, if the facts amount to a performance of the condition, performance should have been alleged. The plea is ambiguous and double. The practice of the court, if relied upon, should have been stated. This Court cannot take judicial notice of the practice of another court, as was decided in the previous judgment in the present case. The plaintiff cannot traverse the statements in the plea as now pleaded.

*Talfourd, Serj.* (*Ogle* was with him), in support of the plea.—This purports to be a plea in excuse, shewing that Hales was exonerated from performing the condition of the bond. The former plea was ambiguous, not shewing distinctly whether the defendant relied on a surrender by Hales, or on the ground that Hales was prevented from surrendering.

[*MAULE, J.*—The allegation here is, that by the practice of the Court of Queen's Bench, the defendant was by the arrest exonerated from rendering Hales. You wish to bring the plea under the doctrine in *Co. Litt.* p. 206 *a*, that when the performance of the condition of a bond is rendered impossible by the act of the obligee, then the obligor is exonerated from performing the condition. But does this plea shew that the performance was impossible? It does not allege that it was impossible for Hales to render himself; but that, by the practice of the court, he was not bound to do so.]

The taking of the principal in execution discharged the sureties—*Com. Dig.* 'Sci. Fa.' R, 3.

[*MAULE, J.*—The doubt in the case is,

whether you should not have said that Hales did surrender by the practice of the court, or that the plaintiff, by suing out the writ, made it impossible for Hales to surrender. There is no objection to that, except that which was taken by Mr. Butt, that the practice should have been stated, and this case brought within it. This doubt exists in my mind as to the practice of the Queen's Bench, whether a party taken on a *ca. sa.* could say "I surrender." If you can ascertain the fact, and plead the matter either as a surrender, or as shewing an impossibility to surrender, that may be sufficient. There being a difficulty as to this, perhaps the only plan may be to state that by the practice of the court, and the act of the plaintiff, it became impossible to surrender.]

The Court can see from the plea that it was impossible for Hales to surrender, as he was in the custody of the sheriff.

[*WILLIAMS, J.*—Suppose you had stated the facts in the plea, and proceeded to say, "*per quod* it became impossible for Hales to surrender."]

If that were an inference of law, it would not be traversable. But the Court, on the argument on the former demurrer, held that allegation to be one which might be traversed.

[*MAULE, J.*—A traversable averment does not become less traversable by the introduction of a "*per quod*," but a "*per quod*" may introduce matter of law. In *Pryce v. Belcher* (3), words following the word "whereby" were held to be sufficient averment of matter of fact. But a statement that "thereby it became the duty" would be an allegation of law. I think the defendant ought to have leave to amend on the same terms as formerly. For the sake of making the matter more clear I threw out a suggestion as to the proper form of plea, but that of course was a mere suggestion.]

*Per Curiam.*—The defendant is to have leave to amend, on payment of costs; otherwise, there will be judgment for the plaintiff.

*Amendment accordingly.*

(1) 16 Law J. Rep. (N.S.) C.P. 95.

(2) 3 Com. B. 404; s. c. 15 Law J. Rep. (N.S.) C.P. 315.

(3) 3 Com. B. 58; s. c. 15 Law J. Rep. (N.S.) C.P. 305.

1847. }  
 Jan. 27, 28; } FRANCIS v. DODSWORTH.  
 Feb. 16. }

*Insolvent Debtor*—1 & 2 Vict. c. 110.—  
*Set-off*—*Pleading*—*Replication of Dis-*  
*charge, generally.*

*Debt. Plea, set-off. Replication, that after the set-off had become due, the plaintiff, by an order of the Court for Relief of Insolvent Debtors, was duly discharged, according to a certain act of parliament made and passed in the first and second years of her Majesty, intituled, &c., from the said set-off, without this, that the said order and discharge still remain in full force:—Held, that the order and adjudication and discharge would be a legal answer to the plea of set-off, if properly pleaded. But that the 91st section of the 1 & 2 Vict. c. 110, which allows the discharge to be "pleaded generally," only applies to a plea and not to a replication, and that the replication was therefore bad in form, for not sufficiently shewing that the plaintiff was entitled to his discharge under the statute.*

Debt for the price and value of work done and materials provided, for interest, and upon an account stated. Second plea, set-off of 30l. 12s. 6d. for work and labour as a surgeon and apothecary, and for medicines and other necessary things found, provided, and administered by the defendant for the plaintiff, and for goods sold and delivered, and upon an account stated. Replication, that after the sum of 30l. 12s. 6d., parcel of the sum of money stated in the second plea of the defendant to be due and owing from the plaintiff to the defendant, had become due and owing from the plaintiff to the defendant, to wit, on the 31st of March, A.D. 1843, by a certain order then made, &c. by the Court for the Relief of Insolvent Debtors, held at the court-house in Portugal Street, Lincoln's Inn Fields, in the county of Middlesex, the plaintiff, then being an insolvent debtor in actual custody, and a prisoner in the debtors prison for London and Middlesex, in the city of London, was duly discharged according to a certain act of parliament made and passed in a certain session of parliament, holden in the first and second years of the reign of our Lady the now

Queen, "for abolishing arrest on mesne process in civil actions, except in certain cases, for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England," of and from the said sum of 30l. 12s. 6d., parcel, &c., without this, that the said order and discharge still remain in full force. Verification.

Special demurrer, assigning several causes of demurres, and amongst others, that the replication did not shew how or in what manner the plaintiff was discharged from the said sum of 30l. 12s. 6d., or that the plaintiff was in any manner entitled to relief under or by virtue of the said act of parliament, or that the plaintiff had in any manner complied with the provisions of the said act, or that the plaintiff had given the proper notices required by the said act, or that the plaintiff had inserted the said sum of 30l. 12s. 6d., or any sufficient description thereof, or of her debts due and owing to the defendant in his schedule, as such insolvent debtor.

The case was argued in Hilary term, 1847, (Jan. 27 and 28,) by

C. Jones, Serj., for the defendant; and  
 Manning, Serj., for the plaintiff (1).

*Cur. adv. vult.*

The following judgment was now (Feb. 16) delivered by—

WILDE, C.J.—[His Lordship stated the pleadings, and continued:]—Upon the argument the several grounds of demurrer were discussed, and the defendant also insisted, by way of general demurrer, that the replication was bad in substance, inasmuch as the discharge of the plaintiff, under the Insolvent Debtors Act, had not the effect of extinguishing the debts then owing by him so as to prevent their being available by way of set-off, but that the benefit to which the plaintiff was entitled under the act of parliament, and the order of adjudication and discharge set out in the replication, was his discharge from prison, the protection of his person from future arrest, and the protection of his after-acquired property from liability to seizure under writs of execution founded upon judgments upon debts owing before the

(1) The arguments sufficiently appear in the judgment.

order of discharge; and it was contended, that notwithstanding such order of discharge, the creditors may avail themselves of any legal mode or remedy to obtain satisfaction of their debts, not expressly taken away or prohibited by the statute, and especially that such debts may be pleaded by way of set-off in any action brought to recover any demand which subsequent to the discharge may have accrued due to the insolvent from the creditor.

As the Court is of opinion that the replication is bad, upon the ground urged in the demurrer, that it does not set out the several matters necessary to shew that the plaintiff was entitled to his discharge under the statute, and that he had duly complied with the requisitions of the statute, it will only be necessary to advert to that cause of demurrer, and to the objection taken to the replication in point of substance, that is, that the effect of a discharge under the statute is not to extinguish the debts owing by the insolvent, or to discharge the insolvent from his debt in any sense which precludes the defendant from pleading a set-off in respect of the debt due to him from the plaintiff before his discharge. The effect of the discharge under the Insolvent Act, the 1 & 2 Vict. c. 110, depends upon the construction of sections 75, 87, 90, 91. By section 75. it is enacted,—That after the examination of the prisoner, as in the act directed, it should be lawful for the Court, upon the prisoner's swearing to the truth of his schedule, and executing the warrant of attorney therein mentioned, to adjudge that the prisoner should be discharged, and entitled to the benefit of the act, as to the several debts and sums of money due or claimed to be due to the persons claiming to be creditors, and other persons mentioned in the section, at the time of the making the vesting order before referred to in the act. This section does not give a discharge from the debts, or state what the benefits are to which the debtor is to be entitled. The 87th section enacts,—That before any adjudication shall be made with respect to the prisoner, he shall be required to execute a warrant of attorney to the assignee for the amount of the debts in the schedule, and that if at any time thereafter it should appear to the satisfaction of the Court that such prisoner

should be of ability to pay his debts, or any part thereof, or that he has died leaving assets, that the Court might permit execution upon such judgment to be taken out for such sum of money as, under all the circumstances of the case, the Court should order; such sum to be distributed rateably among the creditors, as directed by the act, and such further proceedings might be had upon such judgment as to the Court should seem fit, until the whole of the debts and costs should be paid and satisfied. By section 90,—No person who should have been adjudged entitled to the benefit of the act should be imprisoned upon such judgment, or with respect to any debt or sum of money or costs, with respect to which such persons should have become so entitled, or for or by reason of any judgment, order, or decree for payment of the same, but that upon every arrest or detainer on any such judgment, or for or by reason of any such debt, judgment, order, or decree for payment of the same, the insolvent was to be discharged by any Judge of the court out of which the process might issue. By section 91. it is enacted,—That no writ of *f. fa.* or *elegit* should issue on any judgment obtained against a prisoner who should have so become entitled to the benefit of the act for any debt or sum of money in respect to which the person should have become so entitled, except upon the judgment entered up under the act; and that if any suit or action should be brought, or *sci. fa.* issued for any such debt or sum of money, or upon any new contract or security for the payment thereof, or upon any judgment obtained against or acknowledged by such person, it should be lawful for such person, his heirs, executors, or administrators, to plead generally that such person was duly discharged according to the act, by the order of adjudication made in that behalf, and that such order remained in force, without pleading any other matter specially, whereto the plaintiffs might reply generally, or reply any matter which might shew that the defendant was not entitled to the benefit of the act, or was not duly discharged under the same.—Such are the sections relating to the discharge of the debtor.

Some ambiguity arises in regard to the extent of the benefit which the statute intended to afford to the insolvent debtor.

It is limited in terms to a discharge from prison, to being exempted from any action in respect of any antecedent debt or judgment, and to the protection of the goods of the debtor from the process of execution in respect of such former debts. But it is to be observed, before the debtor is entitled to his discharge he is required to give a judgment to the assignee of the Court, so that a judgment is in effect obtained for the benefit of every creditor for his debt. It would appear to be somewhat severe to leave the creditors individually in possession of remedies against the future effects of the insolvent, and to leave the insolvent exposed to the fullest remedy against both his person and effects under the judgment in addition. Further, this judgment so given is under the controul of the Court, and can only be made available for the general benefit of the creditors by distribution, and the debtor can only be coerced under the judgment to the extent of his ability to pay, established to the satisfaction of the Court from time to time. It will be observed further, that not only both the insolvent's person and his future effects are protected against actions and judgments in respect of the schedule debts, whether such judgments are obtained before or after the discharge, but also against both actions and judgments founded upon new contracts relating to the schedule debts, and the insolvent is entitled to plead his discharge in a general form in bar of any such action. It appears, therefore, that although the debt is not in terms extinguished on the insolvent's discharge therefrom, yet laborious care seems to have been taken to exclude and bar all means by which the debtor who has given up the whole of his property could, in respect of his former debts, be coerced in any way by the creditors individually, or his future effects in any way made liable to the payment of the scheduled debts. The reasons are obvious for not extinguishing the debt, such as to preserve liens, remedies against sureties, and also to enable the creditors to set off these debts against cross demands on the part of the insolvent debtor; but it is not obvious why so much care should be taken to exclude the remedies expressly mentioned in the act, and all apparent means of creditors obtaining preferences, and that others should be left

open to the creditor, by which the apparent general intention of the statute might be defeated, that is, the protection of the insolvent's future property, and to the exclusion of individual preference out of the insolvent's future effects. It must, however, be admitted, as before stated, that the debt is not extinguished, nor the insolvent in terms discharged from it; and, accordingly, it has been held, that the insolvent's future effects may be distrained for rent which accrued due prior to the discharge.

But although the insolvent is not expressly discharged from his debts, or protected against every possible mode by which payment or satisfaction may properly be obtained, it remains to be considered whether the debt referred to in the plea can be made available by way of set-off. Upon this question it is necessary to refer to the statute by which the right of set-off is given, and the decisions upon it. The statute is the 2 Geo. 2. c. 22. s. 13. It is enacted in that section, "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted upon in evidence, notice shall be given of the particular sum or debt so intended to be insisted upon, and upon what account it became due, or otherwise such matters shall not be allowed in evidence upon such general issue." The judicial construction of this section has been, that no debts can be used by way of set-off under this statute, except such as are recoverable by action, and it has been accordingly held that the Statute of Limitations may be replied to a plea of set-off. It is clear that the debt pleaded by way of set-off in this case could not have been recovered by action, inasmuch as by the 91st section the order or adjudication of discharge might have been pleaded in bar to any such action, and for some purposes the plea of set-off has been considered in

the nature of, or as analogous to, a declaration. In *Chapple v. Durston* (1), it was held, that to a plea of set-off the Statute of Limitations must be specially replied, and it was stated in the judgment that a plea of set-off has ever been considered in the nature of a cross declaration; and in *Ford v. Dornford* (2) Mr. Justice Patteson adopts the case of *Chapple v. Durston*. Therefore, as the debt sought to be set off by this plea is not, under the existing circumstances, a debt for which the defendant could have maintained an action, we are of opinion that it cannot be availably used by way of set-off, and that the order and adjudication of discharge would be a legal answer to the plea, if properly replied. It only remains, therefore, to be considered whether the replication can be sustained against the objections in point of form which have been urged against it; and we are of opinion that the replication cannot be supported in the general form in which it has been pleaded. It is admitted that unless it can be supported under some express or implied authority to be derived from the statute, it is a bad replication at common law, and under the general rules of pleading.

In support of the demurrer, it was urged that as the statute gives authority to plead the order generally only, in a given designated instance, the authority so to plead cannot be extended and applied to other cases than that pointed out by the statute: that the power to plead generally is given to a defendant in answer to a declaration, and that no direct authority has been produced to warrant or sanction the position that a general form of plea given in one instance, may be adopted in all other cases which are supposed to be within the principle or reason which induced the power in question to be granted.

On the part of the plaintiff, it was contended that the general form of plea being given to an insolvent to protect him from being charged in respect of the debts from which he has been discharged, the reason for giving the general plea equally applies to a replication in answer to a plea by which it is sought to do that which the legislature intended to prevent from being

done by giving the general plea; and *Ford v. Dornford* was cited, in which Mr. Justice Patteson is reported, in his judgment, to have said, that although the discharge under the act of parliament in question must be specially replied when it is sought to be used by way of answer to a plea of set-off, yet that the decision of the Court did "not go the length of establishing that it is necessary, in the case of replying a discharge under the Insolvent Act to a plea of set-off, to set out all the proceedings under the Insolvent Act. On the contrary, if the decision in *Chapple v. Durston* amounts to a decision that a plea of set-off is a cross declaration, then it may be that the replication to such a plea might be in the form which the act gives as the form of a plea to a declaration." We have considered this suggestion with all the deference which the Court would ever be disposed to extend to the intimation of an opinion by that learned Judge; but as it is a mere intimation of opinion, and not a decision by him, and as no authority accompanies the intimation, we are not satisfied that such a replication as that suggested can be sustained. It may be correct for some purposes to consider the plea of set-off as a declaration, but we do not feel ourselves called upon or warranted in saying that the analogy exists for all purposes. The matter of set-off may require to be disclosed by the plea so as to shew that the debt sought to be set off is such as would form a cause of action in a declaration; but it does not follow that the rules which would govern the pleadings subsequent to a declaration, regulate those which might follow a plea of set-off. It would be difficult successfully to contend that a plaintiff might reply as many different matters to a plea of set-off as might be pleaded to a declaration for the same matters as those contained in the plea. It is clear that that part of the statute which gives a general form of plea did not contemplate a replication, and that, however inconsistent with the general view of the act it would be to allow a schedule debt to be set off, yet the statute does not provide for the case, and we are not aware of any admitted principle or decision which will sanction the Court in supplying the omission.

The Bankrupt Act of 6 Geo. 4. c. 16.

(1) 1 Cr. & Jer. 1.

(2) 15 Law J. Rep. (N.S.) Q.B. 172.

gives a general plea to the bankrupt in certain cases; and, bankrupts have often found it necessary to set up their certificates by way of answer to actions brought against them not falling within the terms of the act; but, except in the cases in which the general plea is expressly given, it has been the practice to plead the bankruptcy specially by setting out the essential parts of it, and no case has been cited in which it has been even attempted, much less sanctioned, to use the general plea in other cases than those in which it is expressly given. The language of this statute is clear and express as applied to the plea; and in the absence, therefore, of any decision which

warrants such a course of proceeding we are of opinion that the replication is bad, and that the demurrer must be allowed.

Other objections have been urged to the form of the replication, to which it is not necessary to advert, as the judgment must be for the defendant on the objection already stated. As the Court considers that the order of adjudication of discharge under the Insolvent Debtors Act furnishes a substantial answer to the plea of set-off, and that the objection urged to the replication is one of form, we think the plaintiff ought to be allowed to amend, if he thinks fit, upon payment of costs.

*Judgment accordingly.*

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END OF HILARY TERM, 1848.

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# CASES ARGUED AND DETERMINED

IN THE

## Court of Common Pleas.

EASTER TERM, 11 VICTORIÆ.

1848. { TUBBY v. STANHOPE.  
April 17. { TUBBY v. FISHER.

*County Court—Nul Tiel Record.*

*A declaration on a replevin bond for not prosecuting a suit with effect, according to the condition, stated (after setting out the bond), that the plaintiff made his plaint at the Whitechapel County Court, and "that it was adjudged by the said Court that the said plaintiff should take nothing by his said plaint." Plea, nul tiel record. Replication, there is such a record. The order made in the minute book of the county court was "struck out for want of jurisdiction, a disputed title having been sworn to :"—Held, that the above entry did not support the allegation in the declaration of a judgment against the plaintiff in the county court, and that the defendant was entitled to judgment.*

Debt upon a replevin bond by the assignee of the sheriff.

The declaration stated that the plaintiff, on &c., as bailiff of J. A., distrained the goods of one Abraham Hart for 6*l.* rent due to J. A. from the said A. Hart; that the said A. Hart, within five days then next, to wit, on &c., and after the passing of the 9 & 10 Vict. c. 95, made his plaint to the sheriff of Middlesex of the taking, &c., and prayed that the same might be replevied, and alleged the taking of a replevin bond by the

said sheriff from the said A. Hart, with (the defendant) Stanhope and (the defendant) Fisher as responsible sureties. The bond was then set out (which contained the usual condition to prosecute the suit with effect). The declaration then stated "that the said A. Hart made his plaint at the Whitechapel County Court against the now plaintiff," and after averring that the said A. Hart did not prosecute his plaint with effect against the now plaintiff, alleged that such proceedings were thereupon afterwards had that it was adjudged by the said county court that the said A. Hart should take nothing by his said plaint, but that he and his said pledges to prosecute should be in mercy, &c., and that he, the now plaintiff, should go thereof without day, &c. whereby the bond was forfeited; and concluded by shewing the plaintiff's title as assignee of the sheriff.

*Plea—Nul tiel record.*

Replication, that there is such a record of the said judgment remaining in the said court.

There had been two distresses on the same premises occupied by A. Hart (the plaintiff in the suits in the county court) mentioned in the declaration: one on the 28th of September 1847, for 6*l.* rent; the other on the 30th of September 1847, for 3*l.* rent. The goods in each case were replevied; and Fisher and Stanhope became sureties to the sheriff in each case on

the replevin bond. The pleadings and facts were in all material particulars the same in both cases. The actions in this court were commenced on the 17th of November

1847 against one of the sureties on each bond. The records returned in obedience to the *certiorari* were, as to all material parts, in the following form :—

## WHITECHAPEL COUNTY COURT OF MIDDLESEX.

Extract of Minute of Proceedings at a Court holden on Tuesday the 26th of October 1847.

No.	Plt.	Dft.	Particulars of Claim.	Amount claimed.	For whom Judgment given.	Amount of Judgment.	Costs.	Order.
7479	Abraham Hart.	Samuel Tubby.	Unlawful detention of goods belonging to plaintiff.	6l. 0s. 0d.				Struck out for want of jurisdiction, a disputed title having been sworn to. Do.
7480	Abraham Hart.	Samuel Tubby.	Do.	3l. 0s. 0d.				

Extract of Minute of Proceedings at a Court holden on Friday the 26th of November 1847.

7479	Abraham Hart.	Samuel Tubby.	Replevin for unlawful detention of goods belonging to plaintiff.	6l. 0s. 0d.	Plt.	4l. 4s. 0d.	5l. 8s. 10d.	To be paid on the 3rd day of December next.
7480	Abraham Hart.	Samuel Tubby.	Do.	3l. 0s. 0d.	Plt.	2l. 2s. 0d.	2l. 6s. 8d.	Do.

Sealed with the Seal of the Court,

(Signed) J. M. Judge.

*Lush*, for the plaintiff, moved for judgment in each case.—The *certiorari* ordered the Judge of the court below to certify what took place in the matter of a plaint before him on the 26th of October 1847. This Court therefore will only look at the part of the record which refers to that date. A double record is returned by the Judge below, but that which relates to proceedings on the 26th of November is inapplicable to this case; it relates to matters which took place after the actions were commenced.

[WILDE, C.J.—We must look to that which the Judge of the county court certifies to us in obedience to the *certiorari*.]

The causes were at an end when they were dismissed on the 26th of October: the Judge of the county court had no authority to hear again on the 26th of November plaints which he had previously disposed of. He might have granted new trials if he pleased, but the plaintiff in these actions objects that

after judgments were recorded in his favour on the 26th of October, the Judge assumed the power to deprive him of his rights, and a month afterwards decided the causes against him.

[CRESSWELL, J.—The first point you have to establish is to shew that there is a judgment on record in the plaintiff's favour. "Struck out for want of jurisdiction" is not a judgment.]

Such an entry is equivalent to a judgment of nonsuit: that is its effect. There are affidavits to shew that when a county court has no jurisdiction to try the cause (for which defect the plaintiff should be nonsuited) the judgment is always entered in the form here returned, "struck out," &c.

[CRESSWELL, J.—We cannot take notice of such affidavits—we cannot travel out of the record.]

It may be admitted that the Judge was wrong when he struck out the causes on the



26th of October, as there are special provisions in the County Courts Act, 8 & 9 Vict. c. 95. s. 121, relating to actions of replevin; but as on that day he proceeded under the 58th section of the act and decided the causes, such decision is binding under the 89th section, &c.

*J. Brown*, for the defendant, was not called on.

*Per Curiam*.—We cannot construe the words "struck out for want of jurisdiction, a disputed title having been sworn to," to mean the Court gives judgment for the defendant. Your argument is, that the Court gave judgment when it said "I have no authority to decide the case;" and whether the causes were struck out properly or improperly does not affect the question we are to decide. The only judgment in each case returned in obedience to the *certiorari* is a judgment in favour of the plaintiff in the court below, for whom each of the defendants in the cases before us was a surety. There must, therefore, be in each case

*Judgment for the defendant.*

1848. } BICKFORD v. PARSON AND  
May 3, 5. } ANOTHER.

*Landlord and Tenant*—32 Hen. 8. c. 34.  
—*Reversion*—*Demise not under Seal*—*Contract to Repair*—*Assignment of Term*.

*The declaration alleged that, in consideration that B. had become tenant to A, upon terms that B. should, during his said tenancy, keep the premises in repair, B. promised A. to keep the premises in repair during his said tenancy upon the terms aforesaid; that the said tenancy of B. continued until the commencement of the action, but that B. did not, during his said tenancy, keep the premises in repair. Plea, that after B. had become tenant to A, and before the committing of the breach, A, by due course of law, assigned to C. all his interest in the demised premises and in the reversion expectant on the determination of B.'s said tenancy; and A, thenceforth, ceased to have anything in the demised premises, and B. thence ceased to be tenant thereof to A:—Held, that the plea was no answer to the*

*declaration, the contract to repair being a contract to repair during the tenancy; and that the tenancy was not put an end to by the assignment.*

*Assumpsit.* The first count of the declaration stated that, before the commencement of this suit, to wit, on the 25th of June 1835, in consideration that the defendants, at their request, had become and then were tenants to the plaintiff, of a certain dwelling-house and premises, with the appurtenances, of the plaintiff, upon and subject to certain terms, (amongst others) to wit, the terms that the defendants should during their said tenancy keep all repairs thereon, the defendants then promised the plaintiff to use the said dwelling-house and premises in a tenant-like and proper manner during their said tenancy thereof, and also during their said tenancy of the same to keep all repairs thereon, according to the terms aforesaid; and that the said tenancy of the defendants of the said dwelling-house and premises, upon the terms aforesaid, continued for a long space of time, to wit, from the day and year aforesaid, hitherto; yet the defendants, not regarding their said promises, did not nor would, during their said tenancy, use the said dwelling-house and premises in a tenant-like or proper manner, or keep such repairs thereon as aforesaid; but, on the contrary thereof, the defendants, during all the time of their said tenancy, used the said dwelling-house and premises in an untenant-like and improper manner, and also during all that time wholly neglected to keep such repairs thereon as aforesaid, insomuch that, by reason of such default, &c. of the defendants, the said dwelling-house, &c., while the defendants so continued tenants thereof as aforesaid, upon the terms in that behalf aforesaid, were and continued out of repair.

There was a further breach assigned, that the defendants, during their said tenancy, wrongfully pulled down and carried away certain fixtures, parcel of the said dwelling-house.

Sixth plea—That after the defendants had become tenants to the plaintiff, as in the said count alleged, and before the committing of the breaches in that count mentioned, or the accrual of the said causes of action in respect thereof, to wit, on the

1st of December 1843, the plaintiff, by due course of law, conveyed, assigned, granted, and assured all his estate, right, title, and interest of and in the said demised premises, and of and in the reversion expectant upon the determination of the defendants' said tenancy, to a certain other person, to wit, William Bickford; and the plaintiff thenceforward, and before the accrual of the causes of action in the said first count mentioned, ceased to have anything in the said demised premises and tenements, and the defendants thence ceased to be, and never since have been, tenants thereof to the plaintiff. Verification.

Special demurrer, assigning for cause, (*inter alia*) that the promise of the defendants declared on was, according to its legal effect, a promise to keep in repair during the continuance of the tenancy under the plaintiff and his assigns, and not under the plaintiff alone, and that the assignment and cessation of the tenancy under the plaintiff as alleged in the plea was no answer to the causes of action to which the plea was pleaded; and further, that the plea was an argumentative and informal traverse either of the breaches, or else of the continuance or subsistence of the said tenancy at the time of the committing of the said breaches, and that the said traverse should have been in the ordinary form of a traverse, and have concluded to the country.

The judgment of the Court renders it unnecessary to state the other special causes of demurrer.

*Maynard*, in support of the demurrer (May 3).—The declaration avers a promise to repair during the tenancy. The tenancy remains the same, though not under the plaintiff. The words "the said tenancy" are merely used to identify the tenancy, which began under the plaintiff, but may continue under a different landlord. "Tenancy" means the same as "term" or "demise." The words "under the plaintiff" are not material. *Standen v. Christmas* (1) shews that the statute 32 Hen. 8. c. 34. applies only to a demise by deed. The assignee of the reversion of a term under a parol demise cannot sue. Unless, therefore, the former landlord can sue, no one can, and the defendants hold the lands discharged

of all the conditions on which it was demised to them.

[WILDE, C.J.—The defendants would not know whether the plaintiff means to complain of a breach while they remained tenants to the plaintiff, or after his interest ceased.]

[WILLIAMS, J.—The declaration might have averred that the defendants promised to repair, while they continued tenants to the plaintiff or to his assignee.]

The declaration alleges that the tenancy continued to the time of action brought, and that the breaches were during the continuance of the defendants' tenancy. If it be meant by the plea to allege that the tenancy was at an end before the breach was committed, it is an argumentative traverse, either of the breaches alleged, or of the continuance of the tenancy.

*Greenwood*, contra.—(May 5).—The declaration alleges that the defendants became tenants to the plaintiff, and promised to repair the premises during their said tenancy. "Tenancy" is a relative term; it must be a tenancy to some one. The declaration having averred that the tenancy was to the plaintiff, the promise alleged to repair "during the said tenancy," must be taken to mean "during the time the defendants continued in the said relation of tenants to the plaintiff." It is said that "tenancy" is equivalent to "term," but this is not so. The declaration contains no averment that there was any term. It is consistent with the declaration that this was a tenancy at will, which would be determined by the assignment.

[CRESSWELL, J.—If so, would not this plea be an argumentative traverse of the averment that the breaches were committed during the continuance of the tenancy?]

The plea is in confession and avoidance. It confesses that, apparently, the tenancy continues, though it shews how in reality it had ceased. It gives sufficient colour. *Standen v. Christmas* only shews that the assignee of the reversion cannot sue on the contract to repair made with the assignor, unless the tenancy was created by deed; but it does not, therefore, follow that the assignor can sue.

[MAULE, J.—Before the statute 32 Hen. 8, if a lessor stipulated for repairs to be done by the tenant of a term, and then assigned his reversion, could he not still have main-

(1) 16 Law J. Rep. (N.S.) Q.B. 265.

tained the action for breach of the stipulation?]

*Maynard*, in reply.—No new tenancy was created by the assignment: the old tenancy, therefore, remains. It is admitted that no right to sue passed to the assignee, this not being a demise by deed; and no authority can be found for saying that the right to sue for a breach of the original contract to repair can be extinguished by an assignment which did not transfer that right to another person. The only reason why the right of the lessor to sue is extinguished, where by the statute the right to sue is transferred to the grantee of the reversion, is because in that case the tenant would otherwise be liable to two actions—*Com. Dig.* 'Landlord and Tenant,' (Coote's edition), p. 322.

*WILDE, C.J.*—It seems to me that this plea is bad in substance; and it is, therefore, unnecessary to advert to the special causes of demurrer upon points of form. The question turns upon the meaning of the allegation in the declaration as to the tenancy of the defendants: whether it imports a tenancy between the plaintiff and the defendants, or whether it means a tenancy of the premises, which, although originally created between the plaintiff and the defendants, was not to be limited to a tenancy under the plaintiff. It seems to me that the declaration does not limit the promise of the defendants to their tenancy under the plaintiff only; nor does the plea treat the declaration as importing a tenancy so limited. The declaration avers the promise of the defendants to use the premises in a tenant-like manner, and to keep them repaired "during their said tenancy thereof," not following up those words by the words "under the plaintiff." The declaration then contains a distinct averment of the continuance of the said tenancy down to the commencement of the action. Then the question is, whether on the face of the declaration the plaintiff complains of a breach of contract to keep the premises in repair during the continuance of the tenancy generally, or whether the agreement imported that the contract was to continue only while the plaintiff himself remained landlord. Looking at the nature of the property and of the contract between the parties, I do not

perceive that the declaration could have used any other terms more properly describing the contract. The tenancy, at its commencement, was under the plaintiff, no doubt; but there is nothing importing that the defendants were to continue tenants to him only. The idea of a tenancy at will is not at all natural, nor is it to be inferred without something leading to such a conclusion. The plea confesses the tenancy as alleged, whatever that may be, and treats it as a tenancy in respect of which there existed a reversion which was capable of being passed. By the assignment, therefore, the tenancy passed, and continued to exist under the assignee. If, therefore, the tenancy continued, though not under the plaintiff, the only question is, whether, as this is a demise on which the statute 32 Hen. 8. c. 34. does not operate, the right to sue for the breach of contract did not remain in the plaintiff. I see no reason, if the right to sue did not pass with the reversion, why the plaintiff should not sue. The privity of estate was destroyed by the assignment, but not the privity of contract: that was created by the original contract, and remains for ever between the lessor and lessee—*Webb v. Russell* (2). If so, I see no reason why the plaintiff may not maintain this action, taking all that the plea says to be true. It is, therefore, no answer to the declaration, and our judgment must be for the plaintiff.

*COLTMAN, J.*—It seems to me that, in whichever way the plea is looked at, it is insufficient. If the meaning of the declaration be, that the defendants should become tenants to the plaintiff, and should repair during the continuance of such tenancy only, and it be meant to assert by the plea that this is consistent with a tenancy at will, and that such tenancy was put an end to by the assignment, that would amount to a denial of the tenancy alleged, and would be bad as an argumentative denial of the want of repair during the continuance of the tenancy, without giving colour. If, on the other hand, the declaration shews a contract to repair during the term for which the tenancy was created, and not under the plaintiff only, then the plea gives sufficient colour, for it admits that the tenancy sub-

sisted, though under a new landlord, that the premises are out of repair, and that *prima facie* the defendants are liable, and then sets up as an answer, a discharge of the party personally by reason of the assignment of the plaintiff's reversion. Then the question is, whether the right of action in respect of the breach of the contract to repair is thereby put an end to. Unless the demise be by deed, the case is not within the statute of 32 Hen. 8. Then, did the right to sue pass with the reversion at common law? Because, if it did, the defendants could not be liable to two parties. There is no authority for saying that such right to sue passes at common law with the reversion; it, therefore, remains in the plaintiff, the original lessor, and, consequently, the plea is bad in substance, as furnishing no answer to the declaration.

MAULE, J.—I also think this plea bad in substance. It does not seem intended to set up that the defendants' tenancy was at an end, but only that they had become tenants to somebody else, instead of to the plaintiff. It is, therefore, no answer to the declaration, if the declaration means that the defendants contracted to repair so long as they continued tenants to anybody under the demise originally made to them by the plaintiff. If the promise to repair be confined to the time during which the defendants should remain tenants to the plaintiff, then the plea would be an answer to the declaration. I think the first construction the right one, and that the promise is not so limited as the defendants contend. The duties that belong to a tenant ordinarily continue so long as he is tenant at all, and are not restricted to the time during which he remains tenant to a particular person. No doubt it is possible there may be such an agreement, viz., that upon a demise for years, the tenant may contract to repair for one year only; but where the terms of a contract are in any degree equivocal, it is reasonable for the Court so to construe them as to make the ordinary duties of a tenant co-equal and commensurate with the continuance of the tenancy; and so construed, the plea is no answer to the declaration. With respect to the plaintiff being entitled to recover, if the contract be as I have expressed it, there is no doubt. The statute 32 Hen. 8. does not transfer the right to

sue to the assignee in the case of a demise without deed. If it be not transferred, can it be said to be extinguished? Here are two persons who have agreed, upon good consideration, to do certain things, for breach of which agreement either party may bring his action, unless there be anything to take away that right. Being within the general principle, is there anything to take it out of it? I see nothing so to do. The plea, therefore, is bad in substance. I should have some doubt about the point of form, if the plea had been good in substance. It seems to me to be, not so much a round-about way of saying that the tenancy was put an end to, but rather a special way of stating how it was put an end to; and it certainly is desirable to encourage such a mode of pleading as may tend, by narrowing the issue, to save expense, and to direct attention to the particular point to be tried.

CRESSWELL, J.—I concur. The declaration states that the tenancy created still continues. The defendants have not denied that it continues. We must take it, therefore, that it does continue. But the defendants say the plaintiff cannot sue after assignment. But the right to sue would not pass with the assignment; and then it remains where it was before the assignment.

*Judgment for the plaintiff.*

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1848. } TOLSON v. THE BISHOP OF CAR-  
April 18. } LISLE AND OTHERS.

*Practice.—Irregularity—Pleading—Replication; setting aside.*

*A replication commenced "And the plaintiff as to the forty-sixth plea"—it then traversed an allegation in that plea, and went on—"and this the plaintiff prays may be inquired of by the country; and as a further answer in this behalf to the said forty-sixth plea,"—it then alleged new matter by way of answer, and went on—"and this the said plaintiff is ready to verify; and further as to the forty-sixth plea,"—alleging new matter, and concluded—"and this the plaintiff is ready to verify."—Held, that such a replication is so irregular in form that the Court will set it aside with costs, upon a summary application.*

This was an action of *quare impedit*, in which there were many defendants, who severed in pleading.

Two of the defendants pleaded various pleas. Their forty-sixth plea was pleaded under the 30th section of the 3 & 4 Will. 4. c. 27, setting up an adverse possession during the incumbencies of three clerks in succession for more than sixty years; and their forty-seventh plea was pleaded under the 33rd section of the same act, setting up an adverse possession for 100 years.

The plaintiff replied, "And as to the forty-sixth plea of the said M. B. D. and J. B. D, the plaintiff says (denying the presentation of one of the clerks named in that plea) in manner and form, &c., and this he prays may be inquired of by the country, and as a further answer in this behalf to the forty-sixth plea (alleging that the plaintiff's rights were saved by the stat. 7 Anne), and this the said plaintiff is ready to verify, and further as to the forty-sixth plea (alleging that caveats were lodged before the induction of each of the three clerks mentioned in that plea, and so the possession not adverse), and this the said plaintiff is ready to verify." The replication to the forty-seventh plea was substantially the same as that to the forty-sixth plea.

*F. Robinson*, in the last term, had obtained a rule calling upon the plaintiff to shew cause why the whole of the replications to the forty-sixth and forty-seventh pleas should not be set aside with costs, or why the whole of those replications, except the traverse first taken by each of those replications, should not be set aside with costs.

*Manning, Serj.* shewed cause.—The defendants should have demurred, as the replications are bad for duplicity. It is a most inconvenient and improper course to pursue to move to set aside the replications, and it is also unfair towards the plaintiff, who if the usual practice were followed of demurring to the replication would have the right to object to the pleas. *Griffiths v. Eyles* (1) shews that this form of replication is a subject for demurrer, but not for the exercise of the summary jurisdiction of the Court.

*F. Robinson*, in support of the rule.—

The replications are, in truth, three in number, to each of the forty-sixth and forty-seventh pleas. The first is a traverse concluding to the country; the two others have each a formal heading and conclusion, and each contains an answer to the plea. The rule of Hil. term, 2 Will. 4. pl. 34, which allows the opposite party to sign judgment for irregularities, applies only to pleas, and to no future proceedings. The only course open to the defendants is to come and shew the Court that the form of these replications is so contrary to all the rules of pleading and practice, that they must be set aside with costs.

WILDE, C.J.—It appears that these replications are pleaded in a form so contrary to the practice of the Court, and the defects are so patent and glaring that we should introduce great mischief if we were to hesitate to set them aside. It would be a useless waste of time and money to drive the defendants to demur. We think this application a very proper one, and the rule must be absolute to set aside the whole of the replications to the forty-sixth and forty-seventh pleas, except the traverse first taken to those pleas, with costs.

*Rule absolute accordingly, with costs.*

1848. }  
April 18. } HOARE v. LEE.

*Practice—Pleading—Trespass—Statute—Disallowance of Counts.*

*A declaration in trespass contained two counts, the first in the usual form for breaking and entering the plaintiff's rooms, the second, under stat. 2 Will. & M. sess. 1. c. 5. s. 5, for distraining goods for rent pretended to be due, and selling them, and claiming their double value, &c. There was only one act of trespass committed:—Held, that the plaintiff was not entitled to more than the second count of the declaration, under which he could recover damages, though proof of a simple act of trespass only were given.*

*Trespass.* The first count of the declaration was in the usual form, for breaking and

(1) 1 Bos. & Pul. 413.

entering certain rooms of the plaintiff, and taking and converting his goods. The second count was framed, under the stat. 2 Will. & M. sess. 1. c. 5. s. 5, to recover double the value of the goods distrained and sold, and was as follows:—That the defendant heretofore, to wit, on the day and year first aforesaid, by and under colour of the statute in such case made and provided, with force and arms, &c., then seized, took and distrained divers other goods and chattels of the plaintiff, (to wit), goods and chattels of like quantity, quality, description and value to the said goods and chattels in the said first count mentioned, as for and in the name of a distress for certain rent then claimed, and pretended by the defendant to be due and in arrear from the plaintiff for and in respect of certain rooms and premises theretofore demised by one J. B. to the plaintiff, and then carried away and detained the same as and for such distress for a long space of time, (to wit), for the space of two calendar months then next following, and afterwards (to wit), on the 1st day of May, in the year aforesaid, by and under the like colour and pretence sold and disposed of the said last-mentioned goods and chattels, and converted and disposed thereof, and of the monies therefrom arising to his, the defendant's, own use; whereas in truth and in fact no rent was due or in arrear from the plaintiff, for the said last-mentioned premises during the time in this count aforesaid, contrary to the form of the statute in such case made and provided; and other wrongs to the plaintiff the defendant then did against the peace of our Lady the Queen, &c.

On a summons at chambers, calling upon the plaintiff to shew cause why one of these two counts should not be struck out, at the plaintiff's cost, the following order was made by Cresswell, J.:—"Upon hearing the attorneys or agents on both sides, I do order that the plaintiff within three days elect which count in the declaration he will strike out; otherwise, the second count be struck out, and in either event, at the cost of the plaintiff to be taxed.—14th of February 1848."

*W. H. Cooke* now moved for a rule nisi to discharge this order.—The question for the consideration of the Court is, whether the two counts in this declaration are a violation of Reg. Gen. Hil. T. 4 Will. 4. r. 1.

s. 5, whereby "several counts in trespass for acts committed at the same time and place are not to be allowed." The cause of action in the second count is a different subject-matter of complaint to the ordinary trespass set forth in the first count. The plaintiff will be entitled to recover, on the first count, upon proof of any act of trespass however small. To recover under the statute of 2 Will. & M. sess. 1. c. 5. s. 5, the plaintiff must establish a distress and sale made under colour of that act for rent pretended to be due, when in truth no rent is in arrear or due to the person distraining, and the owner of such goods is then entitled by action of trespass or upon the case to recover double the value of the goods so *distrained and sold*; the plaintiff has, therefore, a right of action under the second count which he cannot maintain under the first. In *Thornton v. Whitehead* (1), a count for use and occupation was allowed with one for double rent under 11 Geo. 2. c. 19. s. 18; and that case overrules *Lawrence v. Stephens* (2). The present case is not distinguishable from *Cahoon v. Burford* (3), where an *indebitatus* count for money had and received was allowed, with a special count to recover damages for the breach of a warranty of a horse. Alderson, B. in giving judgment there says, "It is plain that it is not for the same cause of action. . . . The first count is for the recovery of damages for the breach of a warranty of a horse; but the second is to recover money paid to the defendant, on the ground that it was advanced on a consideration which has failed." In *Sheppard v. Hales* (4), the declaration on certain bills of exchange contained three sets of counts, on the *lex mercatoria*, on the law of France, and on a special contract; and the plaintiff's particulars shewed there was but one cause of action. The Court of Exchequer overruled the suggestion that the true test was, whether anything could be recovered under the latter set of counts which would not be equally recoverable under one or other of the former, and the Court there decided that the true test is, whether the counts

(1) 1 Mee. & Wels. 14; s. c. 5 Law J. Rep. (n.s.) Exch. 113.

(2) 3 Dowl. P.C. 377.

(3) 13 Mee. & Wels. 136; s. c. 13 Law J. Rep. (n.s.) Exch. 265.

(4) 13 Law J. Rep. (n.s.) Exch. 333.

are inserted, in apparent violation of the rule, as being substantially for the same cause of action. *Bulmer v. Bousfield* (5) recognizes this decision.

[WILDE, C.J.—Will not the second count alone answer your purpose?]

The right of action relied on in the second count being given by the statute, the plaintiff cannot recover anything unless he proves all the aggravating circumstances on which the right to recover double value depends—*Masters v. Farris* (6), *Ireland v. Johnson* (7).

[WILDE, C.J.—Why not? The simple trespass is not excluded from the second count, nor is the right of the plaintiff to recover for a common trespass destroyed because he fails to prove all the aggravating circumstances which would entitle him to recover the double value.]

[CRESSWELL, J.—Do you admit that the act of trespass relied on in each count is the same?]

The act of trespass is certainly the same; but the second count enables the plaintiff to recover for the continuing grievance—the sale of the goods, without proof of which tortious act the right to double value does not attach.

*Per Curiam*.—It is admitted that this motion cannot be granted if the declaration is in apparent violation of Reg. Gen. Hil. term, 4 Will. 4. r. 1. s. 5, and we must therefore see whether the counts are founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only. Here, it is conceded, that there has been only one act of trespass; but it is contended, that as the second count enables the plaintiff to recover for a more aggravated injury than is set forth in the other, he is entitled to both counts. We think he is not, because it will be competent for him to recover under the latter count for a common trespass, in the event of his not being able to satisfy the jury as to the aggravated circumstances set forth under the conditions of the statute.

#### *Rule refused.*

(5) 16 Law J. Rep. (N.S.) Q.B. 237.

(6) 1 Com. B. Rep. 715.

(7) 1 Bing. N.C. 162; s.c. 3 Law J. Rep. (N.S.) C.P. 303.

1848. }  
April 26. } HARDINGHAM v. ALLEN.

*Tender—Appropriation of Sum tendered—Money had and received—Detinue.*

*In an action of debt, with a count for the detention of a horse, the defendant pleaded to the count in detinue a lien of 10s. for trying the horse in harness. The plaintiff replied a tender. At the time the horse was demanded of the defendant he claimed the sum of 1l. 7s. for keep, &c., including the sum of 10s. for the trial, whereupon the defendant said the charge was exorbitant, and tendered the sum of 19s. 6d.:—Held, that the plea of tender was not proved.*

*Proof of money received upon a condition does not support a count for money had and received.*

**Debt.** The first count was for money had and received; and the second was a count in detinue for a horse.

**Pleas**—First, to the first count, never indebted. Issue. Second, to the last count, that the defendant doth not detain the said horse in manner and form, &c. Issue. Third, to the last count, that the plaintiff was not lawfully possessed of the said horse in manner and form, &c. Issue. Fourth, to the last count, that the defendant was possessed of a repository for the sale of horses; that the plaintiff delivered the said horse to the defendant to be there sold on certain conditions then agreed upon between them, that is to say, "Should any horse be warranted and prove unsound, he must be returned within the second day after the sale, before five o'clock, with a certificate from a veterinary surgeon, particularly describing the unsoundness, when, if confirmed by the veterinary surgeon of the establishment, the amount received for the horse shall be immediately paid back, but if he should not confirm the certificate, another veterinary surgeon shall be called in, and his decision shall be final, and the expenses of such umpire shall be borne by the party in error.—If a horse, warranted quiet in harness, or quiet to ride, or in any other respect (except as to soundness), shall be returned within the prescribed period as not answering the warranty given with him at the time of the sale, he shall be tried and examined by an impartial person, whose

decision shall be final, and the consideration for the trial and examination, viz. 10s., shall be paid by the party in error.—All horses, carriages, &c., brought to this repository for sale, and sold either by any person employed by the proprietor or by the owner of the lot, shall pay the usual commission, and no horses, carriages, &c. shall be taken away until the keep, commission, and all other expenses are paid, whether sold by public auction, private contract, or are not sold.—That the horse was sold at the repository, upon such conditions, to J. B. and by the plaintiff warranted at the time of the sale to J. B. to be quiet in harness; that the horse was then taken away by J. B. from the repository, and afterwards, and within the time limited by the said conditions, returned to the said repository, according to the said conditions, because he was not quiet in harness; that the said horse was tried and examined according to the said conditions, and found not to be quiet in harness, of which the plaintiff had notice, by means of which premises the plaintiff became liable to pay the sum of 10s., being the consideration for the said trial and examination of the said horse, and an expense which, according to the said conditions, should have been paid by the plaintiff before the said horse should be taken away from the repository: of all which premises the plaintiff, before the said detention, had notice, and was then required to pay the sum of 10s., which the plaintiff refused to do; wherefore, after the plaintiff had refused to pay, and in consequence of such refusal to pay the said sum of 10s., the defendant refused to permit the plaintiff to take away the said horse from the possession of the defendant, as it was lawful for the defendant to do, which is the same detention, &c. Verification.

Replication to the fourth plea, that the plaintiff, after he became liable to pay the said sum of 10s. in the fourth plea mentioned, and just before the detention in the last count mentioned, tendered and offered the defendant to pay him the said sum of 10s. for the trial and examination of the said horse of the plaintiff, which the defendant then refused to receive, and of his own wrong detained, and still detains, the plaintiff's horse. Verification.

Rejoinder, that the plaintiff did not tender

or offer the defendant to pay him the said sum of 10s. for the trial and examination of his, the plaintiff's, horse, in manner and form, &c. Issue.

The cause was tried, before Wilde, C.J., at the London Sittings after Hilary term. The defendant proved the facts as stated in the fourth plea; and it appeared, from the printed rules of the repository, which were given in evidence, "that the purchase-money for any horse, &c. was not to be paid over to the vendor until four days after the sale." The defendant gave in evidence the following bill, which his clerk delivered to the plaintiff, when he inquired for an account of the demand against him:—

	s.	d.
1847. July 31. Bay gelding, bait .....	1	6
Auction .....	5	0
July 31 and August 4. Bay gelding, three days .....	10	6
August 3. To cash paid for trial of bay gelding in harness .....	10	0
	<b>£1</b>	<b>7 0</b>

The plaintiff said the charge was exorbitant, and put down 19s. 6d. The defendant's clerk refused to take it. The plaintiff then demanded his horse. The defendant's clerk said, "You cannot have it: look at the rules." The plaintiff replied, "I have nothing to do with the rules, I must have my horse." The plaintiff then left the 19s. 6d. on the desk, and went away. The learned Judge thought the tender was not proved, and nonsuited the plaintiff.

Huddleston moved for a rule *nisi* to set aside the nonsuit, and for a new trial.—The plaintiff proved that his horse was sold by the defendant, who, no doubt, received the purchase-money, and it was for the jury to say upon all the facts, whether the money so received by the defendant was received to the plaintiff's use.

[WILDE, C.J.—One of the facts proved was, that the money was received upon a condition, which does not establish a *prima facie* case of money had and received to the plaintiff's use.]

Then the defendant ought to have shewn by the best evidence that the horse was not quiet in harness. The person who tried the horse should have been called, and it should have been left to the jury to say, whether or no the condition had been performed.

[WILDE, C.J.—The question was not



withdrawn from them, and there was abundant evidence that the horse was not quiet in harness.]

Then the plea claims a lien for 10s. only, and the plaintiff proved a tender of 19s. 6d., which covers that demand.

[WILDE, C.J.—The whole of the plaintiff's demand was 1l. 7s., and I told the jury that if a party makes a claim composed of various items and a less sum is tendered in payment, the party claiming may apply the sum tendered to any of the items he chooses, if the party tendering does not appropriate it at the time.]

Then it should have been left to the jury to say, whether upon the whole claim as made, more than 19s. 6d., the sum tendered, was really due.

[COLTMAN, J.—Did you put that view of the case to the learned Judge at the trial? It appears that the amount of any specific item was not then objected to.]

It was proved by the defendant's witness that the plaintiff said that the bill was exorbitant. It is sufficient to tender a gross sum, though money be owing to several different persons—*Douglas v. Patrick* (1). If 19s. 6d. did not cover the whole sum properly due, the defendant should have rejoined that more than 19s. 6d. was due.

[CRESSWELL, J.—Not so. It would have been a departure if he had. The defendant claims 10s. for a particular service—the plaintiff proves a tender of 19s. 6d. to a demand of 1l. 7s., which includes the charge for the particular service, together with a great many other items; that does not prove a tender for the sum claimed for the particular service.]

COLTMAN, J.—There is no ground for a rule in this case. The money for the horse was only received conditionally, and proof of such a receipt does not sustain a count for money had and received to the use of the plaintiff. As to the tender of 19s. 6d., no doubt, if 10s. was all that the defendant claimed, such a tender would have been sufficient; but there were other charges, which together amounted to the sum of 1l. 7s., and as there was no appropriation of any part of the sum tendered to any specific item of charge, there was no evi-

dence to support the allegation in the replication of a tender of the sum of 10s. for the trial and examination of the horse. The nonsuit was therefore right.

CRESSWELL, J., WILLIAMS, J. and WILDE, C.J. concurred.

*Rule refused.*

1848. } NEWTON v. LORD ALBERT  
April 15. } CONYNNGHAM.

*Execution—Costs on Nonsuit—Error—*  
7 & 8 Vict. c. 96. s. 57.

*The 7 & 8 Vict. c. 96. s. 57. enacts, that no person shall be taken in execution upon any judgment in any action, wherein the sum recovered shall not exceed the sum of 20l., exclusive of costs.*

*In an action, wherein the plaintiff was nonsuited, the defendant made up the judgment roll, and entered thereon the award of a ca. sa. for the amount of the taxed costs; the plaintiff brought a writ of error and assigned as error the entry of the ca. sa. on the record:—Held, that the ground of error assigned was not frivolous.*

*Semble—A plaintiff cannot be taken in execution for costs.*

This was an action against a provisional committee-man of a railway company, wherein the plaintiff was nonsuited. The judgment roll was made up by the defendant in the usual form. The award of a writ of ca. sa., which the defendant had issued against the plaintiff for the amount of his taxed costs, amounting to 105l., was entered on the roll after the judgment. The plaintiff brought a writ of error, assigning for error the entry of the writ of ca. sa. on the record. Notice of the allowance of the writ of error was served upon the defendant, who thereupon took out a summons before a Judge at chambers, to allow the defendant to proceed in the execution of the writ of ca. sa., notwithstanding the allowance of the writ of error.

The summons was heard before Coltman, J., who declined to interfere, and indorsed on the summons, "Apply to the Court."

*Bramwell* moved for a rule to shew cause "why upon reading the judgment roll with the award of execution thereon, the copy of the assignment of errors delivered to the

defendant's attorney, and a copy of the notice of the allowance of the writ of error, the defendant should not be at liberty to proceed in the execution of the writ of *ca. sa.*, notwithstanding the allowance of the writ of error, the grounds of error being frivolous, with a stay of proceedings in the mean time."

—It is said, that since the stat. 7 & 8 Vict. c. 96. a party cannot be taken in execution for costs only, and the 57th section of that statute is relied on. It enacts, "that no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment." That section gives no protection to plaintiffs, but is intended to shield defendants who are proceeded against for debts under 20*l.* This is a case in which the act has no application; it is not an action wherein the sum recovered does not exceed 20*l.* exclusive of costs. No sum at all has been recovered, as the plaintiff was nonsuited.

[CRESSWELL, J.—I think some of the Judges have thought that the late statute does protect plaintiffs from arrest, and have discharged such persons from custody who have been taken in execution for costs.]

The act will be disastrous to defendants, if it be held that by its provisions a defendant who has been unjustly sued has no power to get the costs from a litigious opponent. But if the Court have any doubt on the construction of the act, the defendant does not press this application.

*Per Curiam.*—We cannot say that the grounds of error assigned are frivolous, and that the question raised is an improper one to be argued before a court of error. There are no special reasons given to induce the Court to interfere. It appears, moreover, that in several instances some of the Judges have understood the 57th section of the 7 & 8 Vict. c. 96. in the sense contended for by the plaintiff, and have discharged plaintiffs from custody, who have been taken in execution for costs.

*Rule refused.*

1848. }  
April 15. } TOBY v. LOVIBOND.

*Arbitration — Award — Judgment non obstante veredicto—Finality—Release.*

*By order of Nisi Prius a cause and all matters in difference were referred to the award of A. B, with power to enter a verdict for either party, the costs to abide the event, and neither party to be at liberty to bring a writ of error. It was contended before the arbitrator that the third and sixth pleas were bad in law, and, though proved in point of fact, that the plaintiff was entitled on the issues raised on them to judgment non obstante veredicto. The award directed a verdict to be entered for the plaintiff on the second and fifth issues, with 1*s.* damages, "which sum, except for my finding upon the other issues, the plaintiff would be entitled to recover in the said cause."—The first, third, fourth, and sixth issues were found for the defendant:—Held, that the arbitrator had no power to order judgment non obstante veredicto; and that as regarded the damages the award (as above) was sufficiently final.*

*An award of mutual releases in general terms is sufficient.*

*Assumpsit.* The declaration was on an indenture of apprenticeship in the usual form. Two breaches were assigned: the first breach was for neglecting to instruct the apprentice; the second breach for not supplying the apprentice with food and necessaries.

*Pleas*—First, to the first breach, performance of the covenants in the indenture up to the 4th of July 1846; second, to the first breach, that from the 4th of July 1846 the defendant was prevented from instructing the apprentice because he absented himself; third, to the first breach, a justification from and after the 4th of July 1846, because the apprentice committed acts of felonious embezzlement; the fourth, fifth, and last pleas were pleaded to the second breach, and were similar to the first, second, and third pleas respectively.

*Replication*, to the first and fourth pleas, issue. To the second and fifth pleas, that the apprentice offered to return, but the defendant refused to take him back. To the third and last pleas, *de injuriâ*. Issue thereon.

Rejoinder to the replication to the second and fifth pleas, a denial that the apprentice absented himself. Issue thereon.

The cause came on to be tried, at the Sittings for Middlesex after Easter term, 1847, and was then referred, by an order of Nisi Prius, the material parts of which are as follows:—"It is ordered by the Court, with the consent of all parties, their counsel and attorneys, that a verdict be entered for the plaintiff, damages 500*l.*, costs 40*s.*, but that such verdict should be subject to the award, order, arbitrament, final end and determination of G. P. Esq., barrister-at-law, who is hereby empowered to direct that a verdict shall be entered for the plaintiff or the defendant, as he shall think proper, and to whom this cause and all matters in difference between the said parties are hereby referred, &c. It is likewise ordered that the costs of the said suit, to be taxed, shall abide the event of the said award, and that the costs of the reference and award, to be taxed, shall be in the discretion of the said arbitrator, &c. And by the like consent it is further ordered, that the said parties shall, on their respective parts, in all things stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, final end and determination of the said arbitrator; and that neither of the said parties shall bring or prosecute, or cause to be brought or prosecuted, any writ of error or any action or suit at law or in equity, against the said arbitrator, or against each other, of or concerning the matters referred by this order. And by the like consent it is also ordered, that the indenture of apprenticeship, in the pleadings in this cause mentioned, shall be cancelled, and that the said arbitrator shall by his award, order and direct what shall be done by the parties respectively, except that he is not to have power to order the defendant to take E. J. Toby into his service again."

The award, after setting out the order as above, proceeded thus:—"Now I, the said G. P. (the arbitrator) having taken upon myself the burden of the said reference, having examined upon oath all such witnesses as were produced before me by the said parties respectively, and having duly weighed and considered all the allegations, proofs, and vouchers made and produced before me, do hereby award, order and adjudge as to

the said cause, that the verdict now entered be set aside, and that the two several issues in the said cause arising respectively upon the rejoinders of the defendant to the replications of the plaintiff to the second and fifth pleas of the defendant, be entered for the plaintiff; and that all the other issues in the said cause be entered for the defendant. And I do hereby assess the damages of the plaintiff upon the said several issues, which I have ordered to be entered for him, at the sum of 1*s.*, which said sum, except for my finding upon the other issues, the plaintiff would be entitled to recover in the said cause. And as to the said matters in difference, I do award, order, and determine, that neither of the said parties hath any claim, right, title, or cause of action whatsoever against the other of them, in respect of any matters in difference referred to me. And I do order and direct that the said parties respectively shall and do each upon the requisition of the other of them, and at the costs and charges of the party requiring the same, sign, seal, and as their respective acts and deeds deliver, each unto the other of them, mutual general releases in writing of all and all manner of actions and causes of action, controversies, claims and demands of what kind soever, from the beginning of the world, until the time of the making of the said order of reference. And as to the costs of this reference and award, I do award and determine that each of the said parties shall bear and pay his own costs incurred by him in and about the said reference. And that the costs of this award be borne and paid by the said parties in equal moieties," &c.

*Prentice*, in last term, obtained a rule, calling upon the defendant to shew cause why the award should not be set aside upon the grounds that the arbitrator had not adjudicated upon all the matters brought before him, viz., that the plaintiff was entitled to judgment *non obstante verdicto* on the third and sixth pleas; that the award leaves it doubtful whether this matter has been so adjudicated upon; that the award is bad upon the face of it, for awarding the plaintiff 1*s.* damages, and leaving it doubtful whether any damages are, and if any, how to be recovered; that the award of mutual releases, without specifying the form of release, is bad; and also why the verdict en-

tered in the said cause should not be set aside and a new trial had, or why judgment should not be entered for the plaintiff on each of the issues raised on the third and sixth pleas, *non obstante veredicto*. The affidavits stated "That at one of the meetings before the arbitrator, the plaintiff's counsel submitted, as a matter for the arbitrator's decision, that the third and sixth pleas were bad in law, which was admitted by the counsel for the defendant, and that the plaintiff's counsel then formally and for the purpose of taking the opinion of the Court of Common Pleas on the point, and as he so informed the arbitrator, requested him to award and give judgment for him *non obstante veredicto*, on the issues raised on the third and sixth pleas in case he should find the said pleas in point of fact proved by the defendants. That the counsel for the defendant contended, and the arbitrator said he thought he had no power to give judgment *non obstante veredicto*, but if he thought either of the pleas bad in law, he would endeavour to make his award in such a way that his decision might be reviewed by the Court."

*Unthank* now shewed cause.—It was contended before the arbitrator that the third and last pleas were bad, and that the plaintiff was, therefore, entitled to judgment *non obstante veredicto* on the issues raised on those pleas. The arbitrator has not awarded such judgment, and this application to the Court is to compel him to do so. But even assuming the pleas to be bad, the arbitrator had no such power, as there is a proviso in the order which prohibits either party from bringing a writ of error—*Chownes v. Brown* (1). The arbitrator's authority extends over the verdict, but not over the judgment—*Steeple v. Bonsall* (2), *Angus v. Redford* (3). The Court will not interfere when the arbitrator has decided the verdict—*Chownes v. Brown*, *Britt v. Pashley* (4). Those cases shew that when a cause has been referred to an arbitrator with powers similar to those conferred here, his authority goes no further than the verdict, and though

applications have been made in every variety of form to induce the Court to compel the arbitrator to order a judgment *non obstante veredicto*, or to arrest the judgment, the Court has always refused to interfere. It is said that the award of mutual releases in general terms is not sufficient; but the award in this respect follows the invariable form. It is said that the damages are contingently assessed, and, therefore, the award is not final; but the award would have been perfect if it had merely ordered the verdict to be entered, and it is submitted that the damages are properly assessed.

[WILDE, C.J.—The arbitrator has not given the plaintiff any damages; he says in effect, I should have given 1s. damages if I could.]

If the damages are not properly assessed, it is the same thing as if no damages at all were granted, and it would then be necessary to have a *venire de novo*, which is not asked for by this rule—*Clements v. Lewis* (5). The arbitrator might assess the damages contingently, if he pleased, for the parties assent to abide by his decision whatever it is—*Morriish v. Murray* (6). Lastly, if there be any valid objection to the mode of the assessment of damages, it is quite a distinct part of the award and may be rejected.

*Prentice*, in support of the rule.—The arbitrator has not awarded on all the matters brought before him which were within the limits of his jurisdiction, and therefore the award is bad. He was formally requested, as appears by the affidavit, to order judgment *non obstante veredicto* to be entered on the issues raised upon the third and sixth pleas, which were admitted to be bad, and he has taken no notice of that application on the face of his award. *Steeple v. Bonsall* is in favour of the plaintiff. The Court, in that case, were asked to give judgment *non obstante veredicto*,—in this case the arbitrator was asked to do so. *Angus v. Redford* is distinguishable. There the verdict only was referred. Here the cause and all matters in difference were before the arbitrator.

[WILLIAMS, J.—From the report of that case in 2 *Dowl.* n.s. 735, it seems that the cause and all matters in difference were there referred.]

Then that case cannot be supported as an

(1) 14 *Law J. Rep.* (n.s.) *Exch.* 216.  
 (2) 4 *Ad. & El.* 950; s.c. 5 *Law J. Rep.* (n.s.) 188.  
 (3) 11 *Mee. & Wels.* 69; s.c. 12 *Law J. Rep.* (n.s.) *Exch.* 180.  
 (4) 1 *Exch. Rep.* 64; s.c. 16 *Law J. Rep.* (n.s.) *Exch.* 240.

(5) 3 *Brod. & Bing.* 297.  
 (6) 18 *Mee. & Wels.* 52; s.c. 13 *Law J. Rep.* (n.s.) *Exch.* 261.

authority, for it is at variance with the later cases decided in the Court of Exchequer.

[WILDE, C.J.—An order of reference in this form is of matters in dispute at the date of the order: the question as to the validity of the pleas was not at that time a matter in difference, it did not arise till after the verdict, and the arbitrator is then *functus officio*.]

The pleas and the incidents which might attach thereto were matters in difference as soon as they were placed on the record. By consenting to refer, the plaintiff was not barred of any rights which attached to him during the previous progress of the cause, and, therefore, the pleas were matters in difference at the time of the order. The objection to the pleas is not a technical, but a substantial matter in difference. A bad plea to a good cause of action is as substantial a defect in a cause as a declaration which discloses an insufficient cause of action. In *Britt v. Pashley*, Alderson, B. says, "The arbitrator had the power to do what the Court could do, and his award, therefore, puts an end to the proceedings;" and that shews that the arbitrator had the power which it is contended he should have exercised in this case.

[COLTMAN, J.—An arbitrator must act according to the terms of the submission. Where does this submission give him power to order judgment *non obstante veredicto* to be entered?]

[CRESSWELL, J.—If the arbitrator had found that the pleas were bad in law, it would have been of no consequence—issues in law are not referred to him.]

The order to decide all matters in difference confers the power, and the arbitrator should have found that the plaintiff was entitled to judgment *non obstante veredicto* on the bad pleas; the judgment would then have followed as a matter of course, and would have been entered at the plaintiff's peril in the right form. The words in the order which prohibit a writ of error from being brought, may mean, "We know there is error on the record, and will leave that to be decided upon by the arbitrator." Next, the award is uncertain as to the damages, which are contingently assessed. The costs are to abide the event, and as it cannot be ascertained whether the plaintiff is to recover 1s. damages or nothing, the question of costs, which must follow the damages, is

not conclusively decided. Lastly, the form and nature of the releases should have been stated. When an arbitrator directs the conveyance of an estate, he ought to state the form and nature of the conveyance. In *Glover v. Barrie* (7) the Court held an award bad for uncertainty, which directed "that A. should beg B.'s pardon, in such manner and place as B. should appoint."

WILDE, C.J.—It seems to me that none of the grounds on which it is sought to set aside this award are substantial; and that which asks for judgment *non obstante veredicto* the Court has no power to enter into. It is now settled law, that when parties consent to choose their own tribunal, and refer to that tribunal the questions in difference between them, the Court will not and cannot interfere to controul that authority, to which both parties have elected to submit their differences. If, however, there be any matters of law on which the arbitrator has felt a doubt and on which he needs the opinion of the Court, it is equally well settled that if questions of law be raised either on the face of an award, or by a formal paper accompanying or annexed to an award, the Court will take upon itself to decide those questions. On this occasion the Court are not asked to review the judgment of the arbitrator on any of the matters submitted by the parties to his decision, nor are his conclusions on any of those matters particularly complained of; but it is stated that his decision on the extent of his jurisdiction was mistaken, and on that ground the plaintiff makes this motion. It is said, that the arbitrator decided he had no power to order a judgment to be entered *non obstante veredicto*, whereas it appears by decided cases that he had such power; and if that fact were made out, it would have been open to consideration whether the Court should not interfere to compel him to do so. Now, what is the matter complained of?—The plaintiff says, he ought to have judgment notwithstanding that the facts stated in the pleas are found to be true in fact, because the pleas are bad in law. If issues both in fact and law have been referred to an arbitrator, he must decide on all matters ranging under those

descriptions which are brought before him ; but when pleas have been pleaded in an action, the other party has pleaded over, issues have been joined, and the cause and matters in difference are referred, what are the subjects included in such an order of reference ? Why, as far as the cause is concerned, all the issues joined are referred, and in the present case those issues are issues of fact. The goodness or badness of the pleas was not at that time a matter in difference. The time for questioning the pleas by demurrer had passed by, and when the order of submission was entered into no such question existed ; nor could any such question arise till after the arbitrator had made his award. It is stated in the affidavit, that the plaintiff "formally called on the arbitrator to award judgment for him, *non obstante veredicto*, on the issues raised on two pleas which were admitted to be bad, but the case of *Angus v. Redford* is conclusive to shew that the arbitrator had no power to order such a judgment to be entered, and all the cases decide that the Court has no such power under the circumstances which exist here. When a cause is to be referred, the parties to the reference agree upon and draw up their own order of submission, and they should be careful to insert such provisions and to give such powers to the arbitrator as they require him to exercise. The main point then, on which it is sought to question the award—a mistake on the part of the arbitrator as to the extent of his authority—is not well founded. What is there on the face of the award which gives rise to the other part of the argument ? It is said, that at one time during the reference the arbitrator thought the pleas bad. But he might not have continued of the same opinion. There is nothing on the face of the award to shew that he thought them bad when he made his award ; and one thing is quite clear, namely, that if he thought them good, he would have found just as he finds now. The award is quite consistent with the pleas being all good ; and therefore the Court (even if it had the power) would not order judgment *non obstante veredicto* to be entered. It is not necessary to advert at length to the other objections—the Court thinks they cannot be sustained. The mode in which general releases are awarded is quite sufficient. As to the uncertainty of the award of damages, it is plain that the

arbitrator never contemplated that any damages should be recovered. The rule must be discharged.

COLTMAN, J.—I am of the same opinion. The arbitrator in this case has done all that he ought to have done. The matters in difference referred to him seem to have been all decided, and the omission complained of was not one of them. The matters referred to him were matters of fact ; and it was never intended to refer to him the question whether the pleas were good or bad. It would be very unfair and prejudicial towards a party who consents to a reference, as here, if it were open to the plaintiff to insist upon the badness of certain pleas before the arbitrator. Such a proceeding would be to allow an objection to be created which did not exist at the time the consent to refer was obtained. What occurs in this case ? The pleadings continue in regular succession, it is possibly known to the defendant that there are doubtful pleas on the record, the plaintiff pleads over, issues are joined, and the cause is referred ; that means that the issues in fact are to be determined by the arbitrator. If the plaintiff were allowed to question the goodness of the pleas, it might be well said on the other side "*Non hæc in fœdera veni*. I was willing that the arbitrator should decide all matters of fact, and have agreed that he should do so, and nothing more." If the plaintiff were to be entitled to question matters of law appearing on the record, what is the meaning or the use of inserting in the submission, that no writ of error shall be brought ? It would be monstrous injustice if, when a reference is consented to, as in this case, either party were entitled to insist on having judgment *non obstante veredicto* ; and such seems to be the view taken by all the authorities which have been referred to.

CRESSWELL, J.—I am of the same opinion. It is quite true that an arbitrator cannot limit the authority conferred upon him, but must decide upon all matters referred to his decision. If he mistakes the extent of his authority, and thinking it more limited than it really is, omits to decide upon some matters within the submission which are brought to his notice, his award is bad. I think the arbitrator here has examined into and decided upon all matters brought before him which were in dispute between the parties at the time they consented to refer. At that time the parties had waived all questions as

to whether there was good or bad pleading on the record ; they had joined issue, and there was no controversy about the pleadings at that time ; and therefore the arbitrator could not be called upon to decide upon them. Now suppose that instead of the cause being referred, it had gone to trial, the judgment would have followed the finding of the jury on the issues in fact ; there would have been no question on the pleadings, nor could any question be raised without taking a fresh step after the verdict was pronounced. So here, the arbitrator stands in the place of the jury ; he orders a verdict, and the plaintiff must take a further step in order to raise that controversy, which he now says was in existence at the time of the reference. Now, what was the arbitrator called upon to do ? To enter a judgment notwithstanding the verdict. What verdict ? Why, that found by his award. But he cannot make a second award, for his authority ceased when the first was published. The case of *Angus v. Redford* is directly in point against the plaintiff. The parties here have precluded themselves from bringing a writ of error, and the effect of that is to prevent each of them from raising any new questions for supposed defects in the record, which they agree shall stand as it is. There is nothing in the objection that the form of the releases is not sufficiently designated. Then as to the uncertainty of the award of damages, it is perfectly clear that the award is, "I do not mean the plaintiff to get any damages."

WILLIAMS, J.—I quite agree. The arbitrator here could not order a verdict of judgment *non obstante veredicto*, there being no such power conferred on him by the submission. If parties wish such powers to attach they should introduce them into the order of reference. Such a course would be fair and proper ; but when a defendant has consented to abide by the decision of an arbitrator on matters of fact, the plaintiff cannot insist on the defendant being bound on matters of law. If at the time the consent to refer was given, the plaintiff had attempted to introduce into the order a provision authorizing the arbitrator to decide upon legal objections existing on the record, the defendant would perhaps have said, "on those terms I will not consent to any reference at all."

*Rule discharged, with costs.*

1848. }  
May 2, 12. } LLOYD v. JONES.

County Court—9 & 10 Vict. c. 95. s. 58.  
—Jurisdiction—Claim to Incorporeal Hereditament—Custom—Fishery.

*The jurisdiction of the county court is not excluded in an action of trespass qu. cl. fr., by a claim of the defendant, as an inhabitant of B, to enter the plaintiff's land for the purpose of asserting a right of fishing there. For, first, a custom for all the inhabitants of B, as such, to enter the close of the plaintiff, and take fish there without limit, is bad ; and, secondly, the right claimed under such a custom, is not a hereditament, and therefore not within the proviso in 9 & 10 Vict. c. 95. s. 58.*

*Morgan Lloyd*, in Hilary term last, obtained a rule, on behalf of the defendant, calling upon the plaintiff to shew cause why a writ of prohibition should not issue to the Judge of the County Court of Merionethshire, to stay further proceedings in this cause.

The affidavit on which the rule was obtained was made by the clerk to the defendant's attorney, and alleged that the action was brought in the county court for certain supposed trespasses, which the plaintiff alleged the defendant had committed by going, in September last, on the plaintiff's land, by the side of the river Trewern, to fish ; that when the cause was called on, the defendant's counsel objected to the jurisdiction of the county court to entertain the action, on the ground that the defendant claimed title and right to fish on the lands and in the river adjacent thereto ; that it was proved before the Judge of the county court that, in March 1847, a society was formed of the inhabitants of Bala, the object of which was to assert their right to fish in various rivers, including the Trewern, which they claimed to have immemorially used ; that it was further proved that the said society sent the defendant, then being one of the inhabitants of Bala, to fish in pursuance of and in assertion of the right which he, as one of the inhabitants of Bala, so claimed, and that the trespass complained of was the act of the defendant, in proceeding to fish in pursuance of and in assertion of the said right ; that it was farther proved, that the defendant, before proceeding so to fish, caused the plaintiff to be

served with a notice in writing, that he was about to proceed to fish in the said river in pursuance of and in assertion of his right, claimed as aforesaid, and that he did in fact and *bonâ fide* proceed to fish by the side of the river on the plaintiff's lands. The affidavit then stated that the Judge, notwithstanding the objection, proceeded to hear the plaint, upon which the defendant's counsel contended that the defendant was not a trespasser, for three reasons:—first, that he had a right of fishing in the river, and of going on the plaintiff's land for that purpose; secondly, that there was on the said lands a public right of path; and thirdly, that there was a right of common over the lands. Witnesses were called for the purpose of establishing these defences; but the Judge proceeded to give judgment against the defendant for the sum of 1*l.* damages, the sum claimed in the plaint, and costs.

The affidavits in opposition to the rule stated, that the defendant was a person living at Bala, but not a householder there, and with no regular means of obtaining a livelihood; that the alleged rights of fishing, of way and of common were all entirely without foundation, and that the Judge of the county court, at the hearing of the cause, had required the defendant to satisfy him that he had some reasonable or probable cause for claiming a right to be on the plaintiff's land, and to fish there, and heard the evidence for that purpose; but that the defendant wholly failed to satisfy the Judge that he ever had a shew or colour of right, as the Judge then stated, and thereupon proceeded to adjudicate upon the matter of the plaint.

*Talfourd, Serj.* shewed cause (May 2).—The ground upon which the defendant seeks for a prohibition is, that the jurisdiction of the county court in this case is taken away by the proviso in the 58th section of the statute 9 & 10 Vict. c. 95, "that the court shall not have cognizance of any action. . . . in which the title to any corporeal or incorporeal hereditaments. . . . shall be in question." But first, the claim of right made by the defendant was a mere pretext, as the Judge decided; no such right, therefore, was in fact in question. Secondly, the affidavit does not state that the right of fishing existed or was claimed in respect of any property by grant, prescription, or custom.

And in point of law no such right can exist. In *Fitch v. Rawling* (1) it was held, that there might be a custom for all the inhabitants of a parish to go upon the close of A. at all seasonable times, to play at cricket, for a grant might be presumed. This, however, is not a claim for recreation, but a claim to a *profit à prendre* out of land. Thirdly, this is not within the exceptions mentioned in the 58th section, for the right to fish claimed not as an individual, but as an inhabitant, is not an hereditament.

[WILLIAMS, J.—The defendant does not claim as a bailiff, in whom the right is vested for the benefit of the inhabitants.]

Further, the defendant is not an inhabitant.

[CRESSWELL, J.—What the defendant urges is this: "You shall not try an action of trespass between A. and B, because B. says, some other persons have a right to go upon A.'s land."]

The same objections apply to the supposed right of way. A public way is not an hereditament.

[CRESSWELL, J.—What possible answer to an action for fishing on the plaintiff's land can a right of way or a right of common be?]

[WILLIAMS, J.—There is no limitation to the right claimed. He does not say he went there to catch fish enough for his house. It is a claim to take all the fish in the river.]

*Morgan Lloyd, contra.*—The right of fishing is an incorporeal hereditament—1 *Black. Com.* by *Stephen*, 159, *Com. Dig.* tit. 'Piscary.' And it is a right which may be claimed by the inhabitants of a particular parish, as here—*Tyson v. Smith* (2), *Caghey v. M'Kay* (3). In *Kinnersley v. Orpe* (4) it was held, that a person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty. In that case there was notice of the defendant's intention to fish. So here there was a *bonâ fide* claim of right, and notice of the intention given. *Tinniss-*

(1) 2 H. Black. 394.

(2) 9 Ad. & EL. 406 (in error); s. c. 6 Law J. Rep. (N.S.) K.B. 189.

(3) *Crawf. & Dixon* (Irish), 290.

(4) *Doug.* 499.



*wood v. Pattison* (5) shews that the jurisdiction of the county court is ousted by a plea setting up title to the freehold.

[WILDE, C.J.—If the mere plea ousts the jurisdiction of the present county courts, the statute may as well be repealed at once.]

[COLTMAN, J.—Can any case be found in which a *profit à prendre* can be claimed without limit?]

Even if the question be doubtful, the Court will allow the defendant to declare in prohibition, in order to have the question fully and deliberately decided (6).

*Cur. adv. vult.*

The judgment of the Court was now (May 12) delivered by—

WILDE, C.J.—The ground on which the defendant claimed to be entitled to the writ of prohibition is, that the action is brought to recover damages for an alleged trespass in having entered the plaintiff's land, and fished, or attempted to fish, there; and the defendant contended, that such acts were done in the exercise of a right conferred on him as an inhabitant of the town of Bala, under an immemorial custom: and as the claim of right set up by the defendant under this custom may be disputed, it is contended that the jurisdiction of the county court over the cause is excluded by the statute 9 & 10 Vict. c. 95. s. 58, by which it is provided that the Court shall not have cognizance of any action in which the claim to an incorporeal hereditament may be disputed. The affidavit filed in support of the rule states the defendant to be an inhabitant of the town of Bala, and that an immemorial custom exists there, conferring the right before mentioned upon the inhabitants of that town, and that the alleged trespasses were committed by the defendant, at the instance or request of certain inhabitants, associated for the purpose of asserting the existence and validity of the custom set up. The affidavits read in answer to the rule deny the existence of the custom in point of fact, and state that the defendant is not a householder, that he is a person having no visible means of support, and is

wholly incompetent to pay any damages or costs which may be recovered against him. Having heard the arguments in support of the rule, we are of opinion that the jurisdiction of the county court over the cause is not excluded by the proviso referred to in the statute 9 & 10 Vict. c. 95. s. 58, and that the rule must be discharged. The custom set up is in effect a custom for the inhabitants of Bala, as such, to have a *profit à prendre* in the soil of another; but we think no question can be said to arise in this case regarding such a custom; as it has been held as clear and undoubted law for two centuries, that no such custom can exist in point of law. The question was determined in the fourth year of James the First, in *Gateward's case* (7), that such a custom was void in law; and since that case the law has been considered as settled, and is not now open to question or doubt. The jurisdiction of the court cannot be excluded by a pretence of a custom which it has been so long and solemnly determined can have no valid existence. But further, supposing any question could arise in the cause regarding the custom, still that circumstance would not bring the cause within any of the cases over which the jurisdiction of the county court is excluded by the 58th section referred to, inasmuch as that section excludes the jurisdiction in causes involving disputed claims of incorporeal hereditaments, and the claim in question is not a claim to an hereditament. "Hereditament" is defined in the text books of authority to signify all such things, whether corporeal or incorporeal, which a man may have to him and his heirs, by way of inheritance, and which, if they be not otherwise bequeathed, come to him who is next of blood, and not to executors or administrators, as chattels do—*Termes de la Ley*, 388, *Co. Lit.* 6. a, and *Co. Lit.* 16. It is obvious that the right claimed under the custom alleged is not a claim to an hereditament, and therefore not such as to exclude the jurisdiction of the county court; the rule, therefore, must be discharged, with costs.

*Rule discharged, with costs.*

(5) 3 Com. B. 243; s. c. 15 Law J. Rep. (N.S.) C.P. 231.

(6) The Court inquired if the defendant would give security for the costs of proceeding in prohibition, to which no reply was given.

(7) 6 Coke, 60.

1848. } WHITE AND OTHERS v. WOOD-  
May 3. } WARD.

*Guarantie—Promise to pay the Debt of another—Consideration—Future Supplies—Notice.*

*B. gave to A. the following memorandum in writing:—"In consideration of your agreeing to supply S. with goods upon credit (the amount to be in your discretion), I hereby guarantee you the due payment of such sum as he may now, or at any time and from time to time hereafter, owe you. My liability under this guarantee is to be limited to principal sum in running account of 100l." Declaration thereon, that confiding in B.'s said promise A. did afterwards supply S. with goods amounting to 85l.; that S, though requested, had not paid for the same, of all which B. had notice. Breach, non-payment by B. on request, of 85l.:—Held, on general demurrer, that the declaration was good, and that the guarantee disclosed a sufficient consideration for B.'s promise.*

*Assumpsit.* The declaration stated that, whereas before and during the times herein-after mentioned, the plaintiffs were and still are warehousemen and wholesale drapers; and whereas also before the commencement of this suit, to wit, &c. the defendant by a certain promise in writing, signed by the defendant and addressed to the plaintiffs, addressed and promised the plaintiffs in and by the words and figures following, that is to say: "Gentlemen,—In consideration of your agreeing to supply Mr. Henry Slater with goods upon credit in the way of your trade (the amount to be in your own discretion), I hereby guarantee you the due and regular payment of such sum or sums as he may now or at any time and from time to time hereafter owe to you, or to the persons who for the time being may comprise your firm, and against any loss you may sustain by his dealings with you, and I give you full liberty to extend the period of credit to the said Henry Slater, and to take collateral security for any monies in which the said Henry Slater may be indebted to you, and to hold over or renew any bills, notes, or other securities you may at any time hold, and to grant him and the parties liable upon bills, notes, or other securities any indulgence, and to compound, concur in

assignment, or otherwise arrange with and to release him and them respectively as you may think fit, without thereby discharging or in any manner affecting my liability by virtue of this guarantee, or entitling me to set off or claim against the sum hereby secured any dividend or payment you may receive from the said Henry Slater or his estate, or any securities you may hold. My liability under this guarantee is to be limited to principal sum in running account of 100l." And the plaintiffs aver that they, confiding in the said promise of the defendant, did afterwards and before the commencement of this suit, to wit, &c. supply the said Henry Slater with goods of great value, to wit, of the value of 85l. 10s. 9d. in the way of their said trade as aforesaid, and for certain reasonable prices and sums of money, amounting in the whole to a large sum, to wit, 85l. 10s. 9d., and although the said credit and the time for the payment of the prices of the said goods elapsed before the commencement of this suit, and although the said Henry Slater was afterwards, and before the commencement of this suit, to wit, &c. requested by the plaintiffs to pay them the said sum of money, yet the said Henry Slater did not pay the same, or any part thereof, of all which premises the defendant afterwards, and before the commencement of this suit, to wit, &c. had notice, yet the defendant has not paid the said sum of money so due from the said Henry Slater to the plaintiffs as aforesaid, being a principal sum not exceeding the said sum of 100l. in the said promise in writing of the defendant in such behalf mentioned as aforesaid, although the defendant was afterwards, and before the commencement of this suit, to wit, &c. requested by the plaintiffs so to do, but the said sum still remains unpaid to the plaintiffs, to the damage, &c.

*General demurrer and joinder.*

The points stated for argument on behalf of the defendant were, that the declaration did not disclose any consideration for the promise therein stated, and that it was not shewn that the 85l. was a sum which Henry Slater did owe at the time of the commencement of the suit on the balance of a running account.

*Pashley*, in support of the demurrer.—The declaration discloses no sufficient con-

sideration for the defendant's promise. There is no absolute agreement by the plaintiffs to supply Slater with goods. The consideration must be distinctly ascertainable from the instrument itself, and it is at least ambiguous whether the consideration for the promise was the amount already due by Slater, or goods to be afterwards supplied to him. As it was at the discretion of the plaintiffs whether they would supply him or not, they were not bound to supply him at all, and in that case the consideration was of no value, and the promise of the defendant was void—*Taylor v. Brewer* (1), *Raikes v. Todd* (2), *Bryant v. Flight* (3). The declaration is also defective, for not shewing that the defendant had notice of the supply of goods to Slater by the plaintiffs within a reasonable time after such goods were so supplied—*Cramer v. Higginson* (4).

[CRESSWELL, J.—Is such notice necessary to give the right of action? Possibly the right of action may be lost by laches in not giving reasonable notice, but in that case it is for the defendant to plead it, and shew it as matter of discharge. This is a general demurrer to the declaration; can any authority be found for saying that the plaintiff must allege such notice in his declaration?]

*Pashley* referred to *Peel v. Tatlock* (5), and *Firth v. Thrush* (6).

[CRESSWELL, J.—In cases of bills of exchange notice is necessary by the Law Merchant, but not so on a guarantie for the payment of goods by another person.]

[WILLIAMS, J.—And notice of dishonour means due notice.]

*T. Jones*, on the other side, was not called on.

WILDE, C.J.—There is no difficulty in this case. The first objection is, that there is no sufficient consideration for the defendant's promise. It is only necessary to read the instrument to answer this objection. If the defendant on the face of the document on which the action is brought avers that a consider-

ation has been given for his guarantie, is not that enough? The document is, perhaps, not in the usual form, but it is quite sufficient to support the promise: nor is there any ambiguity in it; the supposition that there is rests upon a misapprehension. The existing debt, at the date of the agreement is referred to, as well as the future advances to be made to Slater, but the consideration for the defendant's promise is the agreement of the plaintiffs to supply Slater with goods in future. As to the reasonable notice of the goods having been supplied, if such be necessary, the omission to give reasonable notice is matter of discharge, which should come by way of plea from the defendant.

COLTMAN, J. concurred.

CRESSWELL, J.—I am of the same opinion. It is said the plaintiffs ought to have refused to supply goods to Slater. But there is an averment that they did continue to supply goods to him; and in *Johnstone v. Nicholls* (7) it was held, that a somewhat similar guarantie was binding, though it referred, in fact, almost exclusively to goods already supplied.

WILLIAMS, J. concurred.

*Judgment for the plaintiffs.*

1848. }  
May 4. } HAMS v. PAWLETT.

*Venue, Change of.*

*An application to change the venue after issue joined and notice of trial given, must shew at least that the plaintiff will not be injured or delayed by the change, and that it will be more convenient to the defendant.*

In this case a rule nisi had been obtained, to change the venue from Middlesex to Cambridgeshire. The declaration was in debt; and the plea was, never indebted.

It appeared that the declaration was delivered on the 10th of March; that the defendant, after twice obtaining time to plead, being under terms to plead issuably and take short notice of trial, delivered his plea on the 29th

(1) 1 Mau. & Selw. 290.

(2) 8 Ad. & El. 846; s. c. 8 Law J. Rep. (N.S.) Q.B. 35.

(3) 5 Moo. & Wels. 114; s. c. 8 Law J. Rep. (N.S.) Exch. 189.

(4) 1 Mason (American), p. 323.

(5) 1 Bos. & Pul. 419.

(6) 8 B. & C. 387; s. c. 6 Law J. Rep. K.B. 355.

(7) 1 Com. B. 251; s. c. 14 Law J. Rep. (N.S.) C.P. 151.

of March; and that on the 12th of April the issue was delivered with notice of trial for the 26th of April.

*Sanders* shewed cause and objected that the application was made too late; that the affidavit did not deny that it was made for the purposes of delay, and that it did not state that the defendant intended to call witnesses, or that he had a good defence to the action.

*Bircham*, contra, submitted, that as it appeared the action was brought by an outgoing farming tenant against the incoming tenant of a farm in Cambridgeshire, it would be more convenient and less expensive that the cause should be tried in that county.

**WILDE, C.J.**—The defendant knew from the declaration the nature of the plaintiff's demand, and of course he knew also the nature of his own defence. He took out a summons for time to plead; but he took no steps for obtaining the common order to change the venue, till a week after he had received notice of trial. He then makes this special application, which if granted will have the effect of delaying the judgment of the plaintiff until after the next assizes. The Court ought to know from the applicant why the application was not made before, and the causes which render it desirable to have the action tried in the county to which it is sought to remove it. The affidavit shews neither of these. It may be that the defendant has only one witness whom he may intend to call, or he may not intend to call any. The plaintiff, on the other hand, may have many witnesses, and it may be more convenient for him that the cause should be tried in London. In support of an application made at such a late period, it ought to be distinctly shewn that the change will be greatly convenient to the party moving, and that it will occasion no inconvenience to the other side. This does not appear: on the contrary, the plaintiff would clearly be delayed by the proposed change.

The rest of the Court concurred.

*Rule discharged, with costs (1).*

(1) See *Notts v. Curtis*, 2 Cr. & Jer. 345.

1848. }  
May 6. } **FIELD v. SAWYER.**

*Practice—Adding Pleas—Sworn Broker.*

*After issue joined, and notice of trial, the Court allowed the defendant to add a plea, that the plaintiff was not a sworn broker of the city of London, it appearing that the trial of the cause would not be thereby delayed.*

**Assumpsit.** The declaration was delivered on the 8th of January, containing the common money counts, with particulars of demand shewing that the action was brought to recover sums paid by the plaintiff, as the broker of the defendant, upon various transactions in shares. On the 29th of January the defendant pleaded, first, non assumpsit; secondly, set-off; thirdly, that the transactions were illegal under the Stock-Jobbing Act, 7 Geo. 2. c. 8. On the 4th of February the plaintiff replied to the first and second pleas, and demurred to the third. The defendant joined in demurrer, and, on the 7th of April, the demurrer was set down for argument, and the issue delivered by the plaintiff, with notice of trial, for the 5th of May, the second sittings in Easter term. The defendant then took out a summons at chambers, to amend the third plea, and to add a further plea, that the plaintiff was not a broker duly licensed within the city of London—6 Anne, c. 16. On the 20th of April the Judge made an order, allowing the amendment of the third plea, on payment of costs, but declined to allow the additional plea. The costs of the amendment were not paid, and the plaintiff countermanded the notice of trial.

*Snow*, on the 28th of April, obtained a rule nisi, for leave to add a plea that the plaintiff was not a duly licensed broker. He cited *Huber v. Steiner* (1) and *Smith v. Dixon* (2).

*Hugh Hill* now shewed cause.—The defendant knew from the particulars the nature of the plaintiff's claim. He may have known, at the time he originally pleaded in January, the fact that the plaintiff was not a licensed broker. The delay in making this application is, therefore, inexcusable;

(1) 4 Mo. & Sc. 328.

(2) 4 Dowl. P.C. 471.

and the Court will not interfere with the discretion of the Judge who refused an application made after notice of trial, which would have the effect of delaying the plaintiff.

*Snow*, in support of the rule.—The plaintiff, having countermanded his notice of trial, will not now be delayed by the addition of the proposed plea; and even if the application might have been made earlier, this is no answer to it, if the proposed defence be one which is founded on justice, and if the plaintiff be placed in no worse position than he would have been in if such a plea had been originally on the record.

*WILDE, C.J.*—The defendant would have been entitled to what he seeks, according to the usual practice of the Court, if he had made the application originally before notice of trial was given; but he lets the time go by, and he now asks for the indulgence of the Court to be permitted to add this plea. I confess I see no reason why he should not be allowed to do so. There is nothing in the plea itself which should deprive him of the privilege. The plea is not an unjust plea, but founded upon an act of parliament passed for public purposes, and essential to the public security, in the numerous and important transactions in which it is most desirable that proper persons only should be allowed to act as agents. Then, if the plea be not against conscience, is there anything in the facts to deprive the defendant of that which would otherwise be his right? True he comes late; but "late" is a relative term, and it seems that the plaintiff having, for some other independent reason, countermanded the notice of trial, will not now be delayed by the addition of the proposed plea.

*Rule absolute, on payment of costs of the amendment of the third plea and of this application; the plea to be delivered in a week.*

1848. }  
May 12. } *MEETEN v. NICHOLLS.*

*Costs—Suggestion on the Roll—County Court—9 & 10 Vict. c. 95. ss. 128, 129—Affidavit, Negating Exceptions in.*

*In order to deprive a plaintiff of costs under the 129th section of the County Court*

*Act, the defendant must shew affirmatively that the case is not within any of the exceptions mentioned in the 128th section of that act.\**

Assumpsit by indorsee against indorser of two bills of exchange, for 11*l.* and 14*l.* respectively.

At the trial, at the last Kingston Assizes, the plaintiff had a verdict for 11*l.* The learned Judge who tried the cause did not certify that the action was fit to be brought in the superior court. Notice of taxation having been given—

*Talfourd, Serj.* (May 3,) obtained a rule *nisi* calling on the plaintiff to shew cause why he should not bring in the *postea*, in order that a suggestion might be entered on the record to deprive him of costs, under the 9 & 10 Vict. c. 95. s. 129. The affidavit on which he moved alleged that the plaintiff and the defendant dwelt within twenty miles of each other, and that the cause of action arose within the jurisdiction of the county court, within which the defendant carried on his business at the time of action brought.

*Lush* now shewed cause.—The affidavit does not allege that neither the plaintiff nor the defendant is an officer of the county court. It does not, therefore, negative the exceptions in the 128th section of the 9 & 10 Vict. c. 95, which provides, "that all actions which before the passing of this act might have been brought in any of Her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such superior court at the election of the party suing or proceeding as if this act had not been passed." The plaintiff, if an officer of the county court, may still bring his action in the superior court. Then the 129th section only operates to deprive plaintiffs of costs, if any action be brought in the

\* See *Nind v. Rhodes, ante, Q.B. 179.*

superior court "for any cause other than those lastly hereinbefore (in the 128th section) specified." The 129th section, therefore, does not apply to the present case.

The Court called on—

*Talfourd, Serj.*, to support the rule.—The 128th section applies to particular kinds of actions, and also to actions by or against particular persons, viz., the officers of the county court. The first question is, whether the words in the 129th section, "where the action is commenced for any cause other than those previously specified," refer, not only to the causes, but to the persons mentioned in the 128th section. But even if they do, this is matter of proviso and exception, which must come from the other side. It is sufficient for the defendant to shew affirmatively in the first instance, that the case is within the jurisdiction of the county court, within the 58th section of the statute.

*WILDE, C.J.*—No: you say the rights of the plaintiff to sue in the superior court are taken away: you must shew this affirmatively. Your affidavit does negative some of the exceptions of the 128th section, for you have affirmed that the plaintiff lives within twenty miles of the defendant, and that the cause of action arose within the jurisdiction of the court in which the defendant dwells. You are equally bound to shew that he is not an officer of the county court: otherwise, his right to sue in the superior court is not excluded.

*COLTMAN, J.*—The point has, I believe, never been raised before; but I think the exceptions of the 128th section must all be negatived, before the penalty imposed by the 129th section in all other cases can be insisted on.

*CRESSWELL, J.*—The 128th section is not a proviso. It excepts from the obligation to sue in the county court certain cases. Then the 129th section says, in all cases but those so excepted you must sue in the county court, or run the risk of losing costs. The defendant must shew that this is not one of the excepted cases.

*WILLIAMS, J.*—He must not only shew it by his affidavit, but so must the suggestion on the record. Otherwise, there would be error on the record.

*Rule discharged, with costs.*

1847. }  
Jan. 29; } RIZZI v. FOLETTI.  
May 12. }

*Judgment, as in Case of Nonsuit—Peremptory Undertaking to try.*

*A rule nisi for judgment as in case of a nonsuit was discharged in Michaelmas term upon the plaintiff's giving a peremptory undertaking to try at the sittings after that term. The plaintiff entered the cause for those sittings; but it was not reached in the course of business, and was made a remanet. On the fifth day of Hilary term, the defendant obtained a rule absolute for judgment as in case of a nonsuit. On application to set the rule aside,—Held, that a peremptory undertaking to try is not an engagement to try at all events: a bonâ fide attempt to fulfil the undertaking is a compliance therewith.*

On the 19th of November 1847, the defendant obtained a rule nisi for judgment in this cause as in case of a nonsuit, which was discharged on the 24th of November 1847, upon the plaintiff's giving a peremptory undertaking to try, at the adjourned sittings after Michaelmas term, 1847, pursuant to the notice of trial that had been then given by the plaintiff.

The plaintiff, on the 23rd of November, gave notice of trial for the adjourned sittings for London after Michaelmas term, and entered the record for trial at those sittings on the 2nd of December (the last day for entering causes being the 7th of December). The Court did not arrive at the cause in the course of business; and on the 17th of January 1848, the defendant obtained a rule for judgment as in case of a nonsuit (which is absolute in the first instance).

On the 19th of January,

*Bramwell* obtained a rule nisi to discharge the rule of the 17th of January, obtained by the defendant, and to enlarge the plaintiff's peremptory undertaking.

*Charnock* (Jan. 29,) shewed cause.—The defendant was regular in his application on the 17th of January; the plaintiff ought to have asked the Court to enlarge the peremptory undertaking within the first four days of the term. A peremptory undertaking, as the name imports, is an undertaking to try

at all events—*Ward v. Turner* (1). The judgment of this Court, in *Petrie v. Cullen* (2), wherein the statute 14 Geo. 2. c. 6. s. 1. and the terms of the peremptory undertaking were very fully considered, is a direct authority for the course pursued by this defendant. *Lumley v. Dubourg* (3) is not consistent with the decision in *Petrie v. Cullen*; and in *Rogers v. Vandercom* (4) the Bail Court adopted the construction of the statute given by this Court.

*Bramwell*, in support of the rule.—In *Rogers v. Vandercom* the question turned upon the absence of a material witness; the delay here complained of was the act of the Court. *Lumley v. Dubourg* is to be supported rather than the decision of this Court in *Petrie v. Cullen*.

[MAULE, J.—I perceive that in giving judgment in *Lumley v. Dubourg* the words of the statute are chiefly referred to; the terms of the peremptory undertaking itself were not much considered.]

In *Petrie v. Cullen* the terms of the statute were not much considered, and the form of the peremptory undertaking seems there to have had undue weight on the mind of the Court. It is submitted that looking at the statute and the terms of the undertaking, the true meaning is this: the plaintiff is to take all necessary steps to try at the sittings named in the undertaking; and if the cause is not reached at those sittings, then he is to try as soon after as possible. If the Court does not arrive at the cause, there is no default or neglect on the part of the plaintiff; if his witnesses are ill, or he omits to take a step he ought to have done, either of such matters might be considered within his controul to such an extent as to oblige him to apply to the Court to enlarge his undertaking.

[MAULE, J.—The Courts always grant a rule on affidavits that the party giving the peremptory undertaking did not proceed to trial.]

Yes; but here the plaintiff has proceeded as far as he could; therefore it is not true to say the plaintiff did not proceed to trial.

(1) 5 Dowl. P.C. 22.

(2) 2 Dowl. & L. P.C. 604; s. c. 14 Law J. Rep. (N.S.) C.P. 29.

(3) 14 Mee. & Wels. 295; s. c. 14 Law J. Rep. (N.S.) Exch. 334.

(4) 5 Dowl. & L. P.C. 104; s. c. 15 Law J. Rep. (N.S.) Q.B. 313.

Those words mean the plaintiff is to do everything he can to proceed towards the trial of the cause.

[WILLIAMS, J.—In *Tidd's Practical Forms*, p. 266, the affidavit for judgment states "that the plaintiff peremptorily undertook to bring on the said cause to be tried," &c. "and that the plaintiff hath not proceeded to the trial of the said issue in pursuance of his said undertaking"; therefore, according to *Tidd*, it seems, "to proceed" means the same thing as "to bring on."]

It is submitted that the use of different words rather shews that a different meaning is to be attributed to them. The intention of discharging the rule for judgment on a peremptory undertaking is to give the plaintiff further time to try the cause; but no further time is in truth given if it be coupled with a condition impossible to be performed. It was here impossible to try, as the cause was not reached in its order; and therefore this rule should be made absolute.

*Cur. adv. vult.*

The judgment of the Court was now (May 12) delivered by—

CRESWELL, J.—This is a case respecting the practice of the Court in cases where rules for judgment as in case of nonsuit have been discharged on peremptory undertakings. In this case, in Michaelmas term last, a rule for judgment as in case of a nonsuit was discharged on a peremptory undertaking to proceed to the trial of the cause at the adjourned sittings after that term. It appears that the plaintiff duly entered his cause, and did what he could, *bond fide*, to proceed to trial at the time fixed, but in the course of business the Court did not arrive at that cause. In the first five days of Hilary term the defendant came and moved for a rule for judgment as in the case of a nonsuit, in the ordinary way, for not proceeding to trial pursuant to a peremptory undertaking, which, of course, is absolute in the first instance. Afterwards, application was made to set that judgment aside as irregular. The application to set it aside was founded upon a case of *Lumley v. Dubourg*: the application was resisted on the authority of the case in this court of *Petrie v. Cullen*. It appeared in that case that the party had

given a peremptory undertaking to go to trial, and according to the opinion of the late Lord Chief Justice, upon the facts of the case appearing upon affidavit, had not made a *bonâ fide* attempt to fulfil that undertaking, and therefore it was held, that the party was entitled to a rule absolute for judgment as in case of a nonsuit. My Brother Maule went further in that case, and expressed an opinion that when a party undertakes to go to trial at a particular time, it is an absolute undertaking, and he is responsible if he is not able to perform it, and can only protect himself against a rule absolute for judgment as in case of a nonsuit by coming to enlarge his peremptory undertaking. The case in the Exchequer was after that decision; and after communicating with the late Lord Chief Justice of this Court, the Court of Exchequer came to the determination that it was not necessary for the party to enlarge his peremptory undertaking, that he had done enough if he had set the case down for trial, *bonâ fide* attempting to bring it on for trial. We have therefore communicated with the Judges in the other courts, in order that there might be uniformity of practice in this particular, and we all think the case of *Lumley v. Dubourg* should be adhered to, that the rule there laid down will be the proper rule in similar cases for the future, and the rule in the present instance for setting aside the judgment will, therefore, be absolute; but inasmuch as the parties proceeded in conformity with what they had grounds for thinking was the decision of this Court, we think the rule should be absolute without costs.

*Rule absolute, without costs.*

1848. }  
 April 17. } BATTY v. MARRIOTT.

*Gaming—8 & 9 Vict. c. 109.—Foot-race.*

*Since the passing of the 8 & 9 Vict. c. 109. a foot-race is a lawful exercise.*

*Two persons deposited 10l. each with a stakeholder, to abide the event of a foot-race to be run between them:—Held, that the money deposited was "a subscription" for a sum of money to be awarded to the winner of "a lawful game," within the 8 & 9 Vict. c. 109. s. 18.*

*Assumpsit.* The declaration stated that the defendant was indebted to the plaintiff in 10l. for money had and received, to the use of the plaintiff, and in 10l. on an account stated.

*Plea—Non assumpsit.*

The cause was tried, on the 29th of June 1847, before the assessor of the sheriff of Yorkshire, when it appeared that the plaintiff and one Askey agreed to run a foot-race for 20l., and each of them deposited 10l. with the defendant to abide the event. The race was run, and Askey was declared the winner. The decision was disputed, and the plaintiff gave notice to the defendant not to pay over the stakes to Askey, and demanded back his own deposit, who, notwithstanding such demand, paid over the money to Askey. A verdict was found for the plaintiff for 10l., leave being reserved for the defendant to move to enter a nonsuit. A rule accordingly had been obtained on the ground that as the money was deposited with the defendant to abide the event of a legal game, the contract was a legal contract, and within the proviso of the 18th clause of the 8 & 9 Vict. c. 109 (1).

*Ogle* now shewed cause.—The plaintiff claimed his stake before the defendant paid it over, and he is therefore entitled to recover it back. It is not contended that the plaintiff is entitled as a winner, but on the ground that as the wager was illegal, the contract can be repudiated at any time before the money is paid over. A foot-race is an illegal game by the combined operation of the statutes 16 Car. 2. c. 74. s. 2. and the 9 Anne, c. 14. ss. 1, 2. *Goodburn v. Marley* (2) and *Lynall v. Longbottom* (3)

(1) Which enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

(2) 2 Stra. 1159.

(3) 2 Wils. 36.



decide that a foot-race for more than 10*l.* is an illegal game. *Hastelow v. Jackson* (4) shews that money deposited with a stakeholder to abide the event of an illegal game can be recovered at any time before the stakes have been paid over, whether the event has been decided or not. Such was the law before the recent statute, 8 & 9 Vict. c. 109. It is contended on the other side, that the 15th section of that act repeals the statute of Anne, and that the race was a legal game, protected by the proviso at the end of the 18th section of the 8 & 9 Vict. c. 109. But the statute of Anne, so far as it prohibits unlawful gaming, is not repealed by the 15th section of the 8 & 9 Vict. c. 109, by which only so much of an act passed in the ninth year of the reign of Queen Anne, intitled, &c. as was not altered by the 5 & 6 Will. 4. c. 9. shall be repealed. That enactment does not annihilate the 1st and 2nd sections of the 9 Anne, c. 14, but repeals only the 5th section of that statute. Then, as the proviso at the end of the 18th clause of the 8 & 9 Vict. c. 109. excepts only *lawful games* from the operation of the former part of the section, and the 2nd section of the 9 Anne, c. 14, which allows an action to be brought for money lost at gaming, is still in force, the plaintiff is entitled to recover.

*Hugh Hill*, in support of the rule.—The race was a legal game, protected by the proviso of the 18th section of the 8 & 9 Vict. c. 109. Askey was declared the winner, and the defendant performed his duty by paying over the stakes to him. A foot-race is not illegal by the common law, nor is it illegal by statute. It never was by any statute *by itself* illegal, and is only mentioned by name in the 2nd section of 16 Car. 2. c. 7, which prohibits the recovery of money won at a foot-race *by cheating*. The 2nd section of the 9 Anne, c. 14. makes a foot-race or any other game illegal, if any person concerned in it loses the sum of 10*l.*, and so a cricket match for 20*l.* a side was held illegal—*Hodson v. Terrill* (5). The 1st section of the same statute

makes all notes, bills, and other securities given for money lost at play absolutely void; that is partially repealed by 5 & 6 Will. 4. c. 41. s. 1, which enacts that the notes, bills, and securities mentioned in the statute of Anne are not to be deemed void, but shall be taken as having been given or executed for an illegal consideration, whilst by section 2. of the statute of Will. 4. money paid on account of such bills, &c. may be recovered from parties to whom such bills were originally given. Then comes the late statute, 8 & 9 Vict. c. 109, the 15th section of which repeals the stat. 16 Car. 2. c. 7. and the whole of the stat. of Anne, except such part of it as is maintained in its altered state by the 5 & 6 Will. 4. c. 41. The 8 & 9 Vict. c. 109. contemplates two objects: the first, is to restrain and put an end to improper gaming; the second, to encourage all games of skill, and to allow bets on them; and those objects are attained by the 18th section of the statute. Parties are not restrained by that statute from playing at illegal games, but are restrained from betting, and from recovering money won upon any such games. The sole question here is, is this contract within the proviso at the end of the 18th section? That proviso means that whenever the money subscribed is to be paid to the winner of a lawful game, the contract is legal.

[CRESSWELL, J.—Suppose a cricket match where there are eleven persons on each side, and one on each side were to agree to pay the other 100*l.* on the event.]

Possibly such a contract would not be protected, as the money could scarcely be said to be subscribed to be paid to the winner or winners within the words of the proviso. If ten persons were to subscribe a sum of money to be paid to the winner of a foot-race, such a contract would be perfectly legal. It can make no difference if two only subscribe instead of ten, and it is equally within the proviso though the parties contesting the race are the parties who subscribe the money to be paid to the winner. The distinction between the cases where the money is to be paid to the winner of the race or to the winner of a wager is recognized in *Clayton v. Jennings* (6), *Écran*

(4) 8 B. & C. 221; s. c. 6 Law J. Rep. K.B. 318.

(5) 1 Cr. & M. 797; s. c. 2 Law J. Rep. (N.S.) Exch. 282.

(6) 2 W. Black. 706.

*v. Pratt* (7), *Challand v. Bray* (8). In *Applegarth v. Colley* (9) the money subscribed was under 10*l.*, and therefore could not be recovered. *Emery v. Richards* (10) decides that a foot-race for a sum under 10*l.* is perfectly legal. The words of the proviso in the 18th section are sufficient to protect all cases, where the money subscribed or agreed to be subscribed is to be paid to the winner of the race. The decision in *Bentinck v. Connop* (11) turned upon the fact of the wagering being on ticket or credit, and that was one of the chief reasons which gave rise to the statute of Victoria.

[CRESSWELL, J.—What do you say to the second horse saving his stake?]

Probably the second horse not being a winner the owner could not recover anything.

[WILDE, C.J.—Why is he not a winner as well as the first, according to the rules of the race?]

[COLTMAN, J.—Suppose the party, instead of paying the money, gave a promissory note for the amount of the stakes, could the winner of the race recover upon it, regard being had to the statute of Anne?]

Probably that statute is not so far repealed, and the winner could not recover upon the note so received by him.

WILDE, C.J.—Considering the subject-matter of this act, under which many cases of complication and difficulty must arise, the only rule which can be adopted in its construction appears to be this—what are the plain words of the statute? If a case seems to be brought within the provisions of any particular part of the statute, and there is nothing in the act repugnant to the operation of the words contended for in the particular case, I am satisfied with giving effect to those words in each case as it arises before us. In this case the first question to be decided is—is a foot-race a lawful game? The statute of Anne which made

it unlawful is repealed so far as regards that question, though it may be that act is still in force so far as it renders of no value certain securities given by way of gaming. The next question is—what is the effect of the 18th section of the 8 & 9 Vict. c. 109. controuled as that section is by the proviso at its conclusion? It seems under that proviso that if ten or twelve persons subscribed to a fund, which fund was to be awarded to the winner or winners of a lawful game, such winner might recover the money. In this case there are only two persons who have subscribed to a fund, which is to be paid over to the winner of a race, and the two parties subscribing are the parties engaged in the race. As the race is not an illegal game, and the money subscribed is confined to these two parties, a question arises, whether that is not in effect a wager, and therefore within the enactment of the 18th section, which enacts that no suit shall be maintained in any court for any sum of money alleged to be won upon any wager. There is an apparent difficulty in saying that the case upon this state of facts does not come within the mischief, and is not the sort of gaming, intended to be prohibited by the 18th section of the act, and in holding (as the money is to be paid to the winner of a lawful game) that the proviso at the end takes the case out of the operation of the first part of the section. At the same time, in construing this act of parliament, one must consider the circumstances which were passing in the world at the time the act passed, the position of the members of the legislature who passed it, and the kind of gaming it was particularly intended to except from the operation of the act. Many of those members engaged in the sport of horse-racing, a great part of which consists in running match races, where one person runs his horse against the horse of another for a sum of money deposited by each party, the whole of which sum the owner of the winning horse is entitled to receive. Clearly such matches were not intended to be prohibited by this act of parliament, and are within the direct terms of this proviso. In what respect does the present differ from a match race? The proviso is confined to the protection of subscriptions where the whole sum subscribed is to be awarded to the winner of a lawful game; and it seems

(7) 3 Man. & Gr. 759; a.c. 11 Law J. Rep. (N.S.) C.P. 87.

(8) 1 Dowl. P.C. (N.S.) 783; s.c. 11 Law J. Rep. (N.S.) Q.B. 204.

(9) 10 Mee. & Wels. 725; s.c. 12 Law J. Rep. (N.S.) Exch. 34.

(10) 14 Ibid. 728; s.c. 15 Law J. Rep. (N.S.) Exch. 49.

(11) 5 Q.B. Rep. 693; s.c. 13 Law J. Rep. (N.S.) Q.B. 125.

to me that this subscription is lawful, the foot-race a lawful game, and the case directly protected by the proviso. As, therefore, the plaintiff has subscribed his money on a legal contract, he is not at liberty to rescind such contract at any time he pleases. That money is to be awarded to the winner of a legal race, and if a proper tribunal had not been specially pointed out to decide who is the winner, the law must have decided it. The plaintiff says, "I can withdraw from the contract at any time,"—the answer is, "The contract is legal and you cannot." This would be the case even if the event was not decided, but here it has been decided; and if there be any distinction in the two cases, that distinction is against the present plaintiff. I am of opinion that a nonsuit must be entered.

COLTMAN, J.—I am of the same opinion. A foot-race is a lawful game at common law, and if it were made unlawful by the statutes of Charles and Anne, those statutes are now so far repealed. It does not materially affect the present case, but it seems a strange anomaly that a party entitled as the winner of stakes subscribed to abide the event of a legal game may recover the money in an action, whilst by the joint operation of the statutes 9 Anne, c. 14. and 5 & 6 Will. 4. c. 41. such winner could not recover on a promissory note given for the amount of the money, because the consideration for that security is illegal. This case falls within the distinct terms of the enactment of the 18th section of the 8 & 9 Vict. c. 109, as the circumstances of it may fairly be called a wager, and would therefore be null and void but for the proviso at the end of that section. That proviso is clearly intended to except from the operation of the clause, and to protect some contracts by way of gaming which would otherwise have been affected by it. The number of contributors is not limited by the proviso, nor does it say whether the parties subscribing are to be engaged in the game or not. If forty or fifty persons were to subscribe to a sweepstakes, and the whole of the sum so subscribed were to be paid to the winner of the race, such a subscription was in the contemplation of the parties who framed the proviso; and it does not seem to me that the case is different when only two parties make the subscription, and the same

two parties are engaged in the race, if the sum subscribed is to be paid over to whichever shall be declared the winner. It is true that this case is very like a wager, and probably one not intended to be legalized, and I cannot help being staggered at the extent to which this decision appears to authorize gambling. We must, however, interpret the words of this statute according to their plain meaning; and if the act of the legislature causes inconvenience, by the legislature it must be remedied.

CRESSWELL, J.—I am of the same opinion. This case rests upon the common law and the statute 8 & 9 Vict. c. 109. By the common law a foot-race is a legal game, and the statutes of 16 Car. 2. c. 7. and 9 Anne, c. 14. are repealed so far as they apply to this part of the case. The 18th section of the 8 & 9 Vict. c. 109. is the only clause which we need here consider, and that contains a proviso which protects some things which would otherwise be prohibited by the former part of the section; some things which might fairly be taken as included in the clause or the proviso would have been altogether nugatory. It appears to me to protect cases such as where parties engaged in a lawful game or sport subscribe together certain sums, the whole of which is to be paid over to the party who proves the winner in such game or sport. It is to be observed, that there is in the act no limit whatever to the number of persons who may subscribe, and it is only by implication that you can limit the number at all. First, suppose only two persons subscribe, still that is a subscription, and if the object be that the winner of a lawful game is to receive the sum subscribed by them, that would be protected by the proviso. Suppose the money here subscribed were laid out in the purchase of a cup, this would then have been a subscription towards a plate or prize, and the party who was the winner would be entitled to have the cup awarded to him; but the words "sum or sums of money" are expressed in the proviso, and the winner is therefore equally entitled to that also. The race being a lawful game, and the sum of money subscribed being to be paid to the winner of it, I am of opinion that the transaction is within the proviso, and the contract is a legal contract which the plaintiff could not set aside. The rule, there-

fore, to enter a nonsuit must be made absolute.

WILLIAMS, J.—The rule must be made absolute. The money demanded in this action is sought to be recovered on account of the illegality of the contract entered into by the plaintiff. Whether it be legal or illegal depends upon the 18th section of the 8 & 9 Vict. c. 109. I agree that the statutes of Charles and Anne in so far as they might have affected the legality of a foot-race are repealed, and then we must consider, first, is a foot-race a lawful sport or exercise? I am of opinion that it is. Next, is the money sought to be recovered subscribed in order to be paid over to the winner? There can be no doubt that it is. This transaction, therefore, is within the proviso at the end of the 18th section. The contract into which the plaintiff entered being therefore a legal contract, he is not at liberty to repudiate it, and at the trial he should have been nonsuited.

*Rule absolute to enter a nonsuit.*

1848. }  
April 17, 19. } SMITH v. DEARLOVE.

*Lien—Innkeeper—Trover.*

*An innkeeper received the carriage and horses of a person not residing at his inn. Whilst they were in his possession the owner took refreshments occasionally at the inn, and a friend of his resided there for some time at the owner's credit, and by his direction:—Held, that the innkeeper had no lien upon the carriage, &c. for the amount of his bill, which included charges for the keep of the horses, the standing of the carriage, and refreshments for the owner and his friend.*

*Trover for a carriage and harness.*

Pleas, first, not guilty; second, that the plaintiff was not possessed, &c. Issues on both pleas.

The case was tried, before Alderson, B., at the last assizes for Yorkshire, when it appeared that the defendant was the landlord of the Queen's Hotel, Harrogate. In September 1847 the plaintiff sent his carriage and horses to the defendant's hotel. He occasionally called and had refreshment there, and for some days in the

months of October and November a friend of the plaintiff's resided at the hotel on the credit and by the direction of the plaintiff. The plaintiff took away the horses, and on the 11th of December 1847 demanded the carriage and harness, which the defendant refused to deliver until his bill was paid for the food supplied to the horses, for the standing of the carriage, and for the refreshment and maintenance of the plaintiff and his friend. These facts having been proved, the defendant's counsel submitted that the plaintiff should be nonsuited, on the ground that as there was a bill due to the defendant in respect of which no tender had been made he was entitled to a lien upon the carriage and harness at any rate for some amount, and was therefore justified in retaining possession.

The learned Judge directed a verdict for the plaintiff, and reserved leave to the defendant to move to enter a nonsuit.

Baines (April 17,) moved accordingly.—If the defendant can establish a lien for any portion of his bill the plaintiff should have been nonsuited; and it is submitted that it is clear that, at all events, the charge for the standing and care bestowed upon the carriage should have been paid before it was removed. The right of the defendant to his lien depends upon the character of the plaintiff when the debt accrued. If he was (in contemplation of law) a guest at the hotel when the debt, or any part of it, was incurred, then for the debt, or such portion of it as was incurred as a guest, the defendant's right to a lien arises. To become a guest it is not necessary that the party should lodge at the inn. "If a man set his horse at an inn, though he lodge in another place, that makes him a guest"—*Yorke v. Grenaugh* (1). This case is much stronger, for here the defendant had refreshments for himself as well as keep, &c. for his horses. *Bennett v. Mellor* (2) shews, that a person who goes to an inn for casual refreshment is in contemplation of law a guest. The fact of the plaintiff's friend living entirely at the hotel on the plaintiff's credit, and by his directions, is the same thing as if he had lived there himself; and if that be so the plaintiff was a guest.

[WILLIAMS, J.—The principle of lien is

(1) 2 Ld. Raym. 866; s. c. 1 Salk. 388.

(2) 5 Term Rep. 273.

this: an innkeeper is bound to receive a traveller and his goods, and may therefore retain the goods for his indemnity. Was the defendant in this case bound to receive the plaintiff's friend, and could he thus gain a lien upon the plaintiff's goods?]

[WILDE, C.J.—It may be that the defendant received the carriage and horses, in the first instance, to stand at livery, and if so no lien attaches (3). Would it attach if the plaintiff afterwards became a guest?]

*Cur. adv. vult.*

The judgment of the Court was now (April 19) delivered by—

WILDE, C.J.—This was an action of trover to recover damages for the unlawful conversion of a carriage and harness. The ground upon which the rule was moved was, that the legal result of the evidence at the trial established a right of lien in the defendant in his character of innkeeper, in respect of a debt incurred by the plaintiff for two horses, and the standing of a carriage, and for a tavern bill for refreshments supplied to the plaintiff and his friend, or to one of them. Upon consulting my Brother Alderson, before whom the cause was tried, we find the facts proved were that the carriage and harness were not received by the defendant in his character of innkeeper and as belonging to any guest residing at his inn; that the plaintiff did not become a guest at the inn, nor was any refreshment supplied to him till after the reception of the carriage; and that the refreshment so supplied was irrespective of the contract on which credit was had in the first instance. It likewise appeared that the friend who was entertained at the inn on the plaintiff's credit also became a guest after the reception of the carriage, and upon a different contract. The right of lien depends upon the fact that the articles detained came into the defendant's possession in the character of innkeeper as belonging to a guest at his inn. It was here proved that the articles were received wholly irrespective of the character of innkeeper, and we think there is no ground for disturbing the verdict.

*Rule refused.*

(3) See *Parsons v. Gingell*, 16 Law J. Rep. (N.S.) C.P. 227.

1848. }  
May 3, 12. } DOE d. DUNTZE v. DUNTZE.

*Practice—Special Case—3 & 4 Will. 4. c. 42. s. 25.*

*The Court refused to give judgment in a special case stated for the opinion of the Court, under the 3 & 4 Will. 4. c. 42. s. 25, it appearing that the action was not bona fide brought to try a question really in contest between the parties to the cause.*

This was an action of ejectment, which, by consent and by order of a Judge, under the 3 & 4 Will. 4. c. 42. s. 25, had been turned into a special case. The question raised thereby for the opinion of the Court was, whether an estate, of which A. B. was mortgagee in fee, had passed by his will. The lessor of the plaintiff was the heir-at-law of A. B., and it was contended, by his counsel, that the estate did pass by the will. The declaration contained no demise by the devisee under the will, nor did it appear from the special case in what way the defendant was interested in the question stated for the opinion of the Court.

The case was argued on the 3rd of May by—

*Henderson*, for the lessor of the plaintiff, and—

*Greenwood*, for the defendant.

During the argument the Court intimated their suspicion that the action had not been brought to determine a matter really in dispute between the parties, inasmuch as it did not appear how or by what claim the defendant was in possession of the premises, and the declaration contained no count on a demise by the devisee of A. B., who would be the party really entitled to the property, if the argument for the lessor of the plaintiff were correct. The Court stated that before giving judgment they should require an affidavit satisfying them that the action was brought really to try a disputed right of possession to the premises.

An affidavit was subsequently furnished to the Court; and now (May 12)—

WILDE, C.J. said—In this case we have read the affidavit, and it confirms the impression the Court had on reading the case and hearing the argument. Some doubt is

entertained as to the construction of the will, and without any real contest, or without any view of recovering the possession, an ejectment has been brought, merely for the purpose of making it the foundation of a case whereon to ask the opinion of the Court. The affidavit satisfies us that this is merely a mode of asking the Court to give an opinion upon a matter not in dispute in the cause, but upon which the parties desire information. If the Court could entertain the question as it is now brought before it, every doubt upon a marriage settlement, and every doubt upon the construction of a will, might be brought before us (long before any question arose, and probably when no question ever would arise), by merely adopting the machinery of an action of ejectment, and by agreement. We therefore do not think ourselves authorized (with a view to the general interests of the suitors of the Court, and that the time of the Court may not be occupied on such speculative questions) to proceed to any judgment. The action is not really brought to try a right. There is no statement that it is brought with a view of recovering possession of the premises. The inference from the facts appears to be, that the defendant on the record has been put into possession for the purpose of making him tenant upon whom to found the ejectment.

*Judgment refused.*

1848. }  
May 8. } MATTHEW v. BROUGHALL.

*Costs—Suggestion on the Roll—County Court—9 & 10 Vict. c. 95. ss. 60, 128.*

*In order to deprive a plaintiff of costs under the 129th section of the Small Debts Act (9 & 10 Vict. c. 95), the defendant must shew that he dwelt or carried on his business at the time of the action brought, within the jurisdiction of the county court. It is not sufficient to shew that the cause of action arose within the jurisdiction of the court.*

Debt for goods sold and delivered.

At the trial, before the sheriff of Middlesex, the plaintiff had a verdict for 16*l.*

Judgment having been signed, and execution issued for the debt and costs,—

*Byles, Serj.* (April 17) obtained a rule calling on the plaintiff to shew cause why the judgment and execution should not be set aside for irregularity, and why the judgment should not be entered up for the debt only, without costs, or why the defendant should not be at liberty to enter a suggestion on the record to deprive the plaintiff of costs. The affidavit on which the rule was obtained stated, that the plaintiff was a butcher, carrying on business in the city of London, within twenty miles of the place where the defendant lives and carries on his business; that the defendant resides and carries on his business in High Street, in the parish of Marylebone, in the county of Middlesex, and that the cause of action arose within the jurisdiction of the county court of Middlesex.

*Gaselee, Serj.* shewed cause.—The affidavit is defective in two respects. First, it does not shew that the defendant resided and carried on his business within the jurisdiction of the Middlesex county court, “at the time of the action brought.” This ought to be distinctly shewn—*Thorne v. Jackson* (1). It is consistent with this affidavit that he may have come to live there after the action was brought. The plaintiff, therefore, may have been entitled to sue in the superior court, the case being within the second exception of the 128th section of the Small Debts Act, 9 & 10 Vict. c. 95. Secondly, for aught that appears on the affidavit, the defendant may be an officer of the Middlesex county court, and therefore within the third exception in the same section (2).

*Byles, Serj.* contra.—The defendant has brought the case within the 60th section, which enacts, that where the sum claimed is not more than 20*l.*, the summons may issue—first, in any district in which the defendant shall dwell or carry on business at the time of action brought; or, secondly, by leave of the Court, in the district in which the defendant shall have dwelt or carried on his business at some time within six months next before the time of the action brought; or, thirdly, in the district

(1) 3 Com. B. 661; s. c. 16 Law J. Rep. (N.S.) C.P. 87.

(2) See *Meeten v. Nicholls*, ante, p. 212.

in which the cause of action arose. The case is within the third branch of this section. The affidavit here shews that the cause of action arose within the jurisdiction of the county court of Middlesex.

[CRESSWELL, J.—The 60th section is in the alternative. The latter part of it only gives power to issue the summons, in the cases there mentioned, "by leave of the Court." And the reason is, because, in the two cases mentioned in the latter part of the section, the party is not within the jurisdiction of the Court at the time.]

WILDE, C.J.—In order to deprive the plaintiff of costs, you must certainly shew that the defendant resided or carried on his business within the jurisdiction of the Court at the time of action brought. The plaintiff would not be bound to apply to the court of the district in which the cause of action arose for leave to issue summons there. The affidavit does not negative the exceptions of the 128th section.

*Rule discharged, with costs.*

1848. } *In the matter of LOWLESS*  
May 11, 12. } *AND SON.*

*Attorney and Solicitor—Bill of Costs—Taxation—Undertaking to pay—Entry of Judgment—6 & 7 Vict. c. 73. s. 43.*

*An attorney's bill of costs was, by Judge's order, on the application of the client, and by consent, referred to taxation. The order contained no undertaking by the client to pay, nor any direction to him to pay what should be found due on taxation, and was made without prejudice to the client disputing the retainer. By agreement between the parties, the question of retainer was submitted to the Master, who decided that it was made out to his satisfaction, and made his allocatur in the usual form, "Allowed, R."—Held, that the order, and the allocatur in pursuance thereof, authorized the Court to order judgment to be entered up, under the 6 & 7 Vict. c. 73. s. 43, for the amount as "certified to be due and directed to be paid."*

In this case a rule nisi had been obtained, calling on Mr. Isaac Aflalo to shew cause why final judgment should not

be signed and entered up, for Messrs. Lowless & Son, against him, for the sum of 834l., the amount of the Master's allocatur, or for the sum of 88l. 2s. 6d., a portion of the same, or why Aflalo should not pay to Lowless & Son the said sum of 834l., or 88l. 2s. 6d., or why an order of Tindal, C.J., dated August 2, 1845, and the rule thereon made, should not respectively be amended.

It appeared from the affidavits in support of the application, that Lowless & Son had been employed by Aflalo, as his attorneys, to conduct the defence of the action of *Phillips v. Aflalo* (1), and also as his solicitors in a Chancery suit, *Mantzqui v. the St. Katherine Dock Company*, in which Mantzqui was the nominal plaintiff only, on behalf and for the benefit of Aflalo. Upon the 25th of June 1845, Cresswell, J., on the application of Aflalo, made an order, at chambers, that Lowless & Son should, within a fortnight, deliver to Hill & Matthews (who had then become the attorneys of Aflalo,) a bill of costs in *Phillips v. Aflalo*, and in all other causes and matters wherein they had been concerned for Aflalo. A similar order was made on the same day, also on the application of Aflalo, in the suit of *Mantzqui v. the St. Katherine Dock Company*. Lowless & Son delivered their bill of costs, accordingly, to Hill & Matthews, including therein their charges in *Mantzqui v. the St. Katherine Dock Company*. On the 2nd of August 1845, Hill & Matthews, as attorneys for Aflalo, applied for, and obtained, an order for referring the said bill to taxation. The order was as follows:—

"In the matter of Lowless & Son.—*Phillips v. Aflalo*. Upon hearing, &c., and by consent, I do order that the bill of costs delivered by Messrs. Lowless & Son, &c., be referred to the Master, to be taxed, without prejudice to the defendant disputing the retainer; that the Master tax the costs of such reference, and certify what may, upon such reference, be found due to or from either party in respect of such bill and demand, and the costs of such reference, to be paid according to the event of such taxation, according to the statute; and that Messrs. Lowless & Son be restrained from commencing or prosecuting any action or

(1) 4 Man. & Gr. 848; s. c. 12 Law J. Rep. (5A) C.P. 49.

suit touching their demand pending such reference. N. C. Tindal."

This order, it will be seen, contained no clause directing the defendant to pay what might be found due on such taxation, nor any undertaking by him so to do. On the reference before the Master, the defendant disputed the retainer of Messrs. Lowless & Son as to a part of the proceedings at law; but, after hearing both parties, the Master decided that the retainer was made out to his satisfaction. The Master then, at the instance of the defendant's attornies, and with the consent of Lowless & Son, referred it to one of the Masters in Chancery to tax the costs of the proceedings in Chancery, and also "to settle the point of retainer as to the Chancery costs." The Master in Chancery commenced the taxation of the Chancery costs, "without prejudice to the question of retainer;" and, subsequently, after a lengthened inquiry into the question of retainer, which was attended by counsel on both sides, decided that the retainer was made out, and certified accordingly. Upon the receipt of this certificate, the Master in the Common Pleas proceeded to complete the taxation, and finally made his allocatur as follows:—

Bill of costs . . . .	£1,319	4	5	
Deducted on taxation . . . .	177	14	5	
	<u>£1,141</u>	10	0	
<i>Costs of Taxation.</i>				
In Chancery . . . .	£73	16	7	
In Common Pleas . . . .	14	5	11	
	<u>          </u>	<u>88</u>	<u>2</u> 6	
		1,229	12	6
Received on account . . . .		395	12	6
		<u>          </u>		
Balance due to Lowless & Son . . . .	£834	0	0	
Allowed, Ray.				

The order of the 2nd of August 1845 had been made a rule of court, and payment of the amount of the allocatur demanded and refused by Aflalo. The affidavits in opposition to the rule alleged that Aflalo had never abandoned his right to dispute the retainer of Lowless & Son, and was still desirous of disputing it.

Channell, Serj., S. Miller, and Huddleston shewed cause (May 11).—This is an application under the 43rd section of the 6 & 7 Vict. c. 73, which enacts that, "upon the taxation and settlement of any such bill (*i. e.* bills referred to taxation under the 37th section), the certificate of the officer

by whom such bill shall be taxed shall (unless set aside, or altered by order, decree, or rule of court) be final and conclusive as to the amount thereof; and payment of the amount certified to be due and directed to be paid may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such Court or any Judge thereof to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon, as such Court or Judge shall deem proper." This application is to the discretion of the Court and in restraint of the defendant's right to have the matter investigated and decided by a jury. The applicants must shew the jurisdiction of the Court. In order to do this, they must first shew that there has been an order directing the payment of costs, an undertaking to pay them when taxed, a taxation, a certificate, and that the retainer is not disputed. Now here the order of the 2nd of August 1845 contains no order to pay what shall be found due, nor any undertaking to pay by the defendant; it expressly reserves the right to dispute the retainer, and, up to the present moment, the retainer is disputed. The words of the section are not "unless the retainer *shall have been* disputed"; but "unless the retainer shall be disputed," *i. e.*, at the time this application is made. The decision of the Master was binding only as to the *quantum* of costs; and does not disentitle the defendant to have the question of retainer decided by a jury. The reference to the Master was conditional only, and, in the absence of any consent by the defendant, is no waiver of his right to call for proof of his liability. Is he to be estopped from setting up that as to a part of the costs Messrs. Lowless & Son may have been guilty of negligence (a question which the Master had no power to entertain—*Matchett v. Parkes* (2),—and as to another part that they may have agreed to charge nothing unless the defendant succeeded in the action?

[COLTMAN, J.—The 43rd section authorizes the Court to order judgment to be

(2) 9 Mees. & Wels. 767; s. c. 11 Law J. Rep. (N.S.) Exch. 287.



entered up unless the retainer be disputed. In the ordinary case, therefore, where there has been a reference to the Master, and the retainer has not been disputed, the party is prevented from setting up negligence as a defence.]

Because, in such case, the party applying to have the bill taxed consents to pay what shall be found due upon taxation.

[CRESSWELL, J.—No. The Master reports that no such consent is now given or necessary, the Court having the power to make the order without it.]

Formerly, the consent to pay used to be written in the Judge's book, at the Judge's chambers; and, in some way or other, there must be, whether incorporated in the order or not, a valid undertaking, which, in the words of the 43rd section, "may be enforced according to the course of the court in which such reference shall be made." Could the Court, according to the former practice, have enforced payment by attachment, unless there had been some undertaking to pay?

[WILDE, C.J.—An attachment does not issue except for disobedience to an order of Court to do something or to pay something; but, though the order may have been made *in invitum*, an attachment would issue for non-compliance with its terms.]

Then the objection arises, that the order of the 2nd of August 1845 does not order the defendant to pay anything. Though the amount is "certified to be due" by the Master, it is not "directed to be paid" either by him or by the order; and, even assuming the 43rd section to give a cumulative remedy, and to authorize the Court to order judgment to be entered up as well as to issue an attachment, it is to be "entered up for such amount," *i. e.* for such amount as shall not only be certified to be due, but also directed to be paid. But it is submitted, that no attachment could issue here. "The whole essence of the thing is the party's undertaking"—per Erle, J., *In re Woodhouse* (3), *Evans v. Taylor* (4), *Jones v. Roberts* (5). As to the application to amend the order in this respect, it was taken by consent of Lowless

& Son in its present terms, and cannot now be amended.

[CRESSWELL, J.—I cannot find that the affidavits anywhere deny the retainer; and even if they did, how can you be at liberty now to dispute that which has been conclusively decided by the tribunal to which you agreed to refer it? Nor do I find that the affidavits anywhere allege negligence.]

[WILDE, C.J.—As to the defence of negligence, the order is by consent, subject to a particular exception as to the retainer. Surely that is an admission of liability, except so far as the liability is denied. If you wished any other exception, it should have been so stated in the order you yourselves obtained.]

*Byles, Sery., Hoggins and Hodges*, contra, relied upon the affidavits in support of the application. As to the objection that the order of the 2nd of August 1845 contained no direction by the Court to pay, they contended that the words "such amount," in the latter part of the 43rd section, mean the amount certified by the Master to be due and directed to be paid, where by consent the Master has authority so to direct; that the Master had that authority by consent in this case, and that the form of the allocatur shewed that he had properly exercised such authority.

*Cur. adv. vult.*

The judgment of the Court was delivered on the following day (May 12,) by—

WILDE, C.J.—We are of opinion that the terms of the Judge's order in this case, and the allocatur of the Master in pursuance thereof, authorize the Court in their discretion to order judgment to be entered up under the 43rd section of the statute 6 & 7 Vict. c. 78. for the amount of the allocatur, unless the retainer is disputed. We are further of opinion that the alleged client *Afako* cannot be allowed to contend now that the retainer is disputed, inasmuch as the question of the retainer has been conclusively settled by the decision of the taxing Master, to whose award, in fact, both parties submitted the dispute. The only remaining question is, whether any matter has been shewn which ought to induce the Court in the exercise of their discretion to decline making the order. It is said that the client here has a good answer to the claim of the

(3) 2 Com. B. 290.

(4) 2 Dowl. P.C. 349; s.c. 3 Law J. Rep. (N.S.) Exch. 89.

(5) *Ibid.* 656.

attornies, by reason of their negligence in the conduct of the business, in respect of which the claim is made, and that he ought to be allowed to submit that defence to a jury; but we can find nothing in the affidavits which afford any real ground for this, nor any other ground on which we think we ought to decline to make the order for the judgment, or to induce us to make any other order under the concluding part of the 43rd section of the act. The rule must, therefore, be made absolute to enter up judgment for the amount of the Master's allocatur.

*Rule absolute accordingly.*

1847. }  
Jan. 31. } DOE d. HARRISON v. HAMPSON.\*

*Waste Lands — Highway — Ownership, Presumption of.*

*Though it is the presumption of law that a strip of waste land lying between an old inclosure and a highway belongs to the owner of the old inclosure, yet that presumption may be rebutted by shewing that there is other land also adjoining the strip, to which it may have formerly belonged.*

This was an action of ejectment brought by the lessor of the plaintiff, the rector of Thorn Falcon, in Somersetshire, to recover possession of a small slip of land, and a cottage upon it, adjoining the turnpike road leading from Hatch Beauchamp to Taunton.

The cause was tried at the Somersetshire Lent Assizes in 1846, before Erle, J., when it appeared that the piece of land in question about forty-five years ago lay waste and uninclosed, in which state it had always before remained. The land adjoining the piece of land in question on the south, on the same side of the road, which bounded it on the north, and also the land on the opposite side of the road, was then and has always continued to be glebe land belonging to the rectory of Thorn Falcon. About that period, (forty-five years ago,) the piece of land in question was taken possession of by a person, named Dyer, who built a cottage upon it, and about forty years ago it was inclosed by

\* This case has been unavoidably delayed.

another person, named Hurcott. The defendant was not his immediate successor, but he obtained possession of it thirty-seven years before the trial, and had continued in possession ever since. It was proved on cross-examination of the plaintiff's witnesses, that when the inclosure of the piece of land in question was first made, a small strip of land adjoining to and lying to the westward of it had been previously inclosed; but neither the time when such inclosure was made nor who made it was proved. A like slip lying to the eastward of the piece of land in question and adjoining it, had been also inclosed, but by whom or the precise period when did not appear. During the forty years there had been five incumbents of the parish. No evidence was given of any title or claim under the lord of the manor or any other person. The plaintiff contended, under these circumstances, that he was entitled to recover, as the presumption of law was, that a slip of land, like this, lying between a high road and inclosed land, belonged to the owner of the inclosed land, and no evidence had been produced to rebut it. His Lordship, however, directed the jury, that though it was a presumption of law that a slip of land between an inclosure and a highway belonged to the owner of the inclosed land, yet that this presumption was capable of being rebutted, and that if they thought the circumstances of the case rebutted such presumption, they might find a verdict for the defendant. The jury found a verdict for the defendant.

*Channell, Serj.* in the following term obtained a rule to shew cause why there should not be a new trial, upon the ground of misdirection; against which—

*Dowling, Serj.* (*M. Smith* with him) shewed cause (in Trinity term, 1846).—He contended, that the fact of the defendant, and those through whom he claimed, having been in possession of the land in question thirty-seven years and the circumstance of the numerous changes in the incumbency were sufficient to rebut the legal presumption arising from the position of the land, and referred to the following authorities—*Doe d. Pring v. Pearsey* (1), *Grose v. West* (2), *Doe d. Barrett v.*

(1) 7 B. & C. 304; s. c. 5 Law J. Rep. K.B. 310.

(2) 7 Taunt. 39.

*Kemp* (3), *Steel v. Prickett* (4), *Headlam v. Hedley* (5), and *The King v. the Inhabitants of Hatfield* (6).

*Channell, Serj.* (*Fitzherbert* with him), in support of the rule, relied on the stat. 3 & 4 Will. 4. c. 27. ss. 2, 28, 29, the latter of which sections gives to ecclesiastical corporations sole a period of two incumbencies and six years, or of sixty years, for the recovery of lands—and contended, that the fact of the land in question having been an uninclosed strip between the glebe and the road from the earliest time down to thirty-seven years ago, made out a *prima facie* case that it was glebe land thirty-seven years ago. And if that be conceded, then that to hold that any length of occupation short of sixty years, or any number of changes of incumbencies during the sixty years, could be sufficient to defeat a title once established, would be in effect to repeal that section of the act. He also referred to *The King v. Edmonton* (7).

*Cur. adv. vult.*

MAULE, J. now delivered the judgment of the Court.—This case, which was argued some time ago, was an action of ejectment brought by the rector of the parish of Thorn Falcon, otherwise Thorn Parva, in Somersetshire, to recover possession of a small piece of land, with a cottage and out-houses thereon lying by the side of the turnpike-road leading from Hatch Beauchamp to Taunton, which he claimed as part of his glebe. The case was tried, before Mr. Justice Erle, when it appeared in evidence that the lessor of the plaintiff had glebe land lying on each side of the road in question, and the fence of such glebe land was parallel to the road, and a few yards from it. The piece of land sought to be recovered was part of that which was between the fence of the glebe land and the road. On the part of the defendant it was proved, that at the earliest period to which the evidence extended, viz. forty-five years ago, this piece of land lying between the fence of the glebe and the road was open and uninclosed, but at each end of it there

was a small piece also lying between the glebe and the road, inclosed, in the occupation of persons who were not shewn to derive title under the incumbent of Thorn Falcon; and no evidence was given of the time when such inclosure was made. Part of the piece of land for which the action was brought was inclosed forty years ago by one Hurcott, who sold it to another person, who increased the size of the inclosure. From this person the defendant bought the inclosure, and he had enjoyed it for thirty-seven years, and during the forty years there have been five rectors of Thorn Falcon. There was no evidence to shew that any of the acts of ownership exercised by the defendant, or those under whom he claimed, were referable to any authority derived from the lord of the manor.

For the plaintiff it was contended that it was the presumption of law that the slip of land lying between the fence of the glebe and the road belonged to the rector as part of his glebe, and that the occupation of it by other persons for forty years gave no title to the occupiers, and consequently did not defeat the title by legal presumption arising from the situation of the land. The learned Judge held that the claim of the lessor of the plaintiff resting on presumption, the evidence adduced by the defendant tended to rebut the presumption, and he left the whole to the jury, who found for the defendant. A rule nisi for a new trial was granted on the ground that there was no evidence for the defendant that ought to have been submitted to the jury, and was argued, in last Trinity term, before the late Lord Chief Justice, Mr. Justice Coltman, Mr. Justice Cresswell and myself. The three surviving Judges who heard the argument have come to the conclusion that the rule must be discharged. It is not necessary to determine what would have been the result if the evidence had shewn that at the earliest period to which it applied there was glebe land inclosed, and a slip of land lying uninclosed between that glebe and the road, without any circumstance then existing which tended to rebut the presumption that the slip belonged to the owner of the inclosed land, for the evidence shewed that at that time there were two pieces of land adjoining the piece in dispute at either end, also lying between

(3) 7 Bing. 332; a.c. 9 Law J. Rep. C.P. 102.

(4) 2 Stark. 463.

(5) Holt, N.P. 463.

(6) 4 Ad. & El. 156.

(7) 1 Moo. & Rob. 24.

the glebe and the road, which were occupied adversely to the rector, which fact was undoubtedly evidence tending to raise a presumption that the land lying between the inclosed glebe and the road was not part of the glebe, and the adverse occupation of the part in question in the cause for forty years was evidence strengthening that presumption. The whole, therefore, rested on presumption on both sides. The lessor of the plaintiff, on the one hand, did not prove title, but merely facts from which a title might be presumed; and the defendant, on the other hand, elicited from the witness called by the lessor of the plaintiff evidence of other facts tending to rebut that presumption. It was, therefore, incumbent on the learned Judge to leave the whole to the jury, and there is no ground for granting a new trial.

*Rule discharged.*

*Secondly, that the word "thereupon" in the allegation "it thereupon became and was the duty," was not to be understood as shewing that the proposition following the word was a consequence deducible from what preceded it, but only as shewing the time or occasion upon which the proposition was averred to have taken place.*

*Thirdly, that the allegation in question was an averment of matter of law only, and that there were no sufficient allegations of facts from which such law could be inferred.*

*Fourthly, that as the declaration did not shew either a continuing possession and controul of the defendant at the time of the collision, nor other special circumstances shewing that he was bound to prevent other vessels being injured, the declaration was insufficient in substance.*

*Fifthly, that the mere fact of the defendant having the possession and controul of the barge at the time it sank, was not in itself sufficient to render him liable.*

**Case.** The declaration stated, that whereas before the happening of the damage and injury hereinafter mentioned, to wit, on the 8th day of June, A.D. 1845, a certain barge of the defendant, of which the defendant was then in possession, and then had the care, management, direction and controul of and over the same by his mariners and servants in that behalf, foundered, sank and went to the bottom in a certain navigable river in England, to wit, the river Thames, at and in a certain navigable part and place of and in the said river where no obstruction to the navigation previously existed (the said part of the said river then and from thence hitherto and still being a public highway for all persons to navigate, and pass and repass by and with boats, barges, steamboats, and other vessels at their free will and pleasure, and in and along which divers steamboats and other vessels lawfully might, and were and are used and accustomed daily and at all times of the day to be navigated and pass and repass without obstruction); and the said barge of the said defendant having so sunk as aforesaid, to wit, on &c., the same then lay in the same river in the said navigable part and place of and in the same, under water there, and wholly covered and concealed and out of view, and in such a posi-

1846. }  
Nov. 18. } **BROWN AND OTHERS v.**  
1848. } **MALLETT.**  
Feb. 9. }

*Ship and Shipping—Navigable River—Obstruction by a Sunken Vessel—Duty and Liability of Owner—Pleading.*

*The declaration stated that before the happening of the damage complained of, to wit, on &c., a certain barge of the defendant, and of which he was then in possession and then had the management, sunk in a navigable river in England, the same being a public highway; that it lay concealed under water in such a manner that vessels passing over the place would be in danger of striking against it, of which the defendant had notice; that it thereupon became and was the duty of the defendant while the barge continued so sunk to use due care to prevent the danger to vessels navigating that part, by giving notice by a buoy or otherwise to persons navigating; that the defendant omitted to give such notice, and that a vessel of the plaintiffs was damaged:—Held, first, that the declaration was insufficient for not shewing with sufficient directness any obligation on the defendant to do that which the plaintiffs complained the defendant omitted to do.*

tion and at such a depth that vessels in navigating and passing in, along, and over the said place where the said barge so lay sunk as aforesaid would necessarily strike against the same, and thereby while the said barge so continued and was sunk and lying in the said part and place of and in the said river as aforesaid vessels during that time navigating and passing in and along the said part of the said river (without the persons navigating and directing the same having notice of the said sunken barge so lying and being there) would necessarily be and were liable to and in danger, in so navigating and passing, of striking with great force and violence upon and against the said sunken barge, and of being thereby greatly damaged and injured, of all which said premises the said defendant, before the happening of the damage and injury hereinafter mentioned, had notice; *and thereupon it became and was the duty of the said defendant, while the said barge so continued and was sunk and lying under water in the said part and place of and in the said river as aforesaid, to take and use due and proper care and precautions to prevent and guard against the said danger to vessels during that time navigating and passing in and along the said part of the river, by giving due notice and warning of the said danger by means of a proper and sufficient buoy, or other proper and sufficient mark or signal or otherwise to persons navigating and directing the said vessels, or by other due and proper means in that behalf.* And the plaintiffs further say, that the defendant, well knowing the said premises, suffered and permitted the said barge to be and continue sunk and lying, and the same did continue sunk and lying in the said river, in the said part and place of and in the same under water there, and wholly covered and concealed and out of view, and in such position and at such depth aforesaid, for a long space of time, to wit, from the time of the same so sinking as aforesaid, until and at and after the time of the happening of the said damage and injury as hereinafter mentioned. And the plaintiffs further say, that although a reasonable time after the sinking of the said barge, and after the defendant so had notice of the premises as aforesaid, for him, the said defendant, to cause a proper and sufficient buoy or other

proper and sufficient mark or signal to be put and placed in the said river, or other proper means in that behalf used and taken, to give to persons navigating and directing vessels in the said part of the said river notice and warning of the said danger, had elapsed before the happening of the said damage and injury as hereinafter mentioned, nevertheless the said plaintiffs, in fact, say, that the said defendant, well knowing the said premises, but not regarding his duty in that behalf, did not nor would take or use due or proper care or precautions while the said barge so continued sunk and lying at and in the said part and place of and in the said river in such position and at such depth as aforesaid, to prevent and guard against the said danger therefrom to vessels navigating and passing along the said part of the said river, either by giving notice or warning of the said danger by means of a proper and sufficient buoy or other proper and sufficient mark or signal put and placed in the said river for that purpose, or otherwise, or by any other due or proper means in that behalf whatsoever, but wholly omitted and neglected so to do, and at the time of the happening of the said damage and injury the said barge was and continued sunk and lying in the said river, in the said part and place of and in the same under water there and wholly covered and concealed and out of view, and in such position and at such depth as aforesaid without there being then any due or proper care or precautions taken, or any due or proper means in that behalf used to prevent or guard against the said danger to vessels then navigating and passing in and along the said part of the said river, and without any proper or sufficient buoy, or other proper or sufficient mark or signal being put and placed in the said river, or any other due or proper means used or taken to give to persons navigating and directing the said vessels in the said part of the said river due notice or warning of the said danger; and the plaintiffs, in fact, say, that while the said barge was and continued so sunk and lying without any proper or sufficient buoy, or other proper or sufficient mark or signal, or any other due or proper means being used to give notice or warning of the said danger, to wit, on the said 8th day of June, A.D. 1845, the said plaintiffs were lawfully possessed of a certain steam-

vessel, &c. which was then lawfully navigating and passing in and along the said part of the said river Thames, being then under the care, direction and management of certain the mariners and servants in behalf of the said plaintiffs, and the said steam-vessel being so then navigated and passing in and along the said river, and the said plaintiffs and the said mariners and servants not having any knowledge or sufficient means of knowledge of the said danger, and no due or proper care or precautions being taken by the said defendant to prevent or guard against the said danger, and the said plaintiffs, by their said mariners and servants, then having lawful occasion to navigate and direct the said steam-vessel in, along and over the said place where the said barge so then lay sunk as aforesaid, they, the said plaintiffs, by their said mariners and servants, did then accordingly navigate and direct the said steam-vessel in, along, and over the said place, and thereby and by means of the said premises, and of the said misconduct, omission and neglect of the defendant, and without any neglect or default of the said plaintiffs, or their said mariners and servants, the said steam-vessel was then, to wit, on &c., driven and struck with great force and violence upon and against the said sunken barge, and was thereby then greatly broken, stove in, damaged and injured, &c.

Plea, that a reasonable time for the defendant to remove the said barge from the said place where she so lay sunk as in the declaration mentioned, had not elapsed before or at the time of the alleged damage and injury in the declaration mentioned, and this the defendant is ready to verify, &c.

Special demurrer, on the ground that the plea raised a matter of fact which, if proved, is no answer in law to the action; and that the said plea is in violation of the rules of pleading, inasmuch as it does not traverse any matter of fact contained in the declaration, nor does it confess and avoid any matters of fact alleged in the declaration, but states a new fact which in law is no answer to the action, and is improperly concluded with a verification; and also that the said plea is in other respects uncertain, informal and insufficient. Joinder therein.

*Channell, Serj.* (Nov. 18, 1846.) in support of the demurrer.—In this case, the plea is bad as not answering the declaration;

but the principal question will be, whether the declaration is good. The question is, whether, when a vessel or barge is sunk by accident against the will of the owner, the owner is bound to give reasonable notice of the accident to the public within a reasonable time. In *Hott v. Wilkes* (1), the plaintiff who was a trespasser, had notice that there were spring guns in a wood, but not of the particular place where they were set, and it was held that he could not maintain trespass for an injury which he had received. In that case the plaintiff was a wrong-doer, whereas in the present case he is not, and yet it is evident from the judgment in that case, that if no notice whatever had been given the defendant would have been held liable. In *Bird v. Holbrook* (2), where no notice was given, the defendant was held liable. In this case, though the defendant does not voluntarily commit a nuisance, yet he continues one. If he could not remove it, he ought to have given notice, to prevent injury to others, by placing a buoy over the wreck, or by some other means.

[WILDE, C.J.—Has any individual a right to put up anything in the river to warn others from some fancied danger? He cannot be indicted for not removing it—*The King v. Watts* (3). Why should the expense of notice be put upon the party who has had the misfortune to lose his vessel, rather than upon any other of the public?]

He may be the only one who knows the fact. The same hardship would apply to the case of a party who had had the misfortune to break down his cart upon the public highway, and yet in such case, unless he removed his cart, he would be liable.

[MAULE, J.—In *The Lancaster Canal Company v. Parnaby* (4), the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, held the canal company liable for damage resulting to a barge navigating their canal from a sunken barge: that was upon the ground that as the company derived a profit by tolls for the navigation, there was a common law

(1) 3 B. & Ald. 304.

(2) 4 Bing. 628; a.c. 6 Law J. Rep. C.P. 146.

(3) 2 Esp. 675.

(4) 11 Ad. & El. 230; a.c. 9 Law J. Rep. (N.S.) Exch. 338.

liability cast upon them to make the navigation secure. That principle may apply to a person who derives a benefit from navigating a river, and may throw on him some duties. If afloat, it might be that he ought to hoist lights; if sunk, to give notice in some other manner.]

[WILDE, C.J.—The question may be, what party stands in the class nearest to that of the canal company? May it not be those who have charge of the river, and whose duty it may consequently be to remove nuisances?]

The Court cannot take judicial notice that there are persons who have charge of the river, even if the river should be the Thames; but, besides, the river Thames is only laid as the venue under a *videlicet*. If a party lay down an anchor in a place likely to cause injury, he must place a buoy over it. The question in such cases is, whether the defendant's conduct was negligent, and that is a question for the jury—*Lynch v. Nurdin* (5).

[MAULE, J.—The barge is not stated to have been sunk accidentally, nor to be out of the controul of the defendant. For all that appears, the defendant may for some purpose have scuttled his barge, and may still be in possession of her.]

In that view, the principle of *Dixon v. Bell* (6) will apply, because the barge must be taken to be under the defendant's own controul.

*Talfourd, Serj.* (*Willes* with him) *contra*.—The plaintiffs are not entitled to assume that there was any default in the defendant. The barge must be taken to have been sunk by the act of God while being navigated; the word "founder" means something more than mere sinking. Then, it is not alleged that it was possible for the defendant to have placed a buoy or other mark over the barge. The accident might have taken place upon the ocean.

[MAULE, J.—There is an implied statement that it was possible in the statement that "a reasonable time had elapsed:" the reasonableness of the time necessarily involves the nature of the means, and I do not see how the plaintiffs could have proved the

reasonableness of the time, without proving that the means were practicable.]

[COLTMAN, J. referred to *Harmond v. Pearson* (7), where Lord Ellenborough decided that the owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck.]

[WILDE, C.J.—Would the duty equally arise, if the accident had happened in the Channel? If so, would the owner be bound to remove it?]

If the owner is bound to put it up, is he bound to keep it up for all time?

[MAULE, J.—It might be that he was bound for a time, but not for an unreasonable time.]

In *Harris v. Baker* (8), where rubbish had been left on a public road without lights, and a party was thereby injured, the trustees of the road were held not to be liable. *Jordin v. Crump* (9) throws some doubt upon *Illott v. Wilkes*.

*Channell, Serj.* was heard in reply.

*Cur. adv. vult.*

MAULE, J. now delivered the judgment of the Court.—In this case, which arose out of a demurrer to a plea, it was not disputed on the argument that the plea was bad; but it was insisted, for the defendant, that he was entitled to the judgment of the Court, inasmuch as the declaration was substantially defective in not shewing a cause of action; and the only question argued at the bar, and now to be decided by the Court, is, whether the declaration is open to this objection. The declaration, in effect, states that, *before* the happening of the damage complained of, to wit, on the 8th of June, 1845, a certain barge of the defendant, and of which he was then in possession, and *then* had the care, direction, management, and controul, by his mariners and servants, foundered, sunk, and went to the bottom, in a certain navigable river in *England*, in a navigable part of it, the said part then and still being a public highway for all persons to navigate with their steam-boats and other vessels, and along which vessels were and are accustomed at all times to navigate and pass without obstruction; that the said

(5) 1 Q.B. Rep. 29; s.c. 10 Law J. Rep. (N.S.) Q.B. 73.

(6) 5 Mau. & Selw. 198.

(7) 1 Campb. 515.

(8) 4 Mau. & Selw. 27.

(9) 8 Mee. & Wels. 782; s.c. 11 Law J. Rep. (N.S.) Exch. 74.

barge of the defendant, being so sunk as aforesaid, to wit, on the day and year aforesaid, lay covered and concealed under water in such a manner that vessels passing over the place where it lay would necessarily strike against the same, and vessels passing along the said part of the river without the persons navigating them having notice of the sunken barge, would necessarily be in danger of striking against it, and being thereby greatly damaged; that the defendant had notice of the premises; that it *thereupon became and was the duty* of the defendant, while the barge continued so sunk, to take and use due and proper care and precautions to prevent and guard against the said danger to vessels navigating that part of the river, by giving due notice of the danger, by a buoy, or other proper mark or signal, or otherwise, to persons navigating, or by other due and proper means in that behalf. The declaration then goes on to shew, in terms on which no question arises, that the defendant omitted and neglected to give such notice, or use such means to prevent danger; that a steam-vessel of the plaintiffs was damaged by striking against the barge, without any fault of the plaintiffs, in consequence of the said omission and neglect of the defendant.

The objection made to the declaration is, that it does not shew any obligation on the defendant to do that which the plaintiffs complain of his having omitted. There is, indeed, an express allegation in the declaration, that "*thereupon*" it became the duty of the defendant to do that which the plaintiffs complain of his omitting. But we think that this allegation will not aid the declaration. Where the allegation following such a word as "*thereupon*" or "*whereby*" is an allegation of fact, such allegation is indeed averred with sufficient directness, notwithstanding the word "*thereupon*" or "*whereby*," which is not to be understood as shewing that the proposition following such word is intended to be stated as a consequence deducible from what precedes, but only as shewing the time at which or the occasion on which that which follows the word in question is averred to have taken place: see the case of *Pryce v. Belcher* (10), in which this Court held that an allegation

in a declaration, that the plaintiff sustained damage, introduced by the word "*whereby*," was not to be considered as a statement of matter of inference and conclusion only, but a positive allegation of a fact.

But the allegation now in question is open to the further objection, that, however directly it be averred, it is an averment of matter of law only, and not of matter of fact. If the words had been "*that the defendant became bound by law*" to do certain acts, it could not be questioned that that was an allegation of matter of law: and the words, "*it became the duty of the defendant*," if they were to be understood as averring the existence of some duty different from that arising out of a legal obligation, certainly would not aid the declaration, inasmuch as the breach of such a duty does not give a cause of action. But, if they be understood, as we think they are, as averring the existence of a legal liability, it is well established that such an averment, being an averment of matter of law, will not supply the want of those allegations of matter of fact from which the Court could infer the law to be as stated; so that such allegation is useless where the declaration is insufficient, and superfluous where sufficient without it. In the case of *Parnaby v. the Lancaster Canal Company* (11), the Court rejected the statement that it thereupon became the duty of the company to remove the obstruction, as being an inference of law improperly stated; and in the case of *Priestley v. Fowler* (12), though the declaration contained a direct averment that it became the duty of the defendant to use due and proper care, the Court arrested the judgment, because the declaration contained no premises from which the duty of the defendant, as therein alleged, could be inferred by law.

The sufficiency of the declaration, therefore, in the present case, must be determined without regard to the express allegation of the duty of the defendant which it contains, and will therefore depend on the question whether the facts stated shew that the defendant was bound in law to do that which the declaration charges him with

(11) 11 Ad. & El. 223; s. c. 7 Law J. Rep. (N.S.) Q.B. 258.

(12) 3 Mee. & Wels. 1; s. c. 7 Law J. Rep. (N.S.) Exch. 42.

(10) 3 Com. B. 58; s. c. 15 Law J. Rep. (N.S.) C.P. 305.



having omitted. Now as to this question, there seems no doubt that it is the duty of a person using a public navigable river with a vessel of which he is possessed and has the controul and management, to use reasonable skill and care to prevent mischief to other vessels; and that, in case of a collision arising from his negligence, he must sustain without compensation the damage occasioned to his own vessel, and is liable to pay compensation for that sustained by another navigated with due skill and care: and this liability is the same, whether his vessel is in motion or stationary, floating or aground, under water or above it. In all these circumstances the vessel may continue to be in his possession and under his management and controul; and, supposing it to be so, and a collision with another vessel to occur from the improper manner in which one of the two is managed, the owner of the vessel properly managed is entitled to recover damages from the owner of that which was improperly managed. This duty of using reasonable skill and care for the safety of other vessels is incident to the possession and controul of the vessel. Subject to this obligation, the owner has a right, while his vessel is afloat, to proceed in any direction, and to remain at any place, and when it is aground, whether sunk or not, to remain as long as the occasions of his voyage require. Of the existence of these rights and duties, so long as the possession and controul of the vessel continue in the same person, there seems to be no doubt. Nor does there seem to be any doubt that, if these be transferred to another person, the rights and duties would also be transferred to him, and the original owner would cease to be entitled to or bound by them. But a person may cease to have the possession and controul of a vessel, though they are not transferred to any other person, as is commonly the case when by some casualty of navigation it is brought into a situation in which the owner abandons and relinquishes the possession and controul because it is impossible to retain them; and the effect which this new state of things may have on the duties and liabilities in question does not appear to admit of so simple a determination as that which relates to the duties and liabilities incident to a possession continuing in the same person,

or transferred to another. Those duties and liabilities, there seems to be no doubt, are different in cases where the relinquishment of possession is wrongful, or arises out of circumstances occasioned by the wrongful act or omission of the owner, from what they are when he is blameless. In the present case, supposing the barge to have been out of the defendant's possession at the time of the collision, there is nothing to shew that the defendant wrongfully ceased to be possessed, or wrongfully occasioned anything which led to the ceasing of his possession: the only wrong complained of is the omission to use means to prevent damage from the sunken barge. It is therefore not necessary to inquire what would be the effect of a wrongful act or neglect leading to a divesting of the possession. No such wrong being alleged, none is to be presumed; and the question therefore is, what is the duty of the person who had the possession and controul of a vessel which, without any fault of his, has, while in his possession, sunk, so as to obstruct a public navigable river, with respect to vessels navigating the river, after his possession and controul has ceased? It probably cannot be safely affirmed that, in no case where a vessel has sunk, without fault of the owner, does any duty of this kind at all arise, or continue for any time: nor is it necessary to decide this question; for, in order to sustain the declaration, we must hold, that, in every state of things consistent with the facts stated in the declaration, the defendant was bound to do that which the plaintiff complains of his having omitted. Now, though there seems no doubt, as we have before observed, that he was bound to use due care to prevent injury to others, as long as his possession and controul continue; and, though, after they ceased,—supposing that they did cease,—there may have possibly been some state of facts which might cause the continuance of such a duty for some time, we think that it cannot be universally affirmed that, in all cases where the possession and controul of the owners have ceased, such a duty arises. Indeed, as we have before stated, it seems clear that the duty does not continue in the original owner when his possession and controul have been transferred to another; and where the possession and controul have

not been transferred, but have been relinquished and abandoned, we do not think that the duty *always* arises, and continues for an indefinite time. Where the navigation of a river has become obstructed by a vessel which has sunk and been lost to the owner, without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity, in addition to his share of a public inconvenience; and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil.

In the case of *The King v. Watts* Lord Kenyon held that the owner of a ship sunk in the Thames by accident and misfortune, without his default or misconduct, was not liable to an indictment for not removing the obstruction. It was contended, for the prosecution in that case, that, though the defendant was not punishable for causing the nuisance, it having arisen from accident, it was his duty to remove it; but the learned Judge answered, that perhaps the expense of removal might have amounted to more than the whole value of the property. The same reason would apply in the case of an indictment for not giving notice by signal, or taking other means to prevent damage from a sunken vessel; the expense of doing so might, and probably would, be greater than any private benefit which the owner would derive from it: and, whether it were greater or not, the reason seems to be the same for not throwing on the owner any especial share in the consequence of a public misfortune with which he had no particular concern, except that it arose out of a private disaster which he had innocently suffered.

In the case of such impediments to navigation arising out of unavoidable accident, the proper rule seems to be that the expense of removing or diminishing the danger arising from them should be defrayed by those who would be benefited by such a measure; as is done in the case of lighthouses, which are erected to diminish the danger arising from natural impediments to navigation; and such measures are the proper subjects of local regulations to be made on a comparison of the danger to be guarded against and the ex-

pense to be incurred. It is scarcely necessary to observe, that, if no indictment would lie, under the circumstances stated in this declaration, for the danger and impediment to the public, no action can be maintained for the particular damage sustained by the plaintiff. The duty of the defendant, if it exists at all, is of a public nature; and the plaintiff, in order to succeed, must shew a breach of public duty, as well as special injury to himself. Now, the present declaration does not shew that, at the time of the collision, the defendant had the possession or controul of the barge: it states that before the happening of the damage the barge was in his possession and under his controul; and though it states under a *videlicet* that the damage happened on the same day, this is no averment of possession and controul at the time of the damage, even taking the allegation of the day to be binding. A statement of possession before an event does not amount to even an informal statement that possession continued till the time of the event, however short the interval may be. Since, therefore, the declaration does not shew either a continuing possession and controul on the part of the defendant at the time of the collision, or any special circumstances shewing that, though he may no longer have had the possession and controul of the barge, he was still bound to take care that other vessels should not be injured by striking against it; and since it cannot be inferred from the mere fact of the defendant having the possession and controul of the barge at the time it sunk, that the defendant was bound after that time, that is, at the time of the collision, to use means of precaution, we think the declaration is insufficient in substance, inasmuch as all the facts stated in it may be true, and yet the plaintiffs have no cause of action.

With regard to the cases cited for the plaintiffs, we may observe that the case of *Holt v. Wilkes*, and all the cases of the same kind, were cases of improper management of property of which the defendant had the possession and controul, and therefore apply only to the case of a vessel under the controul of the defendant; in which case we agree that he would be liable. The case of *Harmond v. Pearson* appears to have turned on the question of what was the proper

mode of giving notice of a sunken barge to be adopted by an owner who was admitted to be liable to give some notice. That a liability of that kind might be made to appear, by proper averments in the declaration, we have already shewn; and there is no reason to suppose that the declaration did not contain such averments: the circumstance of a watchman being employed to give notice makes it probable that, in fact, the defendant retained the possession of his barge, and intended to resume his voyage. For these reasons, we are of opinion that the declaration is defective in substance, and that there must be judgment for the defendant.

*Judgment for the defendant.*

1847. }  
Nov. 19; } DICKER v. JACKSON.  
1848. }  
May 12. }

*Pleading—Immaterial Traverse—Dupli-  
city—Contract—Condition Precedent.*

*The declaration stated that by certain articles of agreement the plaintiff agreed to sell, and the defendant to purchase, a piece of land, and the plaintiff agreed to deliver an abstract of title and to deduce a clear title within a month from the signing of the contract, or from being required so to do; that the defendant agreed to pay a portion of the purchase-money on the signing of the contract, and the residue on or before a future fixed day, and to pay interest in the mean time half-yearly; and that the plaintiff did, within one month from being required, deliver an abstract of title and deduce a clear title. Breach, non-payment by the defendant of half a year's interest. Plea, that the plaintiff did not deliver an abstract of title, and deduce a clear title in manner and form, &c. Upon demurrer, for immateriality and duplicity,—Held, that the plea was bad, for raising an immaterial issue, the delivery of the abstract and the deduction of title not being a condition precedent to the payment of the money.*

*Quære—whether the plea was not also bad for duplicity, in denying both the delivery of the abstract and the deduction of the title.*

*Assumpsit.* The first count of the declaration stated that on the 2nd of September, A.D. 1844, in and by certain articles of agreement, dated a certain day, to wit, the day and year aforesaid, and then made and entered into by and between the plaintiff of the one part and the defendant of the other part, the plaintiff agreed to sell and the defendant agreed to purchase, for the sum of 5,489*l.* 8*s.* 10*d.*, payable as thereafter and hereinafter mentioned, a piece of land in the said articles described, together with the use and occupation in common with others entitled thereto, of a certain back street, in the said articles mentioned, and all rights, members, and appurtenances to the said piece of land belonging. And the plaintiff thereby agreed that he would, within one month from the date thereof, or from being required so to do, at his own expense, deliver to the defendant an abstract of his title to the said premises, and deduce a clear title thereto; and that the plaintiff would, upon payment of the purchase-money of the said premises, together with all interest which might accrue due thereon as thereafter and hereinafter mentioned, execute a proper conveyance (to be prepared by and at the expense of the defendant) or of so much thereof as should not have been previously conveyed under the provisions thereafter contained and hereinafter mentioned unto the defendant, his heirs or assigns, or as he or they should direct or appoint, free from incumbrance, (except as thereafter and hereinafter mentioned), and subject to the several stipulations and conditions thereafter and hereinafter mentioned. And the defendant did thereby agree that he, the defendant, his heirs, &c. would pay to the plaintiff the said purchase-money, as follows, that is to say, the sum of 548*l.* 18*s.* 10*d.* on the signing of the said contract, to wit, the said articles, and the residue, or sum of 4,940*l.* 10*s.*, on or before the 2nd of September 1848, together with interest in the mean time on the said sum of 4,940*l.* 10*s.* at the rate of 5*l.* per 100*l.* for one year, payable half-yearly, on the 2nd of March and the 2nd of September in each year; the first payment thereof to be made on the 2nd of March next after the making of the said contract. And the plaintiff did thereby agree that at any time before the said 2nd of September 1848, he,

his heirs, or assigns, &c. would, on being thereunto required by the defendant, execute to him, or to any person he might appoint, a conveyance or conveyances of any portion of the said hereditaments, on payment to the plaintiff of the whole of the purchase-money, which the defendant should have agreed to accept from the purchaser or purchasers thereof, provided that such purchase-money should not be at a less rate than 3*l.* by the yard for land so conveyed; provided also that the costs and charges of furnishing abstracts, if required, and of verifying the same, or of any other proceeding connected with such partial conveyance, should be borne and paid by the defendant, his heirs, &c., it being the intention of the parties that the plaintiff should be indemnified from all such costs and charges, and the defendant should not be entitled to call for, nor should the plaintiff be required to produce, any earlier title to the said land than the original conveyance thereof from F. R. P. to Mr. W. F. deceased; and any conveyance to be made under the said articles should be subject to the reservations, covenants, and restrictions contained in such conveyance, so far as the same affected the land by the said articles contracted to be sold, and also to the several conditions and stipulations therein contained.—[The declaration then set out other provisions which it is unnecessary to detail.]—And it was further agreed that possession of the said land should be forthwith given to the defendant, and that all taxes, rates, and other outgoings up to the date of the said articles should be paid by the plaintiff, and from and after the said date by the defendant, his heirs, or assigns.—[The declaration then stated the terms of the agreement for entry and sale in case of non-performance by the defendant, and alleged mutual promises.]—And the plaintiff further saith, that on the making of the said agreement, to wit, on &c., possession of the land was forthwith given to the defendant, and all taxes, rates, and other outgoings, up to the date of the said articles, were, to wit, then paid by the plaintiff; and the plaintiff did, before the commencement of this suit, and within one month from being required so to do, to wit, on the 5th of June, A.D. 1845, at his own expense, deliver to the defendant such an

abstract of his title to the said premises, and deduce such a clear title thereto, as in and by the said articles in that behalf specified and required; and the plaintiff from the making of the said contract to the commencement of this suit, in all things did perform and was ready and willing to perform the said contract in all things on his part to be performed; and although the defendant, on the signing of the said contract (the same being signed by him on the day and year first aforesaid), did pay to the plaintiff the sum of 548*l.* 18*s.* 10*d.*, and although the residue of the said purchase-money, to wit, the said sum of 4,940*l.* 10*s.*, was on the 2nd of September 1846 (which day elapsed long after the making of the said contract, and before the commencement of this suit), due and unpaid, and still remains due and unpaid; and although the interest, under the said articles payable in respect of the said residue on or before the 2nd of March 1846, had been satisfied to the plaintiff; and although on the 2nd of September 1846, according to the said articles, a certain sum, to wit, 123*l.* 10*s.* 3*d.*, for half a year's interest on the said unpaid residue of the said purchase-money, at the rate of, &c., became and was payable, &c. Breach, non-payment thereof.

Plea—That the plaintiff did not deliver to the defendant an abstract of title to the said premises, and deduce such a title thereto as in and by the said recited agreement specified and required, in manner and form, &c.

Special demurrer, for immateriality and duplicity.

*Aspland* (Nov. 19), in support of the demurrer.—The performance by the plaintiff of the agreement as to the title, is not a condition precedent to the maintenance of the action. That question, indeed, does not arise, for the defendant has not shewn any breach of the contract on the plaintiff's part. The plaintiff contracted that within a month of signing the contract, on being required, he would deliver an abstract, and deduce a clear title. The plaintiff, therefore, was not bound to do this within a month from signing the contract, but might elect to wait till the lapse of a month after being required. But it does not appear that the plaintiff ever was required, or that a month from the signing of the contract

had elapsed before the commencement of the suit. Assuming, however, that the plaintiff has been guilty of a breach of the contract, it is clear that the terms are independent, that the performance by the plaintiff was not a condition precedent, and that the defendant's remedy would be by a cross action. Each party was to do a certain act at once: the plaintiff to give up possession, the defendant to pay part of the purchase-money; and it is therefore plain that the plaintiff was not bound to deliver the abstract and deduce the title before the contract took effect. The notes to *Pordage v. Cole* (1), and the cases of *Boone v. Eyre* (2), *Carpenter v. Cresswell* (3), *Stavers v. Curling* (4), *Mattock v. Kinglake* (5), and *Campbell v. Jones* (6), are all distinct authorities to shew that the averment which the plea has traversed is immaterial, and that the delivery of the abstract and the deduction of title did not form a condition precedent to the right to maintain the action. Besides, the plea is double, the delivery of an abstract and the deduction of the title being distinct matters—*Sansom v. Rhodes* (7); and the defendant should not have included a denial of both in one traverse—*Smith v. Dixon* (8).

*Rew*, for the defendant.—The plea is not double. The meaning of the contract is, that the plaintiff was to deduce a title on the face of the abstract, and this is what the plea puts in issue. There are not two matters of defence put in issue. The present case comes within the rule laid down in *Bell v. Tuckett* (9), as the several things stated in the traverse amount only to one defence. In the case of an action on a replevin bond, an averment of not prosecuting without delay and with effect, may be put in issue together. With respect to the substantial objection to the

plea, the traverse is good. Contracts of this kind are made on the implied condition that the vendor shall make out a good title—*Flureau v. Thornhill* (10), and unless a good title be made out, the vendor has no right to the purchase-money. In *Wilde v. Fort* (11) it was held that where the vendor of an estate did not shew a clear title by the day specified, the purchaser might recover back his deposit and rescind the contract, without waiting to see whether the vendor might afterwards establish a good title.

*Aspland*, in reply.

*Cur. adv. vult.*

WILDE, C.J. now (May 12, 1848,) delivered the judgment of the Court.—[His Lordship stated the pleadings and continued.]—On the argument of this demurrer before us, it was contended, on behalf of the plaintiff, that this traverse was bad in substance, for the delivery of the abstract and deducing a clear title within one month from his being required so to do was not a condition precedent to his right to maintain the action; and therefore the allegation in the declaration, of his having performed it was immaterial and superfluous, and the traverse of it consequently bad. But it was further contended that even if the allegation was material or necessary, the traverse in question was bad for duplicity, for that the true meaning of the agreement in question is, not simply that a clear title should be disclosed on the face of the abstract, but that moreover a clear title should, in fact, be deduced; and, consequently, the failure on the part of the plaintiff, either to deliver an abstract or deduce a clear title within the time, would be a good bar to the action for the performance, if that part of the contract was really a condition precedent. On the other hand, the argument on the part of the defendant was, that nothing more was required by the plaintiff than to deliver an abstract deducing a clear title on the face of it; and therefore the plea was not open to the objection of duplicity; and, further, that the performance of this part of the agreement was a condition precedent. It is not necessary for us to decide whether the plaintiff or the

(1) 1 Wms. Saund. 320.

(2) 1 H. Black. 273, n. a.

(3) 4 Bing. 409; s. c. 6 Law J. Rep. C.P. 27.

(4) 3 Bing. N.C. 355; s. c. 6 Law J. Rep. (N.S.) C.P. 41.

(5) 10 Ad. & El. 50; s. c. 8 Law J. Rep. (N.S.) Q.B. 215.

(6) 6 Term Rep. 570.

(7) 6 Bing. N.C. 261; s. c. 9 Law J. Rep. (N.S.) C.P. 132.

(8) 7 Ad. & El. 1; s. c. 6 Law J. Rep. (N.S.) K.B. 233.

(9) 3 Man. & Gr. 785; s. c. 11 Law J. Rep. (N.S.) C.P. 92.

(10) 2 W. Black. 1078.

(11) 4 Taunt. 334.

defendant is right in the construction of the terms of the contract in that respect, because we are of opinion that the performance of this part of it was not a condition precedent to the plaintiff's right to enforce the payment, which is the subject of the action. The plaintiff, by the terms of the agreement, undertakes that he will within a month from being required so to do, deliver an abstract, and deduce a clear title; the time appointed for his performance of this part of the contract does not, therefore, arrive until he has been required to do so, and a month shall have expired after the date of such requisition; but the defendant undertook to pay interest on the unpaid purchase-money, on certain specified days between the date of the agreement and the day fixed for payment of the residue of the principal purchase-money; and the time appointed for him to make his payment may arrive before a month has expired after a requisition to the plaintiff to deliver the abstract and to deduce the title, and consequently before the time appointed for the plaintiff to do so has arrived. Indeed, it may well be that the payment of the interest for which this action is brought became due before that period; for although it is averred in the declaration to have become due on the 2nd of September 1846, as it is also stated that the plaintiff did within a month from being required so to do, to wit, on the 5th of June 1845, deliver an abstract, &c., yet the latter day being laid under a *videlicet*, is not so alleged as to be material and liable to be traversed. The case, therefore, appears to fall directly within the rule laid down by Mr. Serjeant Williams, in the note to *Portage v. Cole*, namely, that if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. If this rule be correctly laid down, and we think it is, it demonstrates that the performance of this part of the contract by the plaintiff is not a condition precedent to his right to maintain the action; and con-

sequently, the allegation in the declaration of such performance being immaterial and superfluous, the plea, which is merely a traverse of that immaterial allegation, is bad. Our judgment, therefore, is for the plaintiff.

*Judgment for the plaintiff.*

1848. } WHITEHOUSE v. THE LIVERPOOL  
April 19. } GAS COMPANY.

*Contract—Construction.*

*By an agreement under seal, the plaintiff undertook to supply a gas company, for a period of three years, with all such pipes as should, from time to time, during the said period, be required by the company, at certain rates specified in the agreement. The company ordered large quantities of pipes, and when the contract expired had in stock many thousand yards of pipes, which the plaintiff had supplied, and for which he sought to recover the difference in price between the current value and the price paid according to the contract:—Held, that the contract could not be limited to orders for pipes required for use at the time of the orders; but that the plaintiff was bound to supply all pipes ordered by the company for works which they were carrying on and authorized to undertake by their act of parliament.*

Debt on an agreement under seal. The material parts of the first count of the declaration were as follows:—For that whereas, on the 18th of June 1844, by certain articles of agreement then made and entered into between the plaintiff of the one part, and the defendants of the other part, the plaintiff did undertake and agree with the defendants that he should and would, during the period of three years from the date of the said articles, supply the defendants with such quantities of main pipes, bored and turned bends, syphons, and branch pipes, and turned and bored syphons and branch pipes, *as should from time to time during the said period be required by the defendants*, and that all pipes and syphons so supplied should be cast and wrought of good soft metal [the agreement then went on to specify minutely the length, the diameter, &c. of the pipes to be supplied], and

also should and would, at his own cost, cause every lot or parcel of such pipes to be ordered of the defendants to be delivered in Liverpool, free of all charge whatever, within one month from the date of such order for such lot or parcel respectively. In consideration whereof, and of the due performance by the plaintiff of all the stipulations and agreements in the said articles of agreement contained on his part, the defendants did thereby agree with the said plaintiff, his executors and administrators, that the defendants should pay, or cause to be paid, for the furnishing and delivery of the said pipes, at and after the following rates, namely [the sums to be paid for each sort of pipe were then minutely set forth in the agreement], the said several payments to be made in three months after delivery as aforesaid of each lot of the said pipes to be ordered by the defendants as aforesaid. And it was thereby agreed and declared by and between the said parties thereto, that if default should be made in the furnishing and delivery of the said pipes as aforesaid, contrary to the true intent of these presents, it should be lawful for the said defendants to procure the said pipes elsewhere, and the loss thereby incurred by the defendants should or might be deducted or made good out of any sum or sums of money then due or thereafter to become due to the plaintiff, his executors or administrators, from the defendants, or be recoverable by the defendants by action at law or otherwise, as and for liquidated and ascertained damages. And the plaintiff says, that afterwards, on, &c., and on divers other days, &c., during the said period of three years from the date of the said articles of agreement, the said defendants did require and order of and from the plaintiff divers lots and parcels of such pipes as in the said articles mentioned and provided, to wit, ten thousand yards of pipes of 2½ inches diameter, &c., &c., and the prices of which said pipes, at and after the rates in the said articles severally mentioned and provided, amounted in the whole to a large sum, to wit, the sum of, &c. And the plaintiff saith, that afterwards, to wit, on the several days and times aforesaid he furnished and supplied to the said company the said pipes so required and ordered in compliance with the terms of the said arti-

cles, and according to the description therein contained, and at his own cost caused the same to be delivered in Liverpool free of all charges, which the defendants then received and accepted as and for the pipes so required and ordered as aforesaid. And the plaintiff saith, that although he did at all times duly perform all the stipulations and agreements in the said articles contained on his part, and although the period of six months after the delivery and acceptance of the last of the said pipes so required and ordered as aforesaid had elapsed before the commencement of this suit, yet the defendants did not nor would pay for the same or any part thereof, &c.; and there is now due and owing to the plaintiff from the defendants for the said pipes, at and after the rates aforesaid, a large sum of money, to wit, the sum of 5,000*l.*, whereby an action hath accrued to the plaintiff to have and demand from the defendants the said sum of 5,000*l.*, parcel of the monies above demanded, &c.

The defendants pleaded, first, as to the sum of 252*l.* 12*s.* 7*d.*, parcel of the said sum of money in the said first count demanded, *actio non*, because the defendants now bring into court the sum of 252*l.* 12*s.* 7*d.*, and the further sum of 10*l.*, making together the sum of 262*l.* 12*s.* 7*d.*, ready to be paid to the plaintiff; and the defendants further say, that they never were indebted to the plaintiff in respect of the said sum of 252*l.* 12*s.* 7*d.* to a greater amount than the said sum of 252*l.* 12*s.* 7*d.*, and that the plaintiff has not sustained damages by reason of the detention thereof to a greater amount than the said sum of 10*l.*, wherefore, &c. Secondly, as to the residue of the said first count, except the pipes paid for in the last preceding plea, that the plaintiff did not furnish the said pipes or any of them in manner and form, &c. Issue thereon. Thirdly, to the said residue of the said first count, payment. Fourthly, to the said residue of the said first count, the defendants say, that after making the said articles of agreement, and during the said period of three years from the date thereof, to wit, on &c., and on divers other days and times during the said period of three years, the defendants, according to the terms of the said agreement, ordered of the plaintiff divers lots and parcels of such

pipes as in the agreement mentioned (being other and different pipes from the pipes in the said first count alleged) to have been furnished by the plaintiff, and delivered in Liverpool, which were, to wit, on the days and times last aforesaid, required by the defendants, and which the plaintiff was then bound to supply to the defendants, according to the said agreement, to wit, 10,000 yards of pipes, of seven inches diameter, &c., and although the times for the plaintiff to have furnished and supplied and to have delivered the said several pipes respectively so ordered by the defendants, as in this plea mentioned, according to the terms of the said agreement, had, before the defendants procured the same pipes elsewhere as hereinafter mentioned, and before the expiration of the said period of three years, and before the commencement of this suit, expired, yet the plaintiff did not, within the time in the said agreement in that behalf mentioned, or at any other time, furnish and deliver to the defendants the said several pipes so ordered by the defendants as in this plea aforesaid, and which the defendants so required as aforesaid, according to the terms of the said agreement, but wholly refused and failed so to do; and thereupon the defendants, from time to time, after the plaintiff's default in furnishing, &c. the said several pipes respectively, to wit, on &c., and on divers other days and times, &c., did procure the said several pipes which they so required as in this plea aforesaid elsewhere, according to the true meaning of the said agreement; and in so procuring the same did necessarily pay for the price thereof certain large sums of money, to wit, 10,000*l.*, being a much greater sum by, to wit, 5,000*l.*, than the defendants would have been bound to pay to the plaintiff for the same pipes, according to the terms of the said agreement; and by reason of the plaintiff having failed, as aforesaid, to furnish, &c. the said pipes in this plea mentioned, and of the defendants having been obliged to procure the same elsewhere, they had incurred before the commencement of this suit, a loss, to wit, to the amount of 5,000*l.*, which sum is still due and unpaid to the defendants, and exceeds the said debt in the said count demanded, except the sum of 52*l.* 12*s.* 7*d.*, parcel, &c., and the damage sustained by the plaintiff, by the detention thereof, and out of which said sum of 5,000*l.*,

so due to the defendants, they are ready and willing to set off the full amount of the said last-mentioned debt and damages, except as aforesaid, according to the terms of the said agreement.

Replication to the first plea, the plaintiff accepts and takes out of court the said sum of 262*l.* 12*s.* 7*d.*, in discharge of the said sum of 252*l.* 12*s.* 7*d.*, parcel, &c., and of the damages for the detention thereof, and prays judgment for his damages, and also for his costs and charges in this behalf. To the third plea, the plaintiff saith that the said lots and parcels of pipes in that plea mentioned were not, nor were any of them or any part thereof, required by the defendants; and he was not to supply the same, or any part thereof, in manner and form, &c. Issue thereon.

The cause was tried, before Patteson, J., at the last Spring assizes for Stafford, when it appeared that the plaintiff, an iron master at Sedgley, entered into the agreement of the 18th of June 1844, set out in the declaration. He supplied all the pipes, &c. required by the defendants up to the commencement of the year 1846, and sought to recover in this action the full value of all pipes supplied by him since January 1846, amounting to 4,000*l.* more than the sum paid for them by the defendants, on the ground that such pipes had been ordered in fraud of the agreement. The price of iron was low in 1844; it rose throughout 1845, and almost doubled in value. In the first nine months of the contract the defendants ordered 334 tons of pipes, in the second nine months 322 tons, in the third nine months when iron was very high they ordered 1,594 tons of pipes, and in the fourth and last period of nine months 1,150 tons. When the contract expired in June 1847, the defendants had in stock about four thousand yards of pipes which had been supplied by the plaintiff. The difference between the current value and the contract price of the last-mentioned pipes was 1,140*l.* Orders had been given for twelve hundred yards of pipes which the plaintiff had not executed, and which the defendants had procured elsewhere. The difference of the price paid for them and the contract price was 1,200*l.*, which the defendants claimed to set off against the debt. The balance due according to the contract price for pipes supplied was about 300*l.* It appeared that



about twelve months after the agreement was entered into the defendants proposed to extend their works for three or four miles; the new works for which the large supply of pipes was ordered were not in a forward state, and it was contended that the meaning of the agreement was, that the plaintiff should supply pipes for the works only as they existed at the time the agreement was entered into, or, at any rate, only so many pipes for the new works as the defendants from time to time *required for present use*; and as they had ordered more pipes since January 1846 than they had used, they had departed from the contract, and so the plaintiff was entitled to the full value of all pipes supplied since that date.

At the trial the defendants' counsel required the learned Judge to construe the agreement, who decided that the plaintiff was bound to supply all pipes required by the company, during the period of three years, for any works which the company were, at the date of the agreement, authorized by their act of parliament to undertake; and that the question for the jury was, whether the pipes were ordered by the company, and whether they were necessary for all the works existing and in course of execution. The defendants had a verdict.

*Talfourd, Serj.* moved for a new trial on the ground of misdirection.—The question for the jury was, not as put to them by the learned Judge, but whether the pipes ordered were required from time to time as ordered; that is,—Were the pipes wanted for use from time to time as ordered? The defendants had four thousand yards of pipes in hand when the contract expired, and that shews that the pipes were not ordered for use, but to keep in stock: the requisitions for pipes were not therefore *bona fide*, but in fraud of the fair meaning of the agreement. It was proved that it would have taken more than a year and a half to lay down the pipes, &c. in possession of the defendants when the contract expired: the orders were therefore a speculation on their part (iron being at that time excessively dear) against the plaintiff for their own purposes. The agreement cannot mean that the company may order pipes for works to be commenced a year hence.

[*CRESSWELL, J.*—The learned Judge did not so construe the agreement; he ruled, that the plaintiff should supply pipes for all

works authorized by the act of parliament constituting the company which were *bona fide* existing or in progress at the time the pipes were ordered.]

No doubt the agreement is a most improvident one on the part of the plaintiff. He is obliged to supply, but the company are not obliged to order pipes, and it was shewn at the trial, that in this respect the company had taken full advantage of the agreement. If the plaintiff is not entitled to the 4,000*l.* underpaid for all the pipes supplied since January 1846, he is entitled to 1,140*l.*, underpaid for the pipes in the hands of the company when the contract expired, as they were not required by the defendants within the meaning of the agreement. If that be so, there was a misdirection; and there can be no right of set-off for the difference in price of the pipes alleged to have been procured elsewhere by the defendants, as the orders for them, from time to time, when they were not wanted for use, were equally without the terms of the agreement.

*WILDE, C.J.*—This may be an unfortunate case for the plaintiff, who appears to have entered into a most improvident bargain; but the Court must construe the agreement without reference to such considerations, and upon those fixed legal principles which apply to this and all other cases. It is impossible to say that the jury were misdirected; for the agreement cannot be limited to mean that the plaintiff was only to be called upon to replace old pipes, but must be understood to mean that he was to supply all such pipes as were required from time to time, for the purposes of the works which the gas company were empowered to undertake by their existing act of parliament. Looking at the terms of the summing up, the jury were in effect asked, whether the pipes ordered from time to time were necessary for the works the company were carrying on, and were left to form their own conclusion of fact from the evidence before them. They have found that the pipes were necessary, and therefore the general defence insisted on has been negatived by the finding of the jury. There was no misdirection, and no rule can be granted.

*COLTMAN, J., CRESSWELL, J., and WILLIAMS, J.* concurred.

*Rule refused.*

1847. }  
Feb. 15. } IRELAND v. THOMPSON.\*

*Ship and Shipping—Master, Authority of to sell Ship, and receive Proceeds.*

*Where a ship is so damaged during a voyage that she cannot prosecute it, the Master has authority to sell her for all parties interested, and the person whom he may have employed to sell her and receive the money may pay over the proceeds to him or his agent; and such payment, in the absence of any notice not to do so from the parties interested, will be good.*

Assumpsit, for 2,000*l.*, as money had and received; 500*l.*, interest on money forborne, and 2,000*l.*, as money due upon an account stated. The defendant pleaded, first, non assumpsit; secondly, payment and acceptance of 5,000*l.* in satisfaction; thirdly, that the promises were made by the defendant jointly with one Harrison Watson, residing out of the jurisdiction of the Court, and that the plaintiff was indebted to the defendant and the said H. Watson in the sum of 5,000*l.* for work done and materials provided by them for the plaintiff, and for money paid by them, at the plaintiff's request, and for interest for the forbearance by them of money, and on an account stated, which sum exceeded the damages sustained by the plaintiff, and which sum the defendant offered to set off.

The cause came on for trial, before Tindal, C.J., at the sittings at Guildhall, after Trinity term, 1839, when a verdict was found for the plaintiff for 2,000*l.* damages, subject to the opinion of the Court upon the following

#### CASE.

The plaintiff was the registered owner of the ship *Royal William*, at the time of her being wrecked and sold at the Cape of Good Hope, in the month of September 1837. In May 1837 a charter-party was made between the plaintiff, the owner, of the one part, and Charles Alexander Gordon, of the other part, of which a copy was annexed to the case. Messrs. Ouchterlony & Co., of London, being jointly interested with

Gordon in the charter-party, the plaintiff, by mortgage, dated on or about the 23rd of March 1837, and duly entered in the book of registry at the Custom House in London, and indorsed on the certificate of registry, transferred the vessel to Alves Arbuthnot and Alfred Latham, trading in London under the firm of Arbuthnot & Latham, for securing the payment of a certain sum of money, which was unpaid at the time of the remittance of the proceeds of the wreck hereinafter mentioned, and also exceeded the amount of the proceeds. A copy of the mortgage-deed and the mortgage account were to be referred to if requisite. Messrs. Arbuthnot & Latham had been the agents of the plaintiff, and for some time effected his insurances and received his freights, &c. On the 18th of May 1837 they effected a policy on the ship *Royal William* for 6,000*l.* The policy was made in their own names, the premiums paid on the policy were charged to the plaintiff, and the sums paid by the underwriters on the policy were placed to his credit. The sums so paid by the underwriters were 3,000*l.* on the 31st of December 1837, and 1,800*l.* on the 6th of February 1838. The following were the indorsements put upon the policy when the above payments were made: "Settled 50*l.* per cent. on account of the claims on this policy without prejudice, payable in one month. London, 31st of December 1837.—Agreed to settle a further 30*l.* per cent. on this policy; and the proceeds of the ship not being paid to the assured, and it appearing that serious doubts are entertained in regard to the application of such proceeds, it is hereby further agreed that the assured may adopt such measures as they may deem expedient to recover the same, and that the underwriters will bear any loss that may arise from the non-recovery of the proceeds of the vessel.—30*l.* per cent.—London, 6th of February 1838, payable in one month." These payments were made before the present action was commenced. The action was commenced on the 19th of April 1838. The *Royal William* sailed from the port of London in the month of June 1837, on a voyage from London to Madras and Calcutta, and laden with goods the property of about fifty different persons, and under the command of David Frazer; and in the course of such voyage was totally wrecked with the

\* This case has been unavoidably delayed.  
NEW SERIES, XVII.—C.P.

cargo on entering the Cape of Good Hope on the 19th of September 1837. The plaintiff had no interest in the cargo or adventure. Frazer employed Messrs. Thomson, Watson & Co. merchants at the Cape, the firm consisting of the defendant and Harrison and Watson, to superintend the preservation and sale of the ship stores and damaged part of the cargo, and to receive the proceeds thereof. The ship and her stores and the damaged part of her cargo were sold by auction by Jones, an auctioneer at the Cape, who was selected by Thomson, Watson & Co. for that purpose, with the concurrence of Frazer. The ship and materials sold for the net sum of 18955·2 rix dollars, which at the usual rate of exchange is 1,421*l.* 12*s.* 10*d.*, and of this sum Thomson, Watson & Co. received from the auctioneer the sum of 1,102*l.* 7*s.* 3*d.* only, the difference, viz. 319*l.* 5*s.* 7*d.* being the value of certain articles belonging to the wreck purchased at the sale by Frazer and Anderson, the steward of the vessel, which sum of 319*l.* 5*s.* 7*d.* was not paid by Frazer or Anderson, but the whole of it was by the direction of Frazer charged in the accounts of Messrs. Thomson, Watson & Co., to his credit, as part of the proceeds of the wreck, and to his debit, as money advanced by them. Thomson, Watson & Co. made various payments at the Cape of Good Hope by the direction of Frazer, and after the sales were completed, and such payments and disbursements made, Frazer went from the Cape to India in a ship called the *Courier*. The accounts of the disbursements made by Thomson, Watson & Co. and their account current were annexed to the case, and likewise the account sales of the ship and damaged cargo. These accounts included a sum of 321*l.* 2*s.* 8*d.* for port and other charges, which the plaintiff did not dispute, and also items amounting to 668*l.* 2*s.* 5*d.*, which he contended were unjustified. Frazer, previously to his departure for India, addressed a letter to Thomson, Watson & Co. of which the following is a copy:—

“ Cape Town, Oct. 21, 1837.

“ Messrs. Thomson, Watson & Co.

“ Gentlemen,—There are remaining in the Customs warehouse fifty-six packages of merchandise and forty-eight hams landed undamaged from the wrecked ship *Royal William*, late under my command; which I

beg you will forward by the first favourable opportunity to Madras, to the consignment of Messrs. Ouchterlony & Co., in order that they may recover the amount of the average due on the said goods from the respective consignees. On closing the account of the said vessel, the balance in favour of me and the late ship *Royal William*, I shall be obliged by your forwarding, together with the accounts and vouchers, to Messrs. Ouchterlony & Co. and C. A. Gordon, Esq. for appropriation on account of the concern.

“ I remain, &c.

“ David Frazer.”

The accounts referred to in this letter were the accounts above mentioned; and as to the items constituting the sum of 668*l.* 2*s.* 5*d.*, the object of which did not appear upon the face of them, the case stated that they were for the providing and fitting out, by Frazer, of the *Courier*, in prosecution, on behalf of the charterers, of the adventure contemplated by the charter-party, and to convey the passengers and the undamaged part of the cargo upon the voyage which had been interrupted, and in which Frazer himself proceeded to Calcutta. The plaintiff also contended that the defendant was responsible in this action for the sum of 319*l.* 5*s.* 7*d.*, the price of the articles purchased by Frazer and Anderson before mentioned. The work for which commission is charged by the defendant as above, was in fact done by Thomson, Watson & Co., and the charges in respect thereof, and of their agency, were admitted to be fair and reasonable, if such charges could be set off in the present action. On the 19th of February 1838, the plaintiff's solicitors wrote to Messrs. Ouchterlony & Co. as follows:—

“ We have been requested to address you on the subject of the salvage of the *Royal William*, lately wrecked at the Cape of Good Hope. We have been requested to claim the proceeds of the vessel, and to take measures for the recovery of them. We beg you to say whether you hold these proceeds, and are prepared to pay the same to the owner of the vessel.”

In reply to which the following letter was written, on the 3rd of March 1838, by Messrs. Ouchterlony & Co., to the plaintiff's solicitors:—

"In reply to your favour of the 19th ultimo, which has remained thus long unanswered in consequence of the detention of the writer in Scotland by the snow storms, we beg to state that we received certain remittances from the Cape of Good Hope on account of the salvage ex *Royal William*, Frazer, wrecked there; that we had a statement prepared by a proper party from the papers in our possession relative to the affairs; and that we hold at the disposal of the parties interested, who can prove their right, the respective amounts enumerated in the statement, which we have shewn unreservedly to all applicants."

The plaintiff's solicitors also wrote the defendant the following letter on the 19th of February 1838:—

"Sir,—We have been desired to address you relative to the proceeds of the sale of the ship *Royal William*, damaged at the Cape of Good Hope, and sold there, and the proceeds received by your house. The instructions which we have received are to apply to you for these proceeds; and we have to request you will forward to us a cheque for the amount, or inform us when they will be ready to be paid, that we may send for them."

And the following correspondence also occurred between the respective solicitors of the plaintiff and defendant:—

"Gentlemen,—I am desired by Mr. R. J. Thomson, to inform you in reply to your letter to him of the 19th inst., that the proceeds of the sale of the wreck of the *Royal William*, and all the accounts connected therewith, have been received by Messrs. Ouchterlony & Co. and C. A. Gordon, Esq., both of the Baltic Coffee House, Threadneedle Street, to whom I beg to refer you on the subject."

"Sir,—It is not material to the party, on whose behalf we addressed Mr. Thomson relative to the proceeds of the *Royal William*, whether they are paid by him or by Messrs. Ouchterlony & Co., but at present we cannot obtain them from either. It appears that those proceeds amounted to about 1,100*l.*, and Messrs. Ouchterlony & Co. inform us, that they are prepared only to pay a sum of about 200*l.* You inform us that Messrs. Thomson, Watson & Co. are not liable to any person on the subject of the application. We were directed to

address to Mr. Thomson, which makes us doubt whether there may not be some misconception amongst the parties; we would, therefore, ask of you to be so good as to inform us whether Messrs. Thomson, Watson & Co. sold the wreck of the vessel, and received the proceeds of it; and if so, what they have done with the same."

"Gentlemen,—As the wreck of the *Royal William* and the damaged part of the cargo were sold by the master of that vessel from absolute necessity, and 3,338*l.* 13*s.* 7*d.*, the proceeds thereof, remitted to and now actually received in cash, by Messrs. Ouchterlony & Co. and Mr. C. A. Gordon, I must again refer you to them on the subject. I am not aware what part of the proceeds may be applicable to the wreck, but as Messrs. Ouchterlony and Mr. Gordon are in possession of all the vouchers and documents, and have had an estimate made of the proportion due to each claimant, they can, no doubt, give you every necessary information."

203*l.* 2*s.* 2*d.* was the sum due to the ship-owner out of the proceeds of the wreck, over and above the disputed amounts of 578*l.* 2*s.* 5*d.* and 319*l.* 5*s.* 7*d.*, and that sum was, before and at the time of the commencement of this action, in the hands of Ouchterlony & Co., ordered to be paid to whomsoever was entitled to it, as having been the owner at the time of the wreck, and had, since the trial of this cause, been paid by them to the plaintiff under an agreement that such payment should be without prejudice.

The question for the opinion of the Court was, whether the plaintiff was, under the circumstances stated, entitled to maintain an action against the defendant to recover any portion of the proceeds of the wreck. If the Court should be of opinion that no action was maintainable, then a nonsuit was to be entered; if they thought an action was maintainable, then the verdict was to be entered for such amount as the Court should direct. And it was agreed that the Court might draw such inferences and conclusions from the facts of the case as the jury might have drawn.

*Crowder and Greenwood*, for the plaintiff.  
—The present action is maintainable against the defendant for the whole amount claimed. The case states that the master was ap-

pointed by the owner; and, consequently, the possession of the vessel was not given up to the charterers, and if the action can be supported, the plaintiff is the proper party to bring it. The question is, whether the plaintiff, as owner, can sue the defendant for the proceeds. It will be said that he cannot, because there is no privity of contract between them, the defendant acting under the master, to whose order he has paid over the proceeds. The plaintiff, and not the master, was the principal of the defendant, and it was his duty to retain the proceeds for the benefit of the plaintiff. In *Hunter v. Parker* (1) the authority of the master to sell the ship was regarded as incapable of delegation; and the sale here must be taken to have been made by the plaintiff, and not by the master. The disbursements were made, not for the benefit of the charterers, and they cannot be set up as against the plaintiff, who is entitled to recover all the proceeds beyond the mere expenses of the sale. Regarding the sale as a sale by the master, he had no authority to dispose of the wreck, so as to put it out of the power of the plaintiff to recover the proceeds in the present action. His authority was limited and restricted to the necessity of the case; and though he might have authority to sell the ship, yet that would be for the benefit of the owner, and not of the charterers. Because, however, he had authority to sell, it was not a necessary consequence that he had power to dispose of the proceeds in this mode.

[MAULE, J.—Does not the power to sell involve the power to receive the purchase-money?]

It is laid down in *Abbott on Shipping*, p. 138, 8th edit., that the authority of the Master is strictly limited to what is absolutely necessary. Referring to *Cary v. White* (2), it is said, "This case, while it establishes the principle of the personal responsibility of the owners, shews also that the creditor is required to prove the actual existence of the necessity of those things which give rise to his demand." The Master can only do what is strictly necessary and no more: for example, if a creditor furnishes goods to the master of a vessel, he must prove the

necessity for the articles in order to charge the owner. So here, though the sale may have been necessary, there was no necessity that the money should be paid to Frazer's order.

[MAULE, J.—Do you say that the purchaser could not pay the master ready money for the wreck?]

He must pay the owner or his agent.

[MAULE, J.—It is not stated that the owner had not an agent at the Cape. It would lead to great inconvenience, if, in order to limit the master's power, he was to be at liberty to sell on credit to any person he might choose.]

Littledale, J. held, in *Mynn v. Joliffe* (3), that an agent to sell an estate had no authority to receive the purchase-money.

[MAULE, J.—The auctioneer is not intrusted with the estate, nor has he the power to hand it over. A ship must necessarily be handed over at once to the purchaser.]

But if Frazer had authority to receive the purchase-money, it was not competent for him to give an order to credit him for 319*l.* 5*s.* 7*d.*, the price of the articles purchased by himself and the mate. The 578*l.* 2*s.* 3*d.* too, must be taken to have been paid by order of the master for the benefit of the charterers. It is said, in *Story on Agency*, p. 75. s. 98, "In some cases, the nature and extent of the incidental authority turn upon very nice considerations, either of actual usage or implications of law. Thus, an agent employed to make, or negotiate, or conclude a contract, is not as of course to be treated as having an incidental authority to receive payments which may become due under such contract. An insurance broker was held, in *Todd v. Reid* (4), only to be entitled to receive payment for the assured, in money; and, therefore, that a custom to set off the general balance due from the broker to the underwriter, in the settlement of a particular loss, was void. *Bartlett v. Pentland* (5) and *Scott v. Irving* (6) are to the same effect.

[MAULE, J. referred to *Stewart v. Aberdeen* (7).]

(3) 1 Moo. & Rob. 326.

(4) 4 B. & Ald. 210.

(5) 10 B. & C. 760; s.c. 8 Law J. Rep. K.B. 264.

(6) 1 B. & Ad. 605; s.c. 9 Law J. Rep. K.B. 89.

(7) 4 Moo. & Wels. 211; s.c. 7 Law J. Rep. (N.S.) Exch. 292.

(1) 7 Moo. & Wels. 322; s.c. 10 Law J. Rep. (N.S.) Exch. 281.

(2) 5 Bro. P.C. 325.

There the defendant knew the plaintiff to be the owner of the vessel, and he was not justified in paying the proceeds to the charterer, nor was he authorized to make disbursements not for the benefit of the owner. The proceeds might just as well have been applied to purchase another ship as in the mode they have been applied, and to allow such payments as these would open a wide door to fraud.

[COLTMAN, J.—Is there any distinction between the payment made to the order of the Master and the disbursements?]

Alderson, B. says, in *Barker v. Greenwood* (8), "An agent, with a general authority is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to his principal, he must receive it in cash from the debtor; and a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this his duty. If, therefore, the agent be not a creditor of this principal, he must receive the whole in cash, for otherwise he does not, by the act done between him and the debtor, put himself into the situation of being able to pay it over." In *Story on Agency* it is also said that "a person dealing with a factor or broker, though a general agent, is not clothed with authority to pledge, deposit, or transfer the property of his principal for his own debts; and if he receives such a deposit or pledge, the title is invalid, and the property may be reclaimed by the principal."

*Channell, Serj.* and *Cleasby*, for the defendant.—No privity existed between the plaintiff and the defendant, which will enable the plaintiff to maintain this action; and even if there had been, the defendant had discharged himself by the payments made to the order of Frazer and the remittance to England under his directions. The sale at the Cape was necessary and proper, and the owner has admitted that by bringing this action for the proceeds. The Court expressed their opinion in *Hunter v. Parker* that the master of a ship has authority to sell her for the benefit of all parties, if in

consequence of injury to the ship during the voyage, there is no prospect of bringing her to its termination; and they held that, at all events, if the owner receives the proceeds, he ratifies the act of the master in selling her, and is prevented from afterwards recovering back the ship. Frazer, therefore, having under the circumstances authority to sell, the defendants were employed by him, and received the proceeds as his agent and subject to his orders. *Stephens v. Badcock* (9) shews that although Frazer may have been the plaintiff's agent, there was no privity of contract between the plaintiff and the defendant. In that case an attorney, who was accustomed to receive certain dues for the plaintiff his client, went from home, leaving his clerk at the office, who, in the absence of his master, received money on account of those dues for the client, which he was authorized to do, and gave a receipt signed by him for the attorney. The attorney was in bad circumstances when he left home, and never returned; but it did not appear that his intention so to act was known at the time of payment to the clerk, who afterwards refused to pay the money over to the client: and in an action against him for money had and received it was held that the action did not lie, the defendant having received the money as the agent of his master, and there being no privity of contract between the plaintiff and the defendant. Here, too, the ship was mortgaged, and the defendant not knowing the state of the account between the mortgagor and mortgagee, could not tell who was entitled to the proceeds. In *Story on Agency*, sect. 127. p. 179, it is said "that an agent is not ordinarily permitted to set up the adverse title of a third person to defeat the rights of his principal against his own manifest obligations to him, or to dispute the title of his principal. If, therefore, he has received goods from his principal, and has agreed to hold them, subject to his order, or to sell them for him and to account for the proceeds, he will not be allowed to set up the adverse title of a third person to the same goods to defeat his obligation. An exception, however, is allowed, where the principal has obtained the goods fraudulently

(8) 2 You. & Coll. 414; s.c. 6 Law J. Rep. (N.S.) Ex. Eq. 54.

(9) 3 B. & Ad. 354; s.c. 1 Law J. Rep. (N.S.) K.B. 756.

or tortiously from such third person. The same principle is upheld in equity as in law; and, therefore, if an agent received money for his principal, he is bound to pay it over to him, and he cannot be converted into a trustee for a third person, by a mere notice of his claim. It is upon a somewhat analogous principle connected with the want of privity, that an agent employed by a trustee is accountable only to him, and not to the *cestui que trust*, and a sub-agent is accountable to the superior agent who was employed, and not generally to the principal. Cases, however, may occur where by the usage of trade or otherwise a sub-agent is employed where the original agent would not be responsible for the conduct of the sub-agent, and where, therefore, the appropriate remedy of the principal would be directly against the sub-agent." The present case does not fall within any of these exceptions. The ruling in *Mynn v. Joliffe*, that an agent employed to sell an estate has not authority to receive payment, does not affect the present question, for that was the case of land, whereas the contrary has been held with regard to goods—*Capel v. Thornton* (10). If then the defendant would have been justified in paying the proceeds of the sale to Frazer, he was justified in remitting them to his order; and so with respect to the price of the goods bought by the captain and mate. If the defendant can be said to have received it, he must be taken also to have paid it over to Frazer.

*Crowder* replied.

*Cur. adv. vult.*

MAULE, J. now delivered the judgment of the Court.—This case was argued before my Brothers Coltman, Williams, and myself, in the absence of the Lord Chief Justice, who was counsel in the cause. The Judges who heard the argument have agreed on the judgment I am to pronounce. This is an action of assumpsit for money had and received by the defendant to the use of the plaintiff, for interest, and for money due on an account stated. The defendant pleaded—first, non assumpsit; secondly, payment; thirdly, a set-off of money due from the plaintiff to the defendant, and one Harrison Watson, whom the plea alleges to

be out of the jurisdiction of the Court, and to have made the promises alleged in the declaration jointly with the defendant. The issues joined on these pleas came on for trial before Lord Chief Justice Tindal, when a verdict was found for the plaintiff, subject to a case which stated, in effect, that the plaintiff was the registered owner of the ship *Royal William* at the time of the transaction in question. The plaintiff had chartered the ship to C. A. Gordon, for a voyage from London to Madras and Calcutta, and back to London. Messrs. Ouchterlony & Co., of London, were jointly interested with C. A. Gordon in the charter-party. The master of the ship for the voyage was D. Frazer, mentioned in the charter-party as appointed by the owner. The ship had also been mortgaged by the plaintiff, for securing the payment of a sum of money which was unpaid at the time of the remittance of the proceeds of the wreck, and exceeded the amount of those proceeds. The mortgagees had effected a policy of assurance on the ship, and had received money from the underwriters, for which they had given credit to the plaintiff. The ship sailed on the voyage with a cargo belonging to fifty different persons, and, with the cargo, was totally wrecked at the Cape of Good Hope. The plaintiff had no interest in the cargo or adventure. The master, D. Frazer, employed the defendant and his partner, H. Watson, who were merchants at the Cape, to superintend the preservation and sale of the ship stores and damaged part of the cargo, and to receive the proceeds thereof. The defendant and his partner accordingly employed an auctioneer, who sold the ship, damaged cargo, and stores. The net proceeds of the sale were received by the defendant and his partner, with the exception of £19*l.* 5*s.* 7*d.*, which was the amount of certain articles belonging to the wreck which had been bought at the sale by the master, Frazer, and Andrews the mate, which was not actually paid by Frazer or Andrews to the auctioneer, or by him to the defendant and his partner, but which, by order of Frazer, had been credited to him by the defendant and his partner, as money received on his account, and debited to him as money advanced to him. The defendant and his partner, before any claim made on them by the plaintiff, or any one else, had paid over

(10) 1 Moo. & Rob. 326; a. c. 2 Car. & Pay. 352.

the whole of what they had received on the account of ship and cargo either to the master, Frazer, or to his order at the Cape, or to Messrs. Ouchterlony & Co., to whom Frazer had directed them to remit the balance on account of whom it might concern, with the exception of what they retained to cover the disbursements necessarily incurred by them in the execution of the duty of superintending the preservation and sale of the ship and cargo, and their own charge for agency, which was fair and reasonable. Under these circumstances, the plaintiff insists that the defendant is liable to pay him the whole, or some part, of what was received by him and his partner on account of the ship. The defendant insists that he was accountable to Frazer only, and not to the plaintiff; or, at least, that, after having fully accounted to Frazer, and paid over the balance to his order, he is not liable to the plaintiff.

There can be no doubt that the sale was, under the circumstances, necessary, and, indeed, this was not disputed in the argument. Where a ship continues to retain the character of a ship, and to be capable of being used as such, with or without repairs, difficult questions may arise as to the master's authority to sell, and a sale in such a case is to be viewed with suspicion, the master's duty being, in general, to proceed on the voyage, if possible; or, at least, not to sell the ship without a strong necessity, or the express authority of the owner. But in the present case, where the ship is totally wrecked, and a large part of the cargo damaged, in a distant country, there can be no doubt of the right and duty of the master to sell. Indeed, it does not appear what other course, consistent with any regard to the interest of those concerned, it was possible for the master to have adopted. But the plaintiff, though not disputing the right to sell, denies the right of the master to receive the proceeds, or, at least, to dispose of them by ordering the defendant to pay them either to persons at the Cape, or to Ouchterlony & Co., of London, to whom the balance was remitted.

With regard to the right of the master to receive the proceeds, the case of *Mynn v. Lolife* was cited, in which it was decided that an agent employed to sell an estate is not, as such, authorized to receive the pur-

chase-money; and there is no doubt that, on the sale of an estate, to imply such an authority would be most inconvenient and unnecessary, it being clearly for the interest of the vendor that he, and not his agent, should receive the purchase-money; and no inconvenience to any one arises out of the limit to the authority of the agent which excludes his right to receive the money. The proper course is, clearly, that the vendee should retain the money and the vendor the estate till the conveyance is made, and thus neither of them runs any risk of losing the money. But, in the present case, if the master was not to receive the money, he must either give credit to the purchasers of the ship and cargo, leaving the owners to receive it from them, or must employ some third person, of his own selection, to receive the money from the purchasers, and pay it to those who were interested in the ship and cargo. The inconvenience of either of these alternatives is so great and manifest, that it leaves no doubt that the authority of the master to receive the proceeds is a necessary incident to his authority to sell. And it appears to us, that an authority to receive the proceeds involves an authority to order payment of them *bond fide* to such person as the master may think fit: a payment under such an order being, in effect, a payment to the master. It differs from the cases cited of payments where no money is disbursed by the debtor or received by the agent, but where the debt of the agent is discharged by being set off against the money which he has to receive from his creditor on account of his principal. In the present case, the defendant actually pays the money, and has no advantage which he could not have if he paid it into the hands of the master. In the case of the set-off, the debtor gains an advantage by his mode of dealing with the agent, which he could not have had if he had dealt with the principal. The payments having been ordered and made *bond fide*, which we must take to be the case, nothing being stated in the case or suggested in the argument to the contrary, it does not appear to us to be material for what purpose they were ordered, any more than it would be material to inquire into any application which the master might have made of money paid into his hands. The sum of 319*l.* 5*s.* 7*d.*, the amount



of goods bought by the master and mate, does not, we think, fall under a different rule from the rest of the proceeds of the sale. It might, indeed, be said not to have been money actually received by the defendant, but we think it was properly treated by him under the order of the master, as having been received for the master, and advanced to him by his order. This sum of money, together with that paid under the master's orders to persons at the Cape, and to Ouchterlony & Co., and with that properly retained by the defendant and his partner on account of their disbursements and services, constitutes the whole amount with which the defendant is in any way chargeable; and this having been properly paid and retained, it follows that the defendant has duly accounted for all that he was answerable for. Whether the action could have been maintained if the plaintiff, or all those interested in the ship and cargo, had intervened before the money had been paid by the orders of Frazer, it is not necessary to determine.

But there are strong reasons for considering the defendant and his partner as the agents of Frazer only, and not accountable to those interested in the ship and cargo, even if they had intervened before payment. In a learned work cited in the argument, *Story on Agency*, s. 203, n., the author states the rule thus:—"A sub-agent employed by an agent is, in general, accountable to the agent only, and not to the principal; for there is no reciprocity of contract between them." And this doctrine is supported by several cases which he refers to, among which is the case of *Stephens v. Badcock*, where the Court held, that a clerk who had received money for his master on account of the plaintiff, was not answerable to the plaintiff, whose remedy was against the master, though the clerk had not paid the money to him. In the case of *Cartwright v. Hatley* (11), a son employed under and accountable to his father, was held not to be accountable to his father's principal; and in *Pinto v. Santos* (12) (which in its circumstances bears some resemblance to the present case), it was held, that bankers who had received from an agent the proceeds of a ship which belonged to differ-

ent persons in different shares, with notice of the agency of the party from whom the money was received, and of the rights of those who were entitled to it, were liable to account to the agent only from whom they received the money, notwithstanding the intervention of the plaintiff, who was entitled to the largest share. See, also, the case of *Sims v. Brittain* (13), in which the surviving part owners of a ship were considered not entitled to maintain an action for money had and received against persons whom a deceased part owner (who was the ship's husband) had employed to receive and pay money on account of the ship, on the ground of want of privity between the plaintiffs and the defendants. The principle on which these cases were determined would, probably, govern the present case if the circumstances required its application. But the defendant and his partner having duly paid over, under sufficient authority, all for which they were liable before any intervention of the plaintiff or any other of those interested in the fund, we think it clear that the defendant is not now liable to the plaintiff, but is protected by his plea of the general issue, if he never could have been liable, or by the pleas of payment and set-off, if his liability was determined by his accounting: in either of which events, by the agreement of the parties, a nonsuit is to be entered.

*Plaintiff nonsuited.*

1848. }  
May 12. } BAILEY AND OTHERS v. BORSON.

*Costs—Suggestion on the Roll—County Courts—9 & 10 Vict. c. 95.*

*An affidavit to deprive a plaintiff of costs, under the 129th section of the County Courts Act, 9 & 10 Vict. c. 95, must shew that the cause of action arose wholly or in some material point within the jurisdiction of the county court within which the defendant dwells or carries on business at the time of the action brought.*

In this case a rule had been obtained, calling upon the plaintiffs to shew cause why the

(11) 1 Ves. jun. 292.

(12) 5 Taunt. 447.

(13) 4 B. & Ad. 375.

judgment to be signed in this cause should not be for the amount of the debt recovered only without costs, or why the plaintiffs should not carry in the record, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiffs of their costs, the verdict being for a sum less than 20*l.*, for which a plaint might have been entered in a county court.

The affidavit stated that the plaintiffs carried on business at Wapping in Middlesex, within nine miles of the defendant's residence at Woolwich, which is within the jurisdiction of the county court of Kent, and that the action was brought for a balance of 3*l.* 15*s.* 4*d.*, for goods sold and delivered at Wapping aforesaid.

*Lush* shewed cause.—The affidavit upon which this rule was moved does not negative the cases mentioned in the 128th section of the 9 & 10 Vict. c. 95, in which the superior courts have a concurrent jurisdiction with the new county courts; there is nothing, therefore, to shew that the plaintiffs ought to be deprived of their costs by the operation of the 129th section of that act. It is not shewn that the cause of action arose wholly or in some material point within the jurisdiction of the county court, wherein the defendant dwelt at the time the action was brought.

*Simon*, in support of the rule.—The affidavit is sufficient, as the circumstances therein stated shew that the case is within the first part of the 56th section of the act, which gives the county court jurisdiction. In addition it states that the plaintiffs carry on business within twenty miles of the defendant's residence, which is within the jurisdiction of a county court; and it is unnecessary also to state that the cause of action arose within the jurisdiction of the court within which the defendant dwelt at the time of the action brought. By the 60th section of the act a summons may issue, though the cause of action does not arise within the jurisdiction.

[*WILLIAMS, J.*—The question is not, whether the jurisdiction of the county court existed, but whether the action must have been brought there.]

It is submitted that it is sufficient to shew that the plaintiffs might have gone to the county court, and have there recovered against the defendant.

*Per Curiam*.—In order to deprive a plaintiff of his costs it is not sufficient to shew that he might have sued in the county court, it should be shewn that it was incumbent on him to have sued there. There is nothing in this affidavit to shew that the cause of action arose within the jurisdiction of the court where the defendant dwelt, so as to preclude the plaintiffs by the 28th section of the County Courts Act from suing in the superior courts; and this rule must, therefore, be discharged.

*Rule discharged, with costs.*

1848. } VALPY AND OTHERS, ASSIGNEES  
Jan. 24; } OF SUTTON, v. SANDERS AND  
May 12. } ANOTHER.

*Trover—Conversion—Contract, Affirmation of—Bankruptcy.*

*After an act of bankruptcy, committed by A, the plaintiffs, who were subsequently appointed assignees, directed A's shop to be kept open as usual. The defendants, with notice of the act of bankruptcy, purchased goods at the shop, which were delivered to them on the 28th of February, and the plaintiffs were appointed assignees on the 24th of March. Applications were made on the 9th and 23rd of April to the defendants, by the direction of the plaintiffs, as assignees, for payment for the goods supplied on the 28th of February, and a formal demand of them was made and refused on the 14th of May:—Held, that the above facts furnished no evidence of an affirmation by the assignees of a contract of sale, and that the defendants were liable in trover.*

*Trover.* The first count of the declaration was by the plaintiffs, assignees of T. Sutton, a bankrupt, for certain goods of the said T. Sutton, which came into the possession of the defendants before the bankruptcy. The second count was for certain other goods, the property of the plaintiffs, assignees of the said T. Sutton. The defendants pleaded, first, not guilty; whereon issue was joined. Secondly, as to the first count, that the said T. Sutton, before he became bankrupt, was not possessed, &c. Issue thereon. Lastly, as to

the second count, that the plaintiffs were not possessed, &c. Issue thereon.

At the trial, before Patteson, J., at the Warwickshire Summer Assizes, 1846, it appeared that the bankrupt was a draper at Atherstone; and that on the 23rd of February 1846 he committed an act of bankruptcy. The fiat issued on the 3rd of March; the adjudication took place on the 5th; and the plaintiffs were appointed assignees on the 24th of March 1846. The defendants were in partnership as wine-merchants, at Atherstone; and the bankrupt and the defendants were in the habit of dealing with each other. At the time of his bankruptcy, T. Sutton was indebted to the defendants on a balance of accounts; and on Friday, the 27th of February, the defendants went to the shop of Sutton, and bought goods to the amount of 6*l.* 4*s.* 11*d.*, which were sent to their house on Saturday the 28th. The defendants knew that Sutton was a bankrupt at the time the goods were purchased, and were informed by the shopman, who delivered them, that they must be paid for to the bankrupt's estate. On the 14th of May a formal demand of the goods was made by the assignees, when the defendants said they had used them. It also appeared that the present assignees, before their appointment, directed the shop of the bankrupt to be kept open, and sales to take place as usual, from Monday the 23rd of February, when the act of bankruptcy was committed by Sutton, who then left his business, till the night of Saturday the 28th of February. Upon the close of the plaintiffs' case, the defendants' counsel applied for a nonsuit on the ground that the assignees, under the circumstances proved, could not maintain trover. His Lordship refused to nonsuit at that stage of the cause, and the defendants then put in the following letters:—

"April 9, 1846.

"In re Sutton (a bankrupt).

"Gentlemen,—I am directed to apply to you for the sum of 11*l.* 11*s.* 4*d.*, for goods supplied to you on the 25th and 27th of February last, which be pleased to remit to me without loss of time.

"I am, &c., for R. V, official assignee.

(Signed) "G. S."

"To Messrs. Sanders & Sanford."

(Inclosed were accounts of the goods sup-

plied at the above dates, amounting to 5*l.* 6*s.* 5*d.* and 6*l.* 4*s.* 11*d.* It was admitted on the argument, that the claim for the former sum could not be maintained; and the question turned upon the right of the assignees to recover the sum of 6*l.* 4*s.* 11*d.*)

"Rugby, April 23, 1846.

"Gentlemen,—I am directed by Mr. Sutton's assignees to apply to you for payment of the sum of 11*l.* 11*s.* 10*d.*; and you will be so good as to pay the same to me, with 5*s.* for this letter, by Thursday next, as in case of non-payment I have positive directions to sue you for the same. I am, &c.,

"W. F. W."

"To Messrs. Sanders & Sanford, Atherstone."

The following letter was then put in by the plaintiffs:—

"Atherstone, 28th April, 1846.

"Dear Sir,—Messrs. Sanders & Sanford consulted us on the subject of the claim made against them by the assignees of T. Sutton, as appears in your letter to them of the 23rd inst. We carefully considered all the circumstances, and advised that they were not liable to pay that claim, but were legally entitled to set off the amount of their claims on the bankrupt's estate. Since that time we have taken the opinion of Mr. J. B. on the matter, and he concurs with us; and if it be determined to bring an action, we will accept service of the writ and appear. We are, &c. &c.

"P. & P."

"To W. F. W, Esq., solicitor, Rugby."

The question of notice, on the part of the defendants, of the act of bankruptcy on the 27th of February, was left to the jury, who found that the defendants had notice of the bankruptcy at the time of the sale. The learned Judge then nonsuited the plaintiffs, with liberty to move to enter a verdict for them. A rule having been obtained, pursuant to the leave reserved,—

*Whitehurst and Mellor shewed cause* (Jan. 24).—The act of bankruptcy was committed on the 23rd of February, but the shop of the bankrupt was kept open by the direction of the plaintiffs till the night of Saturday the 28th, on which day the goods in question were delivered to the defendants, and the plaintiffs were appointed assignees on the 10th of March. The goods were, therefore, in point of law, sold by the plaintiffs. The letter of the 9th of April, written by

their desire, adopts and confirms the contract of sale, to which the defendants have always assented, and consequently there has not been a conversion. It was said that this question does not arise upon the form of the pleadings, but it is submitted, that the facts proved amount to not possessed, and could not have been expanded on the record—*Stancliffe v. Hardwick* (1), *Pickard v. Sears* (2). The plea of not possessed relates to the time of the conversion, because a plaintiff cannot be expected to go to trial armed with proof that ten years ago the goods belonged to the bankrupt. The question of property must then depend upon the time of the conversion by the defendants, and if the property passed at the time of the sale or delivery of the goods, the assignees were rightly nonsuited. If the delivery on the 28th of March was unauthorized, then, as both the party who assists in an unauthorized delivery and the party who receives are guilty of conversion, it must follow that the shopman delivering, who was acquainted with all the circumstances, is also guilty of conversion—*Kynaston v. Crouch* (3), which could scarcely be insisted on, as the goods were sold and delivered in the usual way of business. The delivery then on the 28th of March was not wrongful, and so there was no conversion on that day. The assignees may affirm or disaffirm a sale, at their option. It is admitted that to shew an affirmation there must be some decisive act on their part, and it is submitted there were many such acts in this case. The bankrupt's shopman was directed by the assignees to sell; it may, therefore, be said that the delivery which necessarily followed the sale was their act, and the money was twice demanded by them as on a sale of goods. The principle of affirmation is well laid down by Lord Kenyon, in *Smith v. Hodson* (4). The assignees must act consistently throughout,—they cannot, as it is said, blow hot and cold. *Brewer v. Sparrow* (5),

*Pearson v. Graham* (6) and *Needham v. Raubone* (7), were also referred to. The letter of the 28th of April from the defendants' attorney, put in as an answer to the defendants' case, has no reference to the point of affirmation: its effect is to say, the defendants had no notice of the act of bankruptcy, and are therefore protected by the 2 & 3 Vict. c. 29. s. 1. The plaintiffs now rely upon a conversion on the 14th of May, and endeavour, by a formal demand of the goods, to do away with and repudiate all the numerous acts of affirmation which had taken place between that day and the 27th of March; but it is not competent for them so to do, and thus annihilate a contract for the sale of goods entered into and completed by a servant acting under their own directions, assented to by them for five weeks, and after repeated applications for the value of the goods as for a debt owing to them—*Gregg v. Wells* (8), *Coles v. the Bank of England* (9).

*Waddington* (*Humfrey* with him).—It cannot be doubted that there was a conversion on the 28th of February. The case of *Hurst v. Gwennap* (10) is exactly in point. Here there was really no affirmation at all. The meaning of the letters is this: the assignees say, "We will waive the tort if you will pay the money."

[WILDE, C.J.—I understand this case thus, "If you do not elect to take the goods as a sale from us, if you insist upon it as a sale from the bankrupt, and so claim a set-off, we will bring an action for a tort."]

Exactly so. The letter of the 23rd of April is no waiver of a tort and affirmation of a contract: but if it were, was there any acceptance on the other side? It is submitted there was nothing of the kind. The answer to it of the 28th of April says in effect, "we had no notice of the act of bankruptcy, and upon that issue we shall resist your claim." There is no case which

(6) 6 Ad. & El. 899; s. c. 7 Law J. Rep. (n.s.) Q.B. 247.

(7) 6 Q.B. Rep. 771, n.

(8) 10 Ad. & El. 90; s. c. 8 Law J. Rep. (n.s.) Q.B. 193.

(9) Ibid. 437; s. c. 9 Law J. Rep. (n.s.) Q.B. 36.

(10) 2 Stark. Rep. 306.

(1) 2 Cr. M. & R. 1; s. c. 4 Law J. Rep. (n.s.) Exch. 161.

(2) 6 Ad. & El. 469.

(3) 14 Mee. & Wels. 266; s. c. 14 Law J. Rep. (n.s.) Exch. 324.

(4) 4 Term Rep. 211.

(5) 7 B. & C. 310; s. c. 6 Law J. Rep. K.B. 1.

carries the doctrine of affirmation of contracts so far as is here attempted. *Brewer v. Sparrow* is easily distinguished; there money had been paid on a balance of accounts, and that operated as an estoppel. As there has been no payment, the defendants here are in the situation of the defendant in *Kynaston v. Crouch*, and may be sued in trover. If payment could have been shewn to have been received by the assignees, then this case would be governed by *Brewer v. Sparrow*; but as no payment was made, it is quite extravagant to say there was any waiver.

[CRESSWELL, J.—If a person sells by the direction and on behalf of those who are subsequently appointed assignees, can they affirm the sale as a contract after they are appointed? Their title accrues by relation, can their affirmation do so also?]

It is extremely doubtful; there is no saying what miracles the difficult doctrine of relation may work. Perhaps the subsequent affirmation would operate as a waiver, but it could not change the original character of the transaction. But, however this may be, the plaintiffs rely upon the point that there is no evidence of affirmation in this case.

*Cur. adv. vult.*

The judgment of the Court was now (May 12) delivered by—

WILDE, C.J.—This was an action of trover brought by the plaintiffs, assignees of Thomas Sutton a bankrupt, for the purpose of recovering the value of certain goods which had belonged to the bankrupt, and which had been sold by the bankrupt's shopman after an act of bankruptcy committed by the bankrupt having absconded, and after notice of the act of bankruptcy received by the defendants. Subsequently to the appointment of the plaintiffs as assignees, their agent sent a bill of parcels to the defendants as for goods sold by the bankrupt to the defendants, and the solicitor of the plaintiffs demanded payment of the amount of such bill of parcels. The defendants refused to pay for the goods, whereupon the plaintiffs demanded the goods, and upon the refusal of the defendants to deliver them brought the present action of trover.

Upon the trial, it was contended, on the part of the defendants, that by the delivery of the bill of parcels and demand of payment as for goods sold and delivered by the bankrupt, the plaintiffs had affirmed the sale and could not afterwards disaffirm it and maintain trover; and upon this objection the plaintiffs were nonsuited, leave being given to them to move to enter a verdict in their favour for the amount demanded, if the Court should be of opinion that the plaintiffs were entitled to recover. It appears by the Judge's report of the evidence, that the sale was made by the bankrupt's servant, after the bankrupt had absconded, and altogether without authority, and after notice of the act of bankruptcy to the defendants. It is therefore clear that the defendants, by receiving the goods under such unauthorized sale, were guilty of a conversion as against the assignees of the bankrupt. There was no evidence to shew that the plaintiffs, or their agents, had any notice that the bankrupt was indebted to the defendants at the time of the delivery of the bill of parcels, nor at the time when the demand was made for payment; and it was proved that before the delivery of the goods the shopman who sold them informed the defendants that the goods must be paid for to the estate of the bankrupt. Under these circumstances, the plaintiffs obtained the present rule nisi to set aside the nonsuit and to enter a verdict for them; and upon the argument upon the rule, the principal point discussed was, whether the plaintiffs had by the acts before mentioned affirmed the sale by the shopman as a sale by their agent, and so precluded themselves from maintaining an action of trover? The Court is of opinion that such was not the effect of those acts; and that the utmost effect to be given to them is, that there was a qualified offer on their part to adopt the sale, that is, if the defendants would pay for the goods, and that when the defendants refused to pay for them, it was competent to the plaintiffs to repudiate the sale altogether and bring the present action. In the case of *Brewer v. Sparrow* assignees were held to have adopted the dealings of the defendant with the estate of the bankrupt, which took place after an act of bankruptcy, and with notice, by adjusting an account of receipts and pay-

ments in respect of such dealings, and by receiving the balance due upon the result of such an account, treating all the transactions as valid; but in the case of *Morris v. Robinson* (11), where a quantity of indigo shipped at Calcutta on freight had been improperly sold under the order of a court of Vice-Admiralty at the Mauritius and the proceeds paid into court, the owner of the indigo was held entitled to maintain trover against the defendant who had purchased and received thirty-two chests of the indigo so sold, notwithstanding the plaintiff's agent, under a power of attorney executed by the plaintiff, had made an unsuccessful application to the Vice-Admiralty Court to obtain the proceeds paid into court of certain other of the chests of indigo sold under the same circumstances as those purchased by the defendant. And in *Burn v. Morris* (12), where trover was brought for a 20*l.* bank note which the plaintiff had lost, and which the defendant had received from a woman who had found it, and had exchanged it at the bank, notwithstanding the plaintiff had received from the woman who found it the sum of 7*l.*, being part of the proceeds which had been obtained by the defendant by the exchange of the note at the bank (the 7*l.* being allowed only in reduction of damages), the plaintiff was held, notwithstanding its receipt, entitled to maintain trover; and upon *Brewer v. Sparrow* being cited, the Court said "that case was distinguishable by the fact that the assignees had there received a sum as the whole balance due to them upon the footing of the account." And in the case of *Hurst v. Gwennap* goods had been delivered by a bankrupt to the defendant upon sale or return, after an act of bankruptcy, but without notice. The assignees, after their appointment, required the defendant to say whether he would keep the goods or not. The defendant elected to keep the goods, whereupon the assignees delivered a bill of parcels as upon a sale by the bankrupt to the defendant, and demanded payment of the amount. The defendant refused to pay, claiming a set-off, as in the present case, whereupon the assignees, without further demand, brought trover, and were held entitled to recover, and the Court confirmed

the ruling of Lord Ellenborough at *Nisi Prius*. We are, therefore, of opinion that the plaintiffs by demanding payment for the goods as upon a sale by the bankrupt, which demand was not acquiesced in by the defendants, did not preclude themselves from maintaining trover upon refusal of the defendants to pay according to such demand. The plaintiffs are, therefore, entitled to make this rule absolute to enter a verdict for them for the value of the goods so received by the defendants under the circumstances before stated.

*Rule absolute.*

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*APPEAL from the Courts of Revision, under 6 Vict. c. 18.*

1848. }  
 Jan. 20; } BURTON, APPELLANT; LANG-  
 May 12. } HAM, RESPONDENT.

*Parliament—Vote—Occupation as Tenant, under 2 Will. 4. c. 45. s. 20.—Committee of Lunatic.*

*By letters patent, the whole management of a lunatic's property, both real and personal, was granted to a committee, who was directed to render a yearly account of the estate to the Court of Chancery. The committee occupied land of the lunatic worth 393*l.* per annum. He described himself as tenant, and debited himself with that sum as rent, in the yearly account rendered to and allowed by the Court of Chancery:—Held, that the committee did not occupy as tenant lands or tenements, within the meaning of the 20th section of the Reform Act.*

At a court held before the revising barrister, duly appointed to revise the list of voters for the parish of Cottesbrooke in the southern division of the county of Northampton, Mr. E. S. Burton objected that Mr. H. Langham was improperly on the register as tenant, under the 2 Will. 4. c. 45. s. 20. The barrister stated the following

#### CASE.

Mr. Herbert Langham is committee of the estate of his brother Sir James Hay Langham, and holds lands in Cottesbrooke, as occupier, to the value of 393*l.* per annum. The said Herbert Langham proved that his

(11) 3 B. & C. 196.

(12) 4 Tyr. 486; s. c. 7 Law J. Rep. (N.S.) Exch. 193.

accounts are from time to time transmitted for examination and approval to the Court of Chancery, and a document was produced by the said Herbert Langham, entitled "The ninth account of Herbert Langham, as committee of the estate of Sir J. H. Langham, bart.," bearing the signature of Edward Winslow, one of the commissioners of lunacy, and the seal of the court in which the name of Mr. H. Langham appeared as tenant, in the tenants' volume, at the rent of 393*l.* per annum.

The said H. Langham stated, that after the passing of the account he retained a balance of about 1,500*l.*, out of which, after paying a jointure on the estate, he defrayed the expenses of repairs and improvements on the property. He further stated, that he was appointed committee on the 21st of June, A.D. 1837; that he took possession of the lands about Lady-day, 1843, succeeding to an occupying tenant, and that he has continued to hold them up to the present time. He also stated that he occupies Cottesbrooke House, and the adjoining

fields. Part of the furniture in the house is his own.

Mr. Wood, steward of Cottesbrooke estate, stated on oath, that he was examined by the Master, with the accounts, and that in such examination the specific lands for which Mr. H. Langham claimed to vote were inquired into, with a view to their condition and value.

Mr. E. S. Burton objected that Mr. H. Langham, as such committee, was improperly on the register as tenant, under the 20th section of the 2 Will. 4. c. 45.

I found that Mr. H. Langham held as occupying tenant, and retained his name on the list of voters.

Signed, E. W, revising barrister.

This case came on to be heard on the 11th of November 1847, and was then remitted to the revising barrister to be stated more fully. The following additional facts were returned, as required by the Court:—

First. The following was the description of the respondent's qualification:—

Christian Name and Surname.	Place of Abode.	Nature of Qualification.	Name of Property, &c.
Langham, Herbert.	Cottesbrooke.	House and Land, Occupier.	Cottesbrooke.

Second. The letters patent, dated the 21st of June 1838, appointing the respondent committee of the lunatic's estate, were set out at length, the material part was as follows:—

"Know ye also, that we of our special grace and of our certain knowledge and mere motion, have given, committed and granted, and by these presents for us, our heirs and successors, do give, commit and grant unto the said Herbert Langham, the custody, regulation, occupation, disposition and receipt, as well of all manors, messuages, lands, tenements, houses, farms, revenues, services and hereditaments, with the appurtenances, and all rents, revenues and profits thereof, which the aforesaid Sir James Hay Langham hath or ought to have in possession or reversion, or which by any lawful ways and means, at any time or times here-

after, may or ought to come, descend, or accrue to the said Sir James Hay Langham, or which any other or others hath or may have to the use and profit of the said Sir James Hay Langham, in the county of Northampton, &c., or elsewhere, within our kingdom of Great Britain, as also the custody and government of all the goods and chattels, farms, stock of cattle, &c., and other the commodities and profits whatsoever, to the said Sir James Hay Langham belonging or in any manner appertaining, and also the use and negotiation of the same to the use and behoof, profit and advantage of the said Sir J. H. Langham, and for the maintenance, sustenance and support of the said Sir J. H. Langham and his family (if he hath any, or in any time to come may have); and also for the maintenance, preservation, and repair of the messuages, lands,

tenements, houses, farms, and the residue of the premises of the said Sir J. H. Langham, to have and to hold the aforesaid custody, regulation, occupation, disposition and receipt of the aforesaid manors, messuages, lands, tenements, houses, farms, goods and chattels of the said Sir J. H. Langham, and all and singular other the premises above given, committed and granted, or mentioned to be given, committed and granted unto the said Herbert Langham from the date of these presents, so long as it shall please us, or during the continuance of the lunacy of the said Sir J. H. Langham. Provided always, that the said Herbert Langham, his executors and administrators, shall render a true account of the issues, revenues and profits of the manors, messuages, lands, tenements, &c. and of the goods, chattels and debts aforesaid, and of the profits thereof and of

the rest of the premises, once in every year at least, and as often as and whensoever to the Lord Chancellor of Great Britain, &c. for the time being shall seem meet, and shall obey and fulfil all and every the order and orders of the Lord Chancellor of Great Britain, &c. made or hereafter to be made anyways touching or concerning the premises, or any part thereof, or the issues or profits thereof, or any account or accounts thereof."

Third. An account of the receipts and disbursements on account of the estate of Sir J. H. Langham, rendered by the respondent for the twelve months next preceding the 28th of August 1846, signed, sworn to by the respondent as correct, and allowed by the certificate of a Master in Chancery, was set out in the case. The name of the respondent appeared in this account thus :

Name of Tenant.	One Year's Rent due Lady-day, 1846.	Rents Received.	Deductions for Income Tax.	Arrears due.
Herbert Langham, Esq.	£. s. d. 393 0 0	£. s. d. 393 0 0	£. s. d. 6 3 8	None.

Fourth. A fuller statement of the circumstances under which the respondent took possession of the land.

On the 25th of March 1841, W. D, who rented and occupied a farm at Cottesbrooke, belonging to Sir J. H. Langham, quitted. At the same time J. G, who rented and occupied another farm belonging to Sir J. H. Langham, also quitted. Mr. Herbert Langham (the committee) entered upon the occupation of both farms, for which he debited himself in his accounts the sum of 31*l.* 10*s.*, which sum was made up as under:—

The rent paid by W. D. ....	£27 10 0
Ditto ditto by J. G. ....	4 0 0
	<hr/> 31 10 0

On the 25th of March 1843, T. F, who rented and occupied a farm belonging to Sir J. H. Langham at Cottesbrooke, at the rent of 210*l.* per annum, quitted. Mr. Herbert Langham entered upon the occupation of it, and charged himself with the

same sum as T. F. had paid for rent, viz. —210*l.*, and with the 31*l.* 10*s.*, making total rent 241*l.* 10*s.*

The above is the occupancy upon which the respondent made his claim for a vote, the greater part of which he still occupies together with Cottesbrooke House. In consequence of J. G, the tenant of the park and other land at Cottesbrooke, having become insolvent, Mr. Herbert Langham entered upon the occupation of the said park and some land adjacent thereto.

In consequence of the above additions, the sum charged by the respondent for rent at Lady-day, 1846, for the whole of the lands which he occupies, amounted to the sum of 393*l.*

The extent of the lands held by the respondent amounts to 210 acres. Mr. Wood, the bailiff of the estate of the respondent, on annually passing his account, makes a report, verified by affidavit, as to the general condition and costs of repairs of the estate. It did not appear in evidence before me, that Mr. Herbert Langham had the



power of making any leases of the lands belonging to the lunatic.

It also appeared, by the evidence of Mr. Herbert Langham, that since his appointment as committee he had actually paid no rent, and that no receipt was given to him by any person, but he had debited himself with the above annual sums, and that the balance now in his hands was upwards of 1,600*l*.

Fifth. The respondent receives the produce of the lands held by him at Cottessbrook entirely to his own use and benefit, and does not account for any part of it to the estate of the lunatic. The sum stated by the respondent as rent paid for the said land, is included with the accounts of the rents of the other tenants on the estate, as will be seen by reference to the account.

*Humfrey*, for the appellant.—The letters patent do not make Herbert Langham tenant of the house and land for which he claims to vote. The words are, "we do give, commit, and grant the custody, occupation, and receipt of all messuages, &c., and all revenues, rents, &c., which the said lunatic hath, or ought to have, to the said Herbert Langham, to the use and profit of the said lunatic, so long as it shall please us, or during the continuance of his lunacy." The committee would cease to have any power over the estate if the lunacy ceased or the letters patent were revoked, and till either of those events happens they operate as an absolute grant to the committee of all the lands, &c. to the use and profit of the lunatic. Herbert Langham is really a trustee, and as such cannot be tenant of any lands of which he is trustee. *The Attorney General v. Dixie* (1) and *The Attorney General v. Lord Clarendon* (2) are express decisions to that effect. Next, the committee has the sole management of the lands, &c.; he cannot lease to himself, and he cannot distrain upon himself, because he has the reversion in himself. The statute 1 Will. 4. c. 65. ss. 19, 23, 24. empowers the Lord Chancellor to direct the committee of a lunatic to make leases when applied for, and that shews conclusively he cannot do so simply as committee.

[WILLIAMS, J.—Would he not be entitled

to vote if he occupied the land on a *quantum meruit* ?]

No—the words of the statute 4 & 5 Will. 4. c. 45. s. 26. require that the party should occupy as tenant, and be liable to a rent of 60*l*.

[CRESSWELL, J.—Suppose that for some reason over which the committee had no controul the land he occupied was entirely unproductive, what rent would he have to pay or account for to the Court ?]

None at all. If the lunatic were to become sane, or to die in the middle of a year, the committee could not require a notice to quit, nor could he be called upon to pay anything after the day that either event happened; it cannot, therefore, be said that he is liable to a yearly rent. He is in an anomalous position; he occupies neither as owner nor as tenant, but as committee, which approaches most nearly to the character of trustee.

*Manning, Serj.*, for the respondent.—It is not disputed that a committee takes no estate in the land—*Knipe v. Palmer* (3). He has no more authority than the donee of a power under a will, in respect of which the donee takes no estate whatever, and for that reason the late act of parliament gives a committee an estate to enable him to make leases. The cases in Chancery relating to trustees do not apply. It is the practice of the Court of Chancery which prevents the trustee from being tenant to the lands of which he is a trustee, in order to guard against all chance of fraud—otherwise, as the trustee has the legal estate, he could make leases.

[WILDE, C.J.—The question is, can the Crown grant a tenancy of a lunatic's estate? and if so, what evidence is there of such a tenancy here ?]

There is evidence of it, and all the evidence that can be produced. The Court of Chancery, which represents and acts for the Crown, accepts Herbert Langham. In the account he renders as committee, he describes himself as *tenant liable to a rent of 393*l*. from year to year*—he is therefore estopped from denying his character and liability as tenant.

[MAULE, J.—That does not make him tenant: it makes him accountable for that

(1) 13 Ves. 519.

(2) 17 Ibid. 401.

(3) 2 Wils. 130.

sum, but not accountable as tenant. The Court of Chancery looks to the substance of matters; it does not care about defining the character of the occupation.]

It makes him accountable for so much rent. It is clear the committee occupies, and if so, he must occupy as owner, tenant, or bailiff. The first character is out of the question; and either of the two latter, if he be liable to the required amount of rent, is sufficient to confer the right to vote.

[WILLIAMS, J.—The committee occupies the mansion-house—if it were demolished by lightning, would he be liable to pay rent?]

That depends upon the nature of his tenancy. A tenant from year to year is not liable in the event of demolition by lightning. Suppose the lunatic were to become sane, and rent were due, he could distrain; for he would say to the committee, "you called yourself tenant, and paid rent as such." The occupation makes him liable "as tenant," and that is all that is necessary under the act.

[MAULE, J.—Has the committee power to let from year to year, by virtue of the letters patent?]

It is submitted that he has not, without the sanction or adoption of the Court of Chancery. That Court is the exponent of the will of the lunatic, and has adopted the respondent as tenant. Suppose a stranger occupied and paid rent, he could not say I am a disseisor and no tenant, neither can the respondent say so here.

[MAULE, J.—The Reform Act means that a party who is entitled to vote must be tenant and liable *as such* to pay 50*l.* a-year—he must have the interest of tenant; he must be tenant and occupy in that character. A committee may make himself liable for rent, but he cannot make himself tenant.]

*Humfrey*, in reply.—A party who claims to vote under this section of the act, must occupy under a demise, by which he is liable as tenant to a yearly rent of 50*l.* The respondent may be estopped as to questions affecting himself from saying he is not tenant, but that does not make him legally tenant, which is what the act requires.

*Cur. adv. vult.*

The judgment of the Court was now (May 12) delivered by—

CRESSWELL, J.—This was an appeal from *NEW SERIES*, XVII.—C.P.

the decision of the revising barrister, who had allowed the name of the respondent, Herbert Langham, to be retained on the list of voters for the county of Northampton. Herbert Langham claimed to vote in respect of a qualification as occupier of a house and land; the vote was objected to on the ground that he did not occupy as tenant. The revising barrister decided that he did, and the appeal was against that decision. The property in respect of which the vote was claimed, is part of the property of Sir James Hay Langham, a lunatic. By letters patent of the 21st of June 1837 (1st Vict.) the custody of the person of the lunatic was granted to Dame Elizabeth Langham. To Herbert Langham (the respondent) was given, committed, and granted, the custody, regulation, occupation, disposition and receipt as well of all manors, messuages, lands, tenements, houses, farms, revenues, services, and hereditaments, with the appurtenances, and all rents, revenues, and profits thereof, which the aforesaid Sir James Hay Langham hath or ought to have in possession or reversion, &c., as also the custody and government of all the goods and chattels, farms, stock, cattle, &c. to the said Sir James Hay Langham belonging, to hold the said aforesaid custody, &c. so long as it should please us, during the continuance of the lunacy of the said Sir James Hay Langham; provided always that the said Herbert Langham, his executors, &c. shall render a true account of the issues, revenues, and profits of the manors, messuages, and lands, and of the goods and chattels, &c. once in every year at least, and as often as and whensoever to the Lord Chancellor should seem meet, and shall obey all order and orders of the Lord Chancellor made or hereafter to be made touching the premises. After this grant some of the tenants of Sir J. H. Langham quitted their farms, and Herbert Langham entered upon the occupation of them, to the extent of 200 acres with a house, received the produce to his own use and benefit, and in his annual account passed before a Master in Chancery in July 1847 entered himself in the column of the tenants; and in the column of rents due at Lady-day 1846, he inserted opposite his name the sum of 393*l.*, and in the column of receipts entered that sum as received.

The question for our decision is, whether

the circumstances stated shew that Herbert Langham occupied the land *as tenant*, so as to be entitled to a vote under the 2 Will. 4. c. 45. s. 20, and after some hesitation we have come to the conclusion that he did not occupy *as tenant*.

The letters patent did not confer on him any estate, but merely the custody of the lands; he did not, therefore, by virtue of his appointment as committee, become tenant. No other act is shewn to have been done, by any person either having an estate, or power to create a tenancy, by virtue of which the respondent could become tenant; and the only evidence relied upon to prove a tenancy is the account rendered in the Court of Chancery, wherein he entered his own name as tenant, and 39*l.* the annual rent due at Lady-day 1846, and that sum as received by him; but he could not make himself tenant by his own act, nor could the Master in Chancery make him tenant by allowing that account. The account might, indeed, preclude the committee from saying he had not received profit to the amount entered, but *it would not confer on him an estate as tenant*, or render him liable to distress, or to an action for rent. We, therefore, think the decision of the revising barrister was wrong, and that the appeal must be allowed.

*Decision reversed.*

1847.	}	SMART AND ANOTHER v. SANDARS AND OTHERS.
Nov. 10, 12.		
1848.		
May 12.		

*Principal and Factor—Sale for Repayment of Advances after Consignment—Authority coupled with an Interest.*

*A factor for sale cannot sell the goods of his principal, in the exercise of a sound discretion, contrary to the principal's orders, for the purpose of reimbursing himself for advances made to the principal, after the consignment. There is not, in such a case, an authority coupled with an interest which is irrevocable; although the advances made subsequently to the consignment might be a good consideration for an agreement that the original revocable authority to sell should become irrevocable.*

*The declaration (which was in assumption) stated that the plaintiffs had consigned a cargo of wheat to the defendants as corn-factors for sale; that the defendants promised to obey the lawful orders of the plaintiffs; that the defendants sold a portion of the wheat for 6*s.* 4*d.* per bushel, and that the plaintiffs ordered them not to sell any more for less than 7*s.* Breach, that the defendants sold for less.*

*First plea—That, after the consignment, the defendants were under advances to the plaintiffs in respect of the consignment; that they gave notice to the plaintiffs to pay the amount, or that they would sell the residue of the cargo to reimburse themselves, that the plaintiffs failed to pay, and that the defendants, in the exercise of a sound discretion, for the benefit of the plaintiffs, and to reimburse themselves, sold at the best price which could be obtained.*

*Second plea, that the defendants had a lien on the residue of the cargo for advances made after the consignment, and, after notice and default, sold in the exercise of a sound discretion for the best price.*

*On demurrer, held that these pleas were bad in substance.*

*Assumpsit. The declaration, which is set out in 16 Law J. Rep. (N.S.) C.P. 39, stated, that whereas the defendants were and are corn-factors at Liverpool, and that heretofore, to wit, on the 23rd of June 1842, in consideration that the plaintiffs, at the request of the defendants, had consigned and delivered to them as such factors a cargo, consisting of 8,563 bushels of wheat, to be sold and disposed of by the defendants, as such factors, for and on account of the plaintiffs, for reasonable commission and reward, the defendants promised to obey and observe the lawful orders and directions of the plaintiffs to be given by them to the defendants, with regard to the sale and disposal of the wheat: that the defendants afterwards sold and disposed of a small part of the wheat at 6*s.* 4*d.* per bushel, and although the plaintiffs ordered them not to sell any more for less than 7*s.* per bushel, yet the defendants sold for less. There was a second count similar to the first.*

*The defendants pleaded two special pleas to each of the counts, to which pleas the*

plaintiffs demurred specially. Judgment having been given for the plaintiffs on the demurrers (1), the defendants obtained leave to add two pleas to each of the counts of the declaration (2).

The first of the additional pleas to the first count was as follows: that after the said cargo of wheat in the said first count mentioned had been so consigned to the defendants as such factors as in the said first count mentioned, and before the committing by the defendants of any of the said alleged breaches of promise in the said first count mentioned, to wit, on the 1st day of November, A.D. 1842, the defendants, as such factors as aforesaid, became and were under advances to the plaintiffs, in respect of the said consignment of the said cargo of wheat in the said first count mentioned, to a large amount, to wit, to the amount of 3,000*l.*, and which said sum, so advanced by the defendants, as such factors as aforesaid, to the plaintiffs, was then due and payable by the plaintiffs to the defendants, and which said advances the defendants had come under by reason of the defendants having (after the making of the promise in the first count mentioned, and whilst the defendants, as such factors as aforesaid, had authority from the plaintiffs to sell the said cargo of wheat in the first count mentioned at such times and for such prices as they, the defendants, in exercise of their discretion as such factors, thought it best for the plaintiffs that the cargo should be sold, and before the giving of any of the orders in the said first count mentioned by the plaintiffs to the defendants, to wit, on the 12th day of July, A.D. 1842,) accepted divers bills of exchange for the plaintiffs, and at their request, against, and on the security of the said cargo, in the said first count mentioned; and thereupon afterwards, and before the committing by the defendants of any of the said alleged breaches of promise in the said first count mentioned, to wit, on the 1st of November, A.D. 1842, they, the defendants, gave notice to the plaintiffs that they, the defendants, required the said sum of money so advanced by the defendants as such factors as aforesaid, in respect of the said consignment of the said cargo of wheat in the said first count mentioned to be repaid to them, the defendants, by the plain-

tiffs, and that if the plaintiffs did not repay to them, the defendants, the said sum of money, they, the defendants, would sell the whole of the residue of the said cargo of wheat in the said first count mentioned, and out of the money to be produced by such sale would repay themselves the said sum of money so advanced by the defendants as in this plea aforesaid. And the defendants further say, that although, after they, the defendants, had given the plaintiffs the said notice in this plea mentioned, and before the committing by the defendants of any of the said alleged breaches of promise in the said first count mentioned, a reasonable time for the plaintiffs to have repaid to the defendants the said sum of money so advanced by the defendants had elapsed, yet the plaintiffs did not nor would repay to the defendants the said sum of money, or any part thereof, but wholly neglected and refused so to do, and the whole of the said sum of money at the time of the committing by the defendants of the said several alleged breaches of promise in the first count mentioned remained due and unpaid from the plaintiffs to the defendants; and the defendants aver, that at the time when the defendants gave the plaintiffs the said notice in this plea mentioned, and from thence continually until and at the several times when the defendants so sold the said residue of the said cargo of wheat as in the said first count mentioned, the defendants believed it to be and it was for the benefit and advantage of the plaintiffs that the said residue of the said cargo of wheat should be sold, and that the sales of the said residue were beneficial and advantageous sales for the plaintiffs, and were made by them, the defendants, in the exercise of a sound discretion as such factors for sale as aforesaid for the benefit of the plaintiffs, and as and at such times and for such prices as they, the defendants, in the exercise of a sound discretion as such factors as aforesaid thought it best for the plaintiffs that the said residue of the said cargo of wheat should be sold; wherefore the defendants, at the several times when, &c. in the said first count mentioned, as well for the benefit of the plaintiffs as for the purpose of reimbursing and repaying to them, the defendants, the said sum of money so advanced by the defendants as in this plea aforesaid, and in the exercise of such sound discretion as aforesaid, sold the said

(1) 16 Law J. Rep. (N.S.) C.P. 44.

(2) *Ibid.* 46.

residue of the said cargo of wheat in the said first count mentioned, at the said price in the said first count mentioned, the same being the best price which could be then obtained for the said residue of the said cargo of wheat, and with the monies produced by the said last-mentioned sales, being a less amount than the amount of the said advances, did then repay and reimburse to them, the defendants, so much of the said sum so advanced by the defendants to the plaintiffs as aforesaid, as the said monies so advanced as aforesaid were sufficient to repay and reimburse, as they lawfully might, &c. Verification.

Second additional plea to the first count, that before and at the time of the giving the after-mentioned notice by the defendants to the plaintiffs, &c. the plaintiffs were indebted to the defendants in a large sum of money, to wit, the sum of 3,000*l.*, for advances before then made by the defendants as such factors as aforesaid to the plaintiffs in respect of and against consignments of goods before then made by the plaintiffs to the defendants as such factors as aforesaid, for the purpose of such goods being sold and disposed of by the defendants as such factors as aforesaid for the plaintiffs, and by reason of the plaintiffs' being so indebted to the defendants, the defendants as such factors before and at the time of the giving the notice hereinafter mentioned, &c. had a lien upon the said residue of the said cargo of wheat, and upon the proceeds of the residue of the said cargo of wheat after the same was sold, for the said sum of money so due and owing from the plaintiffs to the defendants, and had a right to have the said last-mentioned sum of money paid and satisfied to them, the defendants, out of the said proceeds of the said cargo of wheat; and thereupon they, the defendants, after the plaintiffs had become and whilst they were so indebted to the defendants, and before the said alleged breaches of promise in the said first count mentioned, to wit, on the 1st of November 1842, gave notice, &c. The plea then stated the terms of the notice as in the first additional plea; that a reasonable time for paying the money had elapsed; that the plaintiffs had not paid; that the defendants believed it to be, and it was, for the benefit of the plaintiffs to sell the residue of the cargo; that the sales in the first count mentioned were advantageous to the plaintiffs; and that the defendants in the

exercise of a sound discretion as factors for sale for the benefit of the plaintiffs as well as for reimbursing themselves, sold for the price in the first count mentioned, the same being the best that could be obtained, and paid themselves as much of the sum due from the plaintiffs as the produce would satisfy. Verification.

There were two similar additional pleas to the second count of the declaration. To all these pleas the plaintiffs demurred specially.

*Channell, Serj. (Taprell was with him)* Nov. 10, 1847, in support of the demurrer.—An averment has been introduced into these pleas to the effect that the defendants as factors made the sale in question in the exercise of a sound discretion, for the benefit of the plaintiffs and to reimburse themselves. This has been done in pursuance of a suggestion thrown out during the argument on the former demurrer (3). But it is contended, that the authorities do not support the pleas as now pleaded. The passages formerly cited from *Story on Bailments*, s. 308, p. 207, and *Story on Agency*, s. 375, p. 333, do not shew that a factor has any such rights as those contended for in these pleas. In *Pothonier v. Dawson* (4), which may be relied upon on the other side, Gibbs, C.J. puts the decision upon the ground of a contract between the parties, which is not averred here. In *Story on Agency*, s. 37, p. 330, it is said, that "if goods are consigned to a factor for sale, and he makes advances upon them, he is of course invested with a right to sell them, and may out of the proceeds satisfy his lien, or use it by way of set-off," and it is afterwards said that in certain cases the factor may sell to repay himself advances, even *invito domino*. But in this case we must assume from the declaration that the defendants undertook to obey the lawful orders of the plaintiffs, and that the particular orders mentioned were lawful. The defendants might have traversed the promise, or that they had received the goods on the terms specified, or have denied that the orders were lawful. If, in truth, the defendants had power to sell under the circumstances mentioned in the pleas, there must have been a new contract substituted for that stated in the declaration.

(3) 16 Law J. Rep. (N.S.) C.P. 43.

(4) Holt, N.P. 383.

[MAULE, J.—If the effect of the pleas is, that the defendants did not enter into the contract on the terms stated, that amounts to the general issue. The fault of the plea seems to be, that it goes too far. This is not an action for a tort, but upon a contract; and the plea shews that before the breach of the contract declared on, that contract had been put an end to.]

Supposing the facts stated in the plea to be true, they ought to have been differently pleaded, either as a substituted contract, or as a release.

Crompton, in support of the pleas.—These new pleas are good both in substance and in form. The declaration is founded on an executed consideration, and where that is the case, the promise which should be averred in the declaration is the promise implied by law—*Hopkins v. Logan* (5). Maule, B. there says that “an executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two co-existing promises on one consideration.” *Brown v. Crump* (6), *Roscorla v. Thomas* (7) and *Jackson v. Cobbin* (8) are authorities to the same effect. The words “lawful orders” in the declaration mean only orders which are not illegal, in relation to the state of affairs. The consignment was general, and the declaration is founded on a promise to do that which it is the duty of a factor to do. A factor has by law a right to sell to reimburse himself, with the proviso that the sale is made in the exercise of a sound discretion and for the benefit of his principal. The defendants, therefore, had a power coupled with an interest, in which case the power is irrevocable. This is a part of the law of the land, and not a particular custom. The distinction between the general law merchant and particular custom is pointed out in the notes to *Wigglesworth v. Dallison* (9). In *M'Lean v. Dunn* (10) Best, C.J. points out the

mischief which would arise if under such circumstances the factor had not a power to sell. He says, “It is admitted perishable articles may be sold. It is difficult to say what may be esteemed perishable articles and what not; but if articles are not perishable, price is, and may alter in a few days or a few hours.” There is no case in the books hostile to this proposition. At the last argument, *Raleigh v. Atkinson* (11) was cited as hostile, but it has not been relied upon on the present occasion. In that case the factor received the goods originally, with a limit as to the price at which he was to sell. The case of *Graham v. Dyster* (12), which is mentioned in Mr. Justice Story's book, as supporting his view, is not distinctly in point.

[MAULE, J.—In that case the factor had a right conveyed to him to sell and to go on *quà* factor to exercise his power and interest, without the principal being able to interfere.]

The American authorities on this subject are of great importance. The principal cases cited by Mr. Justice Story are *Parker v. Brancher* (13) and *Brown v. M'Gran* (14). In the latter case, where, after an elaborate argument, a solemn judgment was pronounced by a court of appeal, the Court uses these words (15):—“But the main objection to the instruction (of the Judge below) is of a more broad and comprehensive nature. The instruction in effect decides, that in the case of a general consignment of goods to a factor for sale, in the exercise of his own discretion as to the time and manner of the sale, the consignor has a right, by subsequent orders, to suspend or postpone the sale at his pleasure, notwithstanding the factor has, in consideration of such general consignment, already made advances or incurred liabilities for the consignor at his request, trusting to the fund for his due reimbursement. We are of opinion that this doctrine is not maintainable in point of law.” According to the *Code of Commerce of Holland*, arts. 80, 81, 83, a factor has a right to apply to a court for leave to reimburse himself under similar

(11) 6 Mee. & Wels. 670; s.c. 9 Law J. Rep. (n.s.) Exch. 206.

(12) 6 Mau. & Selw. 1.

(13) 2 Law Rep. (American) 96.

(14) 14 Peter's Rep. (American) 480.

(15) Ibid. 494.

(5) 5 Mee. & Wels. 241; s.c. 8 Law J. Rep. (n.s.) Exch. 218.

(6) 1 Marsh. 567.

(7) 2 Gale & D. 508; s.c. 11 Law J. Rep. (n.s.) Q.B. 214.

(8) 8 Mee. & Wels. 790; s.c. 10 Law J. Rep. (n.s.) Exch. 389.

(9) 1 Smith's Leading Cases, 306.

(10) 4 Bing. 722; s.c. 6 Law J. Rep. (n.s.) C.P. 184.

circumstances, which tends to shew that this is not merely a matter of custom but of general mercantile law. In several commercial cases parties are obliged to apply to the Courts abroad for leave to do that which they may do of themselves in England, as in the case of stoppage *in transitu*.

*Channell*, in reply.—To support these pleas it would be necessary to shew that the right of the factor to sell exists as a necessary legal inference from the circumstances; and if the circumstances are only such as might warrant a jury in coming to the conclusion that the right existed, then the pleas are bad. In the American case of *Brown v. M'Gran* two of the Judges dissented, and the judgment of the majority was treated as that of the Court. It is to be remarked, too, that in that case the consignment and advances were contemporaneous. The expressions used in the judgment in *Graham v. Dyster* tend to shew that there must be an express contract in order to give the factor the power contended for:

*Cur. adv. vult.*

WILDE, C.J. now (12th May) delivered the judgment of the Court (16).—The substantial question in this case is, whether a factor, who has made advances on account of his principal, has the right to sell the goods in his hands contrary to the orders of his principal, on the principal making default in repaying those advances. It is now settled law that a factor has a lien for his advances, but the defendant claims more than a lien. He claims a right, if the principal when called on to repay the advances makes default in doing so, to sell the goods at such prices and times as, in the exercise of a sound discretion, he thinks best for his principal. No case, in any English court, can be produced in support of this doctrine. Yet it is a right which one would expect to find enforced every day if it existed. The silence of our law books is a strong argument against the existence of such a right. It is true that in the case of *Graham v. Dyster*, Bayley, J., in considering whether a factor, under the circumstances of that case, had authority to pledge, is reported to have said, "The fact that the plaintiff had drawn bills

against the consignment, and had also drawn in like manner against other consignments, made no difference with respect to the raising an implied authority to pledge. The only difference which the practice makes is, that it conveys to the factor the right to reimburse himself. He may sell on credit, and discount the bills." But these remarks were made with reference to a factor who had express authority, which had never been revoked, to sell at his discretion; and they furnish no authority for maintaining that, in a case where the principal has prohibited the sale, under prescribed limits, he may notwithstanding sell. But it is said, a factor for sale has an authority as such, in the absence of all special orders, to sell, and when he afterwards comes under advances, he thereby acquires an interest, and having thus an authority and an interest, the authority becomes irrevocable. The doctrine here implied, that whenever there is in the same person an authority and an interest, the authority is irrevocable, is not to be admitted without qualification. In the case of *Raleigh v. Atkinson* the goods had been consigned to a factor for sale, with a limit as to the price. The factor had a lien on the goods for advances, and the principal, in consideration of those advances, agreed with the factor that he should sell the goods at the best market price, and realize thereon against his advances. The Court held that this authority was revocable, on the ground that there was no consideration for the agreement. Now, in that case there was an authority given, and one which the principal was fully at liberty to give, and the party to whom it was given had an interest in it, yet the authority was held to be revocable. The effect of that decision was attempted in argument before us to be eluded, by referring to the circumstance that the factor received the goods originally with a limit as to the price of sale, but we do not think that circumstance material, since the limit originally imposed was done away with, by authority afterwards given to sell at the best price. Such an authority requires no consideration to support it. An authority is in its nature revocable by the donors of it—see *Vynior's case* (17). It is only when it is sought to make it

(16) Wilde, C.J. Coltman, J., Maule, J. and Williams, J.

(17) 8 Rep. 162, a.

irrevocable that a consideration is required to give it that effect. On the subject of authority being rendered irrevocable, accompanied by interest, there is not much to be found in the law books. In *Walsh v. Whitcomb* (18) Lord Kenyon is reported to have said, "There is a difference as to powers of attorney; they are revocable from their nature; but there are these exceptions: where a power of attorney is part of a security for money, then it is not revocable. Where a power of attorney was made to levy a fine as part of the security, it was held not to be revocable. The principle is applicable to every case where a power of attorney is necessary to effect any security." *Gaussen v. Morton* (19) and *Watson v. King* (20) were decided in conformity to the case of *Walsh v. Whitcomb*, and the result appears to be, that when no agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, which is commonly said to be irrevocable. But we think this doctrine applies only to cases where the authority is given for the purpose of being a security, or, as Lord Kenyon expresses it, as a part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and is incidental only: as, for instance, in the present case, as disclosed by the pleas, the goods were consigned to a factor for sale—that confers an implied authority to sell; afterwards the factor makes an advance. This is not an authority coupled with an interest, but an independent authority, and an interest subsequently arises. The making such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable, but such an effect will not, we think, arise independent of the agreement. There is no authority or principle in our law, that we are aware of, which leads us to think it will. If such be the law, where is it to be found? It was said in the argument, that it was the common practice of factors to sell in order

to repay advances. If it be true that there is a well understood practice with factors to sell, that practice would furnish a ground for inferring that the advances were made upon the footing of such an agreement, that the factor should have an irrevocable authority to sell in case the principal made default. Such an inference would be a very reasonable and proper one; but it would be an inference of fact and not a conclusion of law. These pleas, therefore, in which the right to sell for advances, on default made by the principal to repay them, is treated as a conclusion of law, cannot be supported. There will, therefore, be judgment for the plaintiffs on the pleas demurred to.

*Judgment for the plaintiffs.*

1848. }  
May 12. } DOE d. LORD v. CRAGO.

*Ejectment—Notice to Quit—Yearly Tenancy—Presumption from Payment of Rent—Demise for Lives—Parol Evidence.*

*In ejectment, to prove the grant of a new lease a witness was called, who deposed to a conversation which took place, fourteen or fifteen years back, with the owner of the property in dispute, under whom the lessor of the plaintiff claimed, in which conversation such owner admitted the premises had been released, without stating the term, or lives, rent, or any other particulars:—Held, that such evidence could not be made available as proof of a new lease having been granted.*

*Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made, for the purpose of repelling such implication.*

In this case, which was an ejectment, tried, before Platt, B., at the Cornwall Summer Assizes, 1846, and in which a verdict was found for the lessor of the plaintiff,—

*Kinglake, Serj.* had obtained a rule, calling on the lessor of the plaintiff to shew cause why a nonsuit should not be entered on a point reserved, or why a new trial should not be had on the ground of the improper rejection of evidence. The facts of this case, and the arguments in shewing cause against and in supporting the rule, are so

(18) 2 Esp. 565.

(19) 10 B. & C. 731; s.c. 8 Law J. Rep. K.B.

113.

(20) 4 Campb. 272.



fully set forth in the judgment, that it is unnecessary to do more than state the authorities.

*Crowder and Greenwood*, for the lessor of the plaintiff, referred to—

*Doe d. Stanway v. Rock*, 4 M. & Gr. 30.

*Kirtland v. Pounsett*, 2 Taunt. 145.

*Howard v. Shaw*, 8 Mee. & Wels. 118 ;

s.c. 10 Law J. Rep. (N.S.) Exch. 334.

*Winterbottom v. Ingham*, 7 Q.B. 611 ;

s.c. 14 Law J. Rep. (N.S.) Q.B. 298.

*Kinglake, Serj.*, for the defendant, referred to—

*Bishop v. Howard*, 2 B. & C. 100 ; s.c.

1 Law J. Rep. K.B. 243.

*Doe d. Martin v. Watts*, 7 Term Rep. 83.

*Goodtitle v. Currie*, Surrey Lent Assizes, 1790.

*Roe d. Brune v. Prideaux*, 10 East, 158.

*Denn d. Brune v. Rawlins*, Ibid. 261.

*Doed. Tucker v. Morse*, 1 B. & Ad. 365.

*Doe d. Earl of Egremont v. Forwood*,

3 Q.B. Rep. 627 ; s.c. 11 Law J.

Rep. (N.S.) Q.B. 321.

*Cur. adv. vult.*

WILDE, C.J. now delivered the judgment of the Court (1).—This was an action of ejectment, brought to recover the possession of premises in the county of Cornwall, which had been occupied, for several years, under a lease for lives subject to a certain rent ; but which lease had determined, a considerable time before the day of the demise in the declaration, by the deaths of the persons upon whose lives the term depended. It was proved, upon the trial of the cause, that those under whom the lessor of the plaintiff claimed, and the lessor of the plaintiff, had continued to receive the rent reserved by the lease up to a short time before the bringing of the present ejectment. Upon the part of the lessor of the plaintiff, it was alleged, that the deaths of the persons upon whose lives the term in the lease depended had been improperly concealed ; that the rent had continued to be paid and received as under the lease, and as far as concerned the lessor of the plaintiff, and the former owner of the premises, in the belief that the term continued, and that the present ejectment had been brought immediately upon the discovery of the fact that the term had in truth expired. Upon the part of the defendant it was contended, first, that after the expiration of the

lease referred to, a new lease for lives had been granted which had not expired, such new lease being at the same reserved rent as the old lease, and that the rent had been paid and received under such new lease up to the time of bringing the ejectment ; or, it was contended secondly, that if the granting of such new lease could not be proved, the law would imply from the receipts of rent since the expiration of the old lease a new tenancy from year to year ; and that as such presumed tenancy had not been determined by a notice to quit, the plaintiff was not entitled to recover in this ejectment. Upon the trial the determination of the old lease was proved ; but it did not appear that the lessor of the plaintiff, or those under whom he claimed, had ever been apprised of that fact until recently before the commencement of this ejectment ; and it was therefore insisted, as before stated, on the part of the plaintiff, that the receipt of rent since the determination of the lease had been in ignorance of the fact of that determination ; and that, therefore, such receipt could not, under the circumstances, be made the foundation of an implied new tenancy from year to year. The verdict was found for the lessor of the plaintiff ; and a rule nisi was afterwards obtained, calling upon the plaintiff to shew cause why a nonsuit should not be entered, or why there should not be a new trial. The new trial was asked upon the ground that the evidence offered on the part of the defendant, for the purpose of proving the grant of the new lease of the premises since the determination of the old lease, had been improperly rejected. We have considered what has been urged at the bar in support of this part of the rule, and have referred to the Judge's notes of the trial, and it appears to us that there is no ground for granting a new trial upon this objection. The evidence, which was alleged to have been improperly rejected, was a statement of a witness called, upon the part of the defendant, to prove a conversation which took place, fourteen or fifteen years ago, between the witness and the former owner of the property, through whom the lessor of the plaintiff made title, that such former owner had said that the land had been re-leased, but without mentioning either term, or lives, or rent, or any of the stipulations of the supposed lease. It appeared, upon the discussion of the rule, that, upon such evidence being given, the

(1) Wilde, C.J., Maule, J., Cresswell, J. and Williams, J.

learned Judge intimated that it was much too loose to be available as evidence of the grant of a new lease, and that the counsel on the part of the defendant acquiesced in the opinion so expressed, and that no further reference during the trial was made to such evidence. No argument took place upon the subject at the trial: the Judge was not asked to make a note of the evidence, or of the rejection of it, or to leave it to the jury; and in truth there was a complete acquiescence, not merely in the opinion expressed by the learned Judge, but also in the insufficiency of the evidence; and, under such circumstances, no objection can now be maintained upon the subject. I may add, that the Court is quite satisfied that the Judge was correct in his view of the effect of the evidence; and that such evidence never could have been made available as proof of a new lease having been granted.

The remaining question to be considered is that which was reserved by the learned Judge, namely, whether the jury ought to have been directed, that the law implied a tenancy from year to year from the receipt of rent, since the determination of the old lease under the circumstances proved; or whether it was properly left to the jury to say if the rent had been received as under the old lease, in ignorance of the determination of such lease, or under some new agreement come to between the parties, such question being left, accompanied by a direction, that if the premises had been occupied since the determination of the old lease, under any new engagement, the defendant was entitled to a verdict. We are of opinion that the learned Judge acted correctly in leaving to the jury the question of fact, whether the premises had been occupied by the defendant, and rent had been received from him as under the old lease in ignorance of its determination, or under some new agreement; and we think it would not have been proper to have directed the jury that the law implied, from the receipt of rent under the circumstances proved, some agreement creating a yearly tenancy which could not be determined without notice to quit. It is clear that, upon proof of the payment of rent in respect of the occupation of premises ordinarily let from year to year, the law will imply that the party making such payments holds under a tenancy from

year to year, and it was so ruled in *Bishop v. Howard*; but it is equally clear, that it is competent to either the receiver or the payer of such rent to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result from the receipt of rent unexplained. The principle that the payment of rent may be explained for the purpose of protecting parties from the legal consequences which would otherwise follow from such payments, is recognized by Mr. Justice Buller, in *Williams v. Bartholomew* (1), and was allowed in *Rogers v. Pitcher* (2); and it is consistent with the general principle of the law. In this case, if the receipt of the rent by the lessor of the plaintiff had been unexplained, a tenancy from year to year ought to have been presumed according to the decision in *Bishop v. Howard*; but the lessor of the plaintiff did not leave the receipt of rent unexplained, but gave evidence for the purpose of shewing that such receipt of rent had taken place under a mistake of fact in respect of the determination of the old lease, which determination had been improperly concealed from him. Upon that explanation the question in the cause was no longer, what was the legal presumption from the unexplained payment of rent? but, whether the evidence offered to explain the receipt of rent on the part of the plaintiff did establish that, in point of fact, the rent had been received in relation to the old lease, and not upon a new agreement? That was a question of fact, which, we think, was properly left to the jury; and the jury were properly directed that if such rent had been received in relation to any new agreement, the verdict should be for the defendant: such direction being in conformity with the principle, that from the payment of rent unexplained the law would imply a tenancy from year to year with the incidents attached to it, namely, the necessity of a regular notice to quit before the defendant's possession could be disturbed. We therefore, think, there was no misdirection, and that the rule must be discharged.

*Rule discharged.*

(1) 1 Bos. & Pul. 326.

(2) 1 Marsh. 541.

1847. }  
 Nov. 17. } OWEN v. CHALLIS.  
 1848. }  
 May 12. }

*Pleading—Money had and received—General Issue, Plea amounting to—Railway Deposits—Statute 9 & 10 Vict. c. 28.*

*In an action for money had and received to the plaintiff's use, non assumpsit puts in issue both the receipt of the money and the existence of the facts which make it a receipt to the use of the plaintiff.*

*In such action the defendant pleaded, that the money claimed was paid to him and others, as members of a committee of management in a railway scheme, by way of deposits on shares allotted by them to the plaintiff, at his request, and that the plaintiff and the other shareholders agreed to form a partnership for carrying on the undertaking. That the plaintiff sought to recover his deposits, on the ground that the scheme had not been prosecuted for a time which he alleged to be unreasonable. That after the passing of the 9 & 10 Vict. c. 28. a meeting was duly held, at which it was resolved that the partnership should be dissolved, and the undertaking abandoned. That the affairs then became liable to be wound up as on the dissolution of a partnership, by mutual consent. That the plaintiff's claim was part of the affairs to be wound up, and that they had not been wound up, nor had a reasonable time for winding them up elapsed, at the commencement of the suit:—On special demurrer, this plea was held bad, as amounting to the general issue.*

*Assumpsit, for money had and received.*

*Plea, as to 52l. 10s., parcel, &c., to the following effect: that before the passing of the statute 9 & 10 Vict. c. 28, intituled, 'An Act to facilitate the dissolution of railway companies,' a prospectus had been issued for the promotion of a certain intended partnership, for carrying into effect an undertaking for constructing a railway, to be called the Direct Western Railway, which could not be constructed without the authority of parliament, and that no act had been obtained for that purpose; that by the said prospectus, the defendant and several other named persons were declared to be a provisional committee; and it*

*was also declared that the capital should consist of 300,000l., divided into 120,000 shares of 25l. each, and that the allottees of such shares should pay 2l. 12s. 6d. on each share allotted to them. That the defendant and the other members of the provisional committee were also the managers of the undertaking; that the plaintiff became a subscriber for twenty shares, which were allotted to him; and that the defendant and the other members of the committee received 2l. 12s. 6d. from the plaintiff in respect of each of such shares, amounting in all to 52l. 10s. That the plaintiff, the defendant, and the other shareholders then entered into an agreement for the formation of a partnership for carrying on the undertaking; and that the plaintiff sought to recover the 52l. 10s., because the scheme was not prosecuted for a time which the plaintiff alleged to be unreasonable. The plea then went on to state, that after the passing of the statute 9 & 10 Vict. c. 28, the committee made the proper returns under the act, and called a meeting, and an adjourned meeting, according to the provisions of the act, at which latter meeting the company and partnership were, according to the act, dissolved, and the prosecution of the undertaking abandoned and discontinued; and thereupon and by force of the statute the affairs of the company became liable to be wound up, according to the rules applicable to partnerships dissolved by mutual consent of all the partners; and that the said sum of 52l. 10s. became subject to the resolution for dissolving the company, and that the plaintiff's claim in this action was part of the affairs of the company to be wound up as aforesaid; and that, at the commencement of the suit, the affairs of the company had not been wound up, nor had a reasonable time elapsed for winding up the same. Verification.*

*Special demurrer, assigning, amongst other causes, that the plea amounted to the general issue.*

*Pigott, in support of the demurrer.—(Nov. 17, 1847).—The act of parliament relied on in the plea (the 9 & 10 Vict. c. 28,) does not afford a sufficient answer to a claim by a shareholder, to recover back a deposit paid on a scheme which has failed. It will be argued that the 25th section affects his rights, because it provides that the dis-*

solution is not to alter the rights of creditors who are *not* shareholders, the affairs on dissolution being directed by the 24th section to be wound up, according to the rules of partnership concerns, and as if the dissolution had been by mutual consent. The legislature must have meant by this only to prevent shareholders from suing for specific performance. But the plea is bad even if the act applies, because it consists of an avoidance without a confession. At what time can it be said that the right of action existed consistently with the plea?

*Wilkes*, *contra*.—The plea is good, both in substance and in form. The act was passed at a time when contests were going on between committeemen and shareholders. *Walstab v. Spottiswoode* (1) had decided that committees were liable to pay back deposits to shareholders on the scheme proving abortive; and this act was passed in consequence. Its meaning must be, that shareholders who would otherwise have been entitled on the authority of *Walstab v. Spottiswoode* to recover their deposits, are thereafter to be entitled to get their share on the winding up of the concern, but not to bring an action for it. If the plea is good in substance it is good in form also. Even supposing the shareholder had a right to his action before the passing of the act, it was taken away by the act. There is sufficient colour in the plea. It amounts to a confession that there may have been a cause of action before the act, and that would be sufficient to give colour to the plaintiff—*Ward v. Robins* (2), *Morant v. Sign* (3).

[*WILLIAMS, J.*—Does the statement that the money was received for a deposit amount to a statement of a colourable receiving to the plaintiff's use?]

The defendant could not have shewn that the 9 & 10 Vict. had passed, under the plea of non assumpsit. Supposing that part of the plea which relates to the statute to be struck out, there would be a confession without an avoidance. The plea is sufficient if it states nothing inconsistent with the allegation that this was money had and received to the plaintiff's use. It would be

otherwise if it contained anything inconsistent with the declaration.

*Pigott*, in reply.—There is no confession at all in the plea. The plea raises a defence exactly similar in principle to that in *Solly v. Neish* (4). There where, to a declaration for money had and received, the defendant pleaded that the money was the proceeds of goods pledged, with a power of sale to the defendants, by persons whom the plaintiff allowed to hold the goods as their own, and which were the joint property of those persons and the plaintiff, and that the defendant was willing to set off against the proceeds of the goods the advance made on them, this plea, the Court said, would have been bad on special demurrer, as amounting to the general issue.

[*MAULE, J.*—The Court there held that the plea shewed a substantial defence, but did not admit the right of the plaintiff as to money had and received.]

The result of the plea in this case is to shew affirmatively under the act of parliament that the plaintiff was not entitled to recover. The plea contains facts which are a sufficient answer without express colour, and is, therefore, bad, as amounting to the general issue.

*Cur. adv. vult.*

*WILDE, C.J.* (May 12th, 1848) delivered the judgment of the Court.—[After stating the pleadings, his Lordship proceeded]—The Court is of opinion that the plea is bad, because it amounts to the general issue. It is, therefore, unnecessary to advert to the other causes of demurrer. The general issue of non assumpsit, in an action for money had and received, operates as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt for the use of the plaintiff. Upon reference to the plea, it will be seen that the facts therein stated are set forth to shew that the money sought to be recovered never was received by the defendants to the use of the plaintiff, and it is therefore an argumentative traverse of the implied promise stated in the declaration; but this is in effect the general issue, and all the facts stated might be given in evidence under non assumpsit. The case is

(1) 15 Mee. & Wels. 501; s. c. 15 Law J. Rep. (N.S.) Exch. 193.

(2) *Ibid.* 237.

(3) 2 *Ibid.* 95; s. c. 6 Law J. Rep. (N.S.) Exch. 14.

(4) 2 Cr. M. & R. 355; s. c. 4 Law J. Rep. (N.S.) Exch. 230.

similar in principle to that of *Solly v. Neish*, where, in an action for money had and received, the plea set forth the circumstances under which the money sought to be recovered had been received by the defendant, and from those circumstances claimed a right of set-off, and the plea was held bad as amounting to the general issue. The case also of *Clarke v. Dignam* (5) is in point. In that case the general issue had been pleaded to an action for money had and received, and it appeared that the money sought to be recovered had been received by the defendant as attorney in an action brought in the plaintiff's name against one Duncombe, and the defendant proved that the plaintiff had allowed his name to be used in such action at the request of Edwards, who really employed the defendant, and was indebted to the defendant in an amount exceeding the sum claimed by the plaintiff, and which the defendant therefore claimed as a set-off. It was objected on the part of the plaintiff, that as the defendant had upon the record acted as the attorney for the plaintiff, he ought to discharge himself by proving the payment of the amount to Edwards. Mr. Baron Parke said, "No. It all arises on the general issue. The defendant disputes all the facts from which the legal inference arises, that the money was had and received to the use of the plaintiff;" which was assented to by the Court. In the present case, the whole object and effect of the plea is to shew that the promise stated in the declaration will not be implied in law from the facts and circumstances set forth. It is, therefore, nothing more than the general issue, and there must be judgment for the plaintiff.

*Judgment for the plaintiff.*

1847. }  
Feb. 15.\* } *DOE d. PHILLIPS v. ROLLINGS.*

*Ejectment—Lease for Years—32 Hen. 8. c. 28.—Tenant in Tail—Notice to Quit—Consent Rule—Disclaimer.*

*A. (tenant in tail) made a lease for years to B. not conformable to the provisions of 32 Hen. 8. c. 28. A. died, and C, the next tenant in tail in remainder, applied to*

(5) 3 Mee. & Wels. 478; s. c. 7 Law J. Rep. (N.S.) Exch. 195.

\* Decided in Hilary term, 1847.

*B. to attorn, and demanded rent from him. B. did not attorn, and after some negotiation, refused to pay any rent, on the ground that D. was entitled to the estate:—Held, that B. did not become tenant to C, and that C. could maintain ejectment against B. without serving him with any previous notice to quit; that the confession of entry in the consent rule was sufficient foundation to support the ejectment; and that setting up the title of D. amounted to a disclaimer of the title of C.*

Ejectment for a farm and premises called Llanolly, in the county of Radnor. The cause came on to be tried at Presteign, at the Summer Assizes, 1845, when a verdict was taken for the plaintiff, subject to a case, the material parts of which were as follows:—The deeds shewing the title of Thomas Phillips as tenant in tail were set out. John Phillips (the lessor of the plaintiff) claimed the premises as heir-at-law and devisee of his brother, T. Phillips, who became, upon the death of his mother, tenant in tail in possession of the said farm and premises. On the 4th of January 1844, T. Phillips, by an agreement in writing not under seal, demised to the defendant the premises sought to be recovered in this action for three years from the 2nd of February 1844, at the yearly rent of 90*l.*, payable half-yearly. T. Phillips died without issue on the 3rd of August 1844. No notice to quit had been served on the defendant before the commencement of the present action, (the day of the demise was the 21st of May 1845,) and it was contended that there had been no disclaimer by him of the title of the lessor of the plaintiff.

In the month of September 1844, the lessor of the plaintiff, with his attorney, Mr. Pugh, went to the farm occupied by the defendant, went over it with him, and told him that the lessor of the plaintiff claimed the greatest part of the farm then in the defendant's occupation, as tenant in tail under a deed of settlement, and that the defendant would be required to pay to the lessor of the plaintiff such proportion of the rent as he was entitled to. The defendant said he would come over to Mr. J. Phillips (the lessor of the plaintiff), after the next half-year's rent was due, and pay it to him. The defendant did not go over, and thereupon Mr. Pugh wrote to him on the 7th of March 1845 as

follows:—"I beg to inform you that Mr. J. Phillips is entitled as heir-at-law to eighty-eight acres of the land you hold, called Llanolly Farm, and which you rented of the late Mr. T. Phillips, and I request you to come over to my office at Haye to attorn to Mr. Phillips, and to agree to the rent to be paid to him in future." The defendant called on Mr. Pugh a few days after, and said it was not usual to pay rent which became due on the 2nd of February before Haye fair day (the 17th of May). Mr. Pugh saw the defendant again on the 19th of May, and he then said, "Mr. Phillips's brother claims the property, and I sha'n't pay Mr. Phillips any rent, but I'll place it in the bank, and afterwards pay it over to the person entitled to it." Shortly after this conversation the present action was brought. The particular parcels of land claimed by the lessor of the plaintiff were not specifically pointed out, nor was any stated amount of rent demanded of the defendant. Mr. Pugh also said that he might have told the defendant the lessor of the plaintiff claimed as heir-at-law.

*Channell, Serj.*, for the plaintiff.—Allowing that Thomas Phillips was tenant in tail of the premises sought to be recovered in this action, still the agreement in writing of the 4th of January 1844, made between Thomas Phillips and the defendant, even if it amounted to a lease, is, by stat. 32 Hen. 8. c. 28, void (or voidable) against those in reversion or remainder, for that statute requires a lease by writing, indented, under seal. Secondly, if the agreement amount to a lease, and is voidable only, this ejectment by the succeeding tenant in tail has avoided it. Thirdly, if the agreement does not amount to a lease, and a tenancy from year to year was created thereby, there has been a disclaimer by the defendant, and then this action can be maintained without any previous notice to quit or demand of possession. First, the agreement (if it be a lease) of the 4th of January 1844, is void against the lessor of the plaintiff, who, at the time of its execution, was a remainder-man or reversioner within the stat. 32 Hen. 8. c. 28. "If a tenant in tail make a lease for years, and die without issue, it is void as to them in reversion or remainder, though it be made according to the said statute" (1),

and the same is laid down in *Cruise's Dig.* p. 70, 4th edit. This lease was void from its commencement. In order to operate against the issue in tail, and those in reversion and remainder it should have been sealed. If the agreement be voidable only and created a tenancy from year to year, it is submitted there has been a disclaimer by the defendant, and it is not necessary to give any notice to quit. *Doe d. Calvert v. Frowd* (2) is an authority in favour of the plaintiff, and decides that if a tenant refuse to pay rent to the owner of the property, that is a sufficient disclaimer; it is not necessary that the tenant should claim the land himself.

*Talfourd, Serj.* for the defendant.—It is admitted that the agreement of the 4th of January 1844 amounted to a lease if the party demising had the power to make a lease, and that it is not made in conformity with the provisions of the 32 Hen. 8. c. 28. Still it is not a void lease, but voidable only, and is not avoided by bringing this action.

[WILDE, C.J.—The entry is admitted by the consent rule, and the day of the demise is *subsequent* to the consent rule. Is not that entry a sufficient avoidance of the lease?]

The acts of the lessor of the plaintiff shew an intention to confirm the lease, not to avoid it; he does not demand possession of the land, but requires the tenant to attorn to him, and that was substantially acceded to by the tenant. Next, there has not been any disclaimer, and a notice to quit was necessary. Assuming the agreement of the 4th of January 1844 to be a lease, a disclaimer by words is not sufficient—*Doe d. Graves v. Wells* (3), *Denn d. Brune v. Rawlins* (4). The defendant occupied as tenant and was recognized as such down to the time of this ejectment, and to make him a trespasser a notice to quit was necessary. He was at least a tenant from year to year; and as the required amount of rent was never fixed, and the lands claimed were never pointed out, the defendant could not pay till the exact proportions were ascertained—*Doe d. Williams v. Cooper* (5), *Doe*

(2) 4 Bing. 557; s. c. 6 Law J. Rep. C.P. 114.

(3) 10 Ad. & El. 427; s. c. 8 Law J. Rep. (N.S.) Q.B. 265.

(4) 10 East, 261.

(5) 1 Scott, N.R. 36; s. c. 1 Man. & Gr. 135.

(1) Co. Lit. 45, b.

*d. Gray v. Stanion* (6), *Doe d. Dillen v. Parke* (7).

*Cur. adv. vult.*

WILDE, C.J. now (Feb. 15, 1847,) delivered the judgment of the Court (8).—In this case the ejectment is brought to recover possession of certain farms and lands situate in the county of Radnor, in the principality of Wales, in the occupation of the defendant. The ejectment came on to be tried in August 1845, at the Summer Assizes, then held at Presteign, in and for the county of Radnor, when a verdict was found for the plaintiff, by consent of the parties, subject to an order of *Nisi Prius*, by which it was referred to a barrister, to state a case for the opinion of this Court, and to state, among other things, what estate and interest was conveyed by certain deeds of settlement, therein particularly mentioned; and the cause comes before the Court upon the special case, stated by the referee under the authority of the order of *Nisi Prius*. The case states a number of deeds connected with the title under which the lessor of the plaintiff claims, and many facts connected with questions which existed between the parties at the time of the reference, to which it will not be necessary to advert for the purpose of the judgment of the Court, inasmuch as, upon the argument, the general title of the lessor of the plaintiff was admitted; and the questions submitted to the judgment of the Court were quite independent of the matters referred to, and were brought within a very narrow compass. It was admitted upon the argument, that the lessor of the plaintiff was tenant in tail under the limitations of certain deeds of settlement, and that he was entitled to recover in this action, unless the defendant could establish a valid defence upon the objections specifically submitted to the Court. [After stating the facts relevant to the questions before the Court, his Lordship proceeded.] Upon these facts, it was admitted on behalf of the defendant, that the lease granted by Thomas Phillips, the last tenant in tail, was not in conformity to the statute, or valid as against the lessor of

the plaintiff. But it was said that the lease was voidable only, and that an actual entry was necessary to avoid such lease, before the day of the demise in the declaration. It was further contended, that, by the communication set forth in the case, a tenancy had been created between the lessor of the plaintiff and the defendant, which it was necessary to determine by a notice to quit, before the lessor of the plaintiff could recover the possession. For the plaintiff, it was insisted, first, that the lease, under which the defendant claimed, was void, and required no entry to vest the right of possession in the lessor of the plaintiff. Secondly, that the confession of entry in the consent rule was conclusive evidence of a sufficient entry, if any were necessary to entitle the plaintiff to recover. Thirdly, it was insisted for the plaintiff that no tenancy had been created between his lessor and the defendant. Fourthly, for the plaintiff, it was contended, that if a tenancy was created, the conduct of the defendant amounted to a disclaimer to hold as tenant to the lessor of the plaintiff, and therefore determined the tenancy. The title of the lessor of the plaintiff being admitted, as before stated, it is only necessary to consider the objections opposed to his recovery of possession. The first objection is, that the lease by the tenant in tail is not void, but voidable only. The authority cited for the proposition was *Co. Litt.* 45, b. Whether the whole passage really establishes the proposition for which it is cited may be open to some doubt, as applied to the present case; but it is not material to be considered, as it was admitted that, at all events, the lease would be avoided by entry; and if, therefore, a sufficient entry has been made, the question whether the lease is void or voidable becomes immaterial.

It has become common learning, that an actual entry is only now necessary in one case, and that is to avoid a fine with proclamations; and the only ground upon which it is held to be necessary in that case is, the supposed stringency of the express words of the Statute of Fines, 4 Hen. 7. c. 24. By that statute, it is enacted, "that, after the engrossing of every fine to be levied, &c. of any lands, &c., the same fine be openly and solemnly read and proclaimed in the same court, the same term, and in three terms then next following, the same engrossing in the same court on four several

(6) 1 Moo. & Wels. 695; s.c. 5 Law J. Rep. (n.s.) Exch. 253.

(7) Gow. N.P.C. 180.

(8) Wilde, C.J., Coltman, J., Maule, J., and Cresswell, J.

days in every term, &c. and the said proclamation so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, except women coverts (other than been parties to the said fine), and every person then being within the age of twenty-one years, in prison, or out of the realm, or not of whole mind, at the time of the said fine levied, not parties to such fine, and saving to every person or persons, and to their heirs, other than the parties in the said fine, such right, title, claim, and interest as they have to or in the said lands, &c., the time of such fine engrossed; so that they pursue their title, claim, or interest by way of action or lawful entry, within five years next after the said proclamation had and made; and also saving to all other persons such action, right, title, claim, and interest in or to the said lands, &c. as first shall grow, remain, or descend, or come to them after the said fine engrossed and proclamation made by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied, so that they take their action or pursue their said right and title, according to the law, within five years next after such action, right, title, claim, or interest to them accrued, descended, remained, fallen, or come."

In all other cases where entry is necessary to vest the possession, or right of possession, proof of actual entry is not necessary; but the confession in the consent rule is deemed to be sufficient evidence that the required entry was made. The authorities to this effect abound. In *Oates d. Wigfall v. Brydon* (9) a question arose as to the effect of the consent rule as proof of an ouster by one tenant in common of another. Lord Mansfield, after stating that the meaning of confessing lease, entry and ouster was to bring the matter to the mere question of the plaintiff's possessory title, said, that actual entry was held necessary to avoid a fine, from the words of the statute, as the word "action" could not mean "ejectment." In all other cases the confession of lease, entry and ouster is sufficient; and so it is now settled that it is sufficient for an ejectment brought for a condition broken. In *Jenkins d. Harris v. Prichard* (10), a fine had been levied, and the Court adjudged an

actual entry not to be necessary to be made in order to avoid a fine at common law as that was, being without proclamations. In *Goodright d. Hare v. Cator* (11), a question arose whether an entry was necessary to sustain the ejectment, which was brought to recover possession upon condition broken by non-payment of rent. Lord Mansfield said: "We have looked very particularly into the cases for 200 years back, and we find great contrariety of opinion, whether an actual entry is necessary to maintain an ejectment on a clause of re-entry for non-payment of rent; but in the most distant period the better opinion has been that it is not. This was Lord Hale's opinion, and is mentioned as such, and as that of L. C. J. Scroggs, by Lord Holt in *Little v. Heaton* (12). But we look upon it as having been fully settled, in 1703, by the opinion of all the Judges, upon deliberation and consideration of all the cases, that an actual entry is only necessary to avoid a fine. And so the practice has been ever since. The reason of the thing is agreeable to the practice; for it is absurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the court, passed for the purpose of bringing the right to an examination, an actual entry can be of no service. In the case of fines, it is required by a positive rule of law, and clearly necessary under the statute 4 Anne, c. 16." In *Doe d. Duckett v. Watts* (13) a fine had been levied, but before the proclamations had been made an ejectment was brought, and it was insisted that the plaintiff could not recover for want of entry before the ejectment. The Court refused a rule nisi upon the ground of misdirection, in ruling that the consent rule rendered proof of actual entry unnecessary. Lord Ellenborough there said, "The statute 4 Hen. 7. makes a fine with proclamation a bar, saving the rights of persons who pursue them by action or lawful entry within a certain time. In *Oates v. Brydon* (14), Lord Mansfield said, that the confession of lease, entry and ouster was sufficient in all cases, except in the case of a fine with proclamations, in which case it was necessary to prove an actual entry."

(11) Doug. 460.

(12) 1 Salk. 259; s. c. 2 Id. Raym. 750.

(13) 9 East, 17.

(14) Bull. N.P. 103, and the same case as *Oates d. Wigfall v. Brydon*.

(9) 3 Burr. 1895.

(10) 2 Wils. 45.



In the note to *Doe d. Duckett v. Watts*, it is said, "Lord Coke seems to consider the statute of Edw. 1. as repealed by the Hen. 7, so far as to render an entry of the party's claim at the foot of the fine unavailable at this day. Certainly it must be unavailable against a fine levied with proclamations according to the latter statute; and since the statute 21 Jac. 1. c. 16. the party having a right of entry has twenty years within which to make his entry after his right accrues; but by the statute 4 Anne, c. 16. s. 16, no claim or entry on lands shall be of any force or effect to avoid any fine levied with proclamations, or shall be a sufficient entry or claim within the statute of Jac. 1, unless an action shall be thereupon commenced within one year after, &c. and prosecuted with effect. Upon the whole, it seems now, that for every purpose, except that of avoiding a fine with proclamations, in which case the statute of Hen. 7. requires an entry, the bringing of an ejectment will serve the same purpose: and indeed, if the good sense of the thing is to be regarded, it seems better adapted to answer any useful purpose for which an actual entry on the land was originally required, or can at this day be made." See also *Duppa v. Mayo* (14).

Even if any question could now be made, whether an entry is necessary to avoid a fine at common law, it seems perfectly clear that in all other cases where entry is necessary, the confession in the consent rule is sufficient evidence of the fact of such entry. We therefore think, there is no objection to the plaintiff's recovery, upon the ground that he has not proved a sufficient entry; if, indeed, entry was necessary. Upon the objection urged, that an undetermined tenancy existed on the day of the demise, we are of opinion that no tenancy was ever created between the parties. The utmost extent of the evidence is, to shew a negotiation between the parties, with a view to a demise, if the parties could agree, and that such negotiation was determined by the defendants' acts and refusal to pay rent to the lessor of the plaintiff. The negotiation had not advanced to the adjustment of the amount of rent, or any of the other material terms of tenancy. It is plain that the defendant did not consider that he had

become tenant to the lessor of the plaintiff; as, if he had so become, he could have had no pretence for refusing to pay the lessor of the plaintiff any rent, upon the ground of an adverse claim, which he peremptorily did: but if the defendant did hold as tenant to the lessor of the plaintiff, by agreement made between them, in that case the setting up an adverse title as a ground for refusing to pay any rent to the plaintiff, was a disclaimer of his then holding as tenant to the plaintiff. In *Doe d. Calvert v. Freed*, and most of the other cases where the question of disclaimer has arisen, the parties in possession have not claimed to be tenants under contracts made with the persons asserting a right of entry by force of the disclaimer; but the claim of tenancy by such persons was by operation of law, by virtue of contracts of demise and tenancy made with other persons, through or under whom the parties claim who insist on the right of possession; but in this case, the defendant claims to retain possession upon the ground that he has agreed to hold the land as tenant; and when a person so circumstanced says, as the defendant did, "I will pay you no rent until it is settled who is entitled to the property, and will then pay to the person who shall establish his title thereto," we think this must be deemed to be a disclaimer of an existing relation of landlord and tenant, and a putting of the person of whom he now professes to hold as tenant to the proof of his title; and he cannot therefore effectually resist an ejectment made necessary by his own conduct, in repudiating a title under which he claims to retain possession of the land.

We think, that the relation of landlord and tenant never existed between the lessor of the plaintiff and the defendant; and that

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1848. }  
Jan. 19; } COCKS v. PURDAY.  
May 12. }

*Copyright—Foreigner—First Publication—Assignment.*

*An alien, the author of a work first published in England, has a copyright in it whether it be composed in this country or abroad.*

*A contemporaneous publication abroad does not defeat the copyright here.*

*A special case stated that the copyright was sold by letter to the plaintiff, and that such a sale was valid by the law of the country where it was made:—Held, that the plaintiff was an "assign" of the author, under the 5 & 6 Vict. c. 45. ss. 2, 3, and as such entitled to copyright.*

Case for the infringement of the copyright of a musical publication.

Pleas—First, not guilty; second, that there was no subsisting copyright; third, that the plaintiff was not the proprietor of the copyright.

The cause was tried, before Erle, J., at the Sittings for Middlesex, after Trinity term, 1846, when a verdict was found for the plaintiff for 40s. damages and costs, with leave to the defendant to move to enter a nonsuit, and with liberty to either party to turn the facts into a special verdict. On the defendant moving to enter a nonsuit, pursuant to the leave reserved, it was agreed between the parties and ordered by the Court, that the verdict should be subject to a case, with liberty to either party to turn the same into a special verdict. The following are the material parts of the case:—The plaintiff is an Englishman, domiciled in England, formerly carrying on business

as a music publisher in Prince's Street, Hanover Square, now in New Burlington Street, and the defendant is also a music publisher, carrying on business in Holborn. The author of the musical composition called "Die Elfen Walzer" is Joseph Labitzky, a native of Carlsbad, in the kingdom of Bohemia, in the empire of Austria, and domiciled there. Previous to the month of September 1842 the copyright of the said musical composition "Die Elfen Walzer" was sold, by letter, to the plaintiff, by Johann Hoffmann, a native of Prague, and domiciled there, he having previously purchased it of the said Joseph Labitzky, of which said letter the following is a copy:—

"Messrs. Cocks & Co. London.

"Leipsig, August 8, 1842.

"In order of Mr. J. Hoffmann, of Prague, I over send you with this an exemplar of the *épreuves corrigées* of Labitzky's Waltz op. 86. The term of publication is fixed on the 1st of September. You will credit the amount of the *honorar*, as usually, to Mr. John Hoffmann. I am, Sir,

"Yours most obediently,

"Friedrick Hofmeister."

Which letter was written and signed by Friedrick Hofmeister, by the authority and direction of Johann Hoffmann. The said musical composition was first published abroad on the 1st of September 1842. On the same day an entry was made, by the direction and on the behalf of the plaintiff, in the Book of Registry of Copyrights and Assignments kept at the Hall of the Stationers' Company, pursuant to the statute 5 & 6 Vict. c. 45, intituled "An Act to amend the law of copyright;" of which entry the following is a copy:—

Time of making the Entry.	Title of Book.	Name of Publisher, and Place of Publication.	Name and Place of Abode of Proprietor of Copyright.	Date of first Publication.
Sept. 1, 1842.	Die Elfen Walzer, composed for the Piano Forte by Joseph Labitzky	Messrs. Cocks & Co. 20, Princes Street, Hanover Square, London.	Robert Cocks, of No. 3, Ladbroke Terrace, Middlesex.	Sept. 1, 1842.

The said musical composition was published and sold by the plaintiff at his shop in

Prince's Street, Hanover Square, for the first time on the said 1st of September 1842,

the plaintiff having received a proof copy about ten days before, and printed it according to the day named for the publication.

On the 7th of August 1845, the plaintiff purchased of the defendant at his shop, in Holborn, a copy of the same musical composition printed and published by the defendant. An indenture, purporting to be under seal, dated the 18th of July 1843, was made between Johann Hoffmann and Joseph Labitzky, the said author, of the one part, and the plaintiff of the other part, and executed by Hoffmann and Labitzky, and duly stamped, so as to be a valid deed according to the Austrian law, which prevailed where Hoffmann and Labitzky resided, whereby Hoffmann and Labitzky, in consideration of the sum of 111*l.* paid by the plaintiff, sold and assigned to him the copyright, among other compositions, of the said "Die Elfen Walzer," and all their interest therein. By the Austrian law, which prevails both in Bohemia and Prague where Labitzky and Hoffmann respectively at the time of the sale of the said copyright resided, a copyright may be assigned by word of mouth without any writing. An author is the proprietor of the copyright, and has a copyright for his life and thirty years afterwards by virtue of his authorship, and an author may transfer the copyright to another individual for one country, after having published it himself.

The jury, in answer to a question from the learned Judge, found, as a fact, that there had been no publication abroad of "Die Elfen Walzer" prior to the publication in this country, but that the publication abroad and in England was simultaneous.

The question for the opinion of the Court was, whether the plaintiff was entitled to maintain his action against the defendant for the piracy of the said musical composition. If the Court should be of opinion that the plaintiff was entitled to maintain his said action, then the verdict was to be for the plaintiff, on all the issues; but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

*Talfourd, Serj.* (January 19) for the plaintiff.—It is contended for the defendant in the first place, that a foreigner domiciled abroad cannot have a copyright in this

country. But *Pisani v. Lawson* (1) shews that an alien domiciled abroad may have personal rights here, and may sue in the English courts in respect of injuries to such rights. *De Londre v. Shaw* (2) and *Page v. Townsend* (3) are relied on for the defendant. In the former case the Vice Chancellor certainly said, "the Court does not protect the copyright of a foreigner;" but there was no real question there of copyright, the matter in dispute being an imitation of labels and seals on bottles containing medicine, and it turned upon the plaintiff's right not to have inferior articles palmed off upon the public as of his manufacture. *Page v. Townsend* was decided upon the terms of a particular statute, the 17 Geo. 3. c. 57, which was passed for the protection of prints engraved, designed, etched or worked in Great Britain. That act purported to be for the protection of British Art, but no such words occur in the Copyright Act. In *Bentley v. Foster* (4), it was held that an alien domiciled abroad publishing a work first in this country is entitled to copyright. *D'Almaine v. Bossey* (5) shews that the English assignee of a foreign composition, first published in England, is entitled to the protection of the copyright laws in England. The second question is whether, as there was in this case no publication in England before the publication abroad, the plaintiff is entitled to protection. For the defendant it is contended, that the contemporaneous publication abroad disentitled the plaintiff to maintain his action. This point arises on the case of *Chappell v. Purday* (6), where it was said, that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statute. In *Clementi v. Walker* (7), where it was held, that after a publication abroad, no copyright was acquired by a subsequent publication here, at a considerable interval, and after another publication here, it seems that the

(1) 6 Bing. N.C. 90; s.c. 9 Law J. Rep. (s.s.) C.P. 12.

(2) 2 Sim. 287.

(3) 5 Ibid. 305.

(4) 10 Ibid. 329.

(5) 1 You. & Coll. 288; s.c. 4 Law J. Rep. (n.s.) Exch. Eq. 21.

(6) 14 Mee. & Wels. 303; s.c. 14 Law J. Rep. (n.s.) Exch. 258.

(7) 2 B. & C. 861; s.c. 2 Law J. Rep. K.B. 176.

case would have been differently considered, if the author had published promptly here, and had made the first publication here. From the case of *Chappell v. Purday* it appears that a foreigner, author of a work unpublished abroad, may communicate his copyright to a British subject. In the present case there was no publication abroad before the publication here, for the publications were contemporaneous. The third question is, whether the plaintiff has derived a good title from the original author. The case states that the copyright was "sold by letter" to the plaintiff by Johann Hoffmann, of Prague, who had purchased it of Labitzky, the author.

[MAULE, J.—Is not the meaning of the letter this—that Hoffmann having bought Labitzky's copyright, and wishing to publish it at Prague and in England on the same day, engages the plaintiff to have it published in England?]

That point was not raised at the trial. It is stated in the case that there was a sale. Copyright, as defined in the 5 & 6 Vict. c. 45. s. 2, is personal property, and can pass like other personal property. In *Power v. Walker* (8) Lord Ellenborough said that the assignment of a copyright should be in writing; but at common law there is no difference between oral contracts and contracts in writing, unless they are by deed. At all events, this contract was made abroad, where a *parol* agreement is stated to be sufficient.

*Channell, Serj.* for the defendant.—It is necessary for the plaintiff to make out the existence of a copyright, and that the right had vested in him. The plaintiff relies in part on the entry made under the 5 & 6 Vict. c. 45, at Stationers' Hall on the 1st of September, as establishing a *prima facie* case. That is an entry by the plaintiff himself, by which he asserts a title in himself. Such a proceeding would not generally be in accordance with the principles of law. It is not to be forgotten, that the 11th section of the act provides that the entry shall be only *prima facie* evidence. The plaintiff registered on the 1st of September, as proprietor. Now, was he at that time proprietor? He says he derived his title from Labitzky, the author, through Hoffmann. The entry does not shew the assignment to

(8) 4 Campb. 8.

the plaintiff, although the act contemplates the entry of an assignment, and an assignment by entry. But Labitzky had no copyright in England, and therefore he could not transfer any copyright to the plaintiff. The question has been argued on the other side, whether a foreigner can have a copyright in England, and attention has been drawn to the case of *Chappell v. Purday*. The doubt raised there was not as to the party being an alien, but his being an alien living abroad. But supposing a foreigner residing abroad or his assignee can have a copyright, he must acquire it by a first publication here, and the cases have decided that if the first publication was made abroad, there is no copyright here. Though the case finds that the publication abroad was simultaneous with the publication here, it does not follow that the first publication was here. If the first publication was not made here, the foreign proprietor had no right which he could assign. If the letter did not operate as an assignment, the deed of July 1843 cannot be relied on as the assignment, as there had been a previous publication by the plaintiff in September 1842. It cannot be said that that was a publication by Labitzky or Hoffmann.

*Talfourd, Serj.* in reply.—The authorities do not establish that a foreigner living abroad cannot have a copyright in England. *Bentley v. Foster* and *Chappell v. Purday* shew the contrary. The publication here was a first publication; there was none before it. Then as to the title, the letter operated as a sufficient assignment by the law of the country; but if it did not, it appointed the plaintiff agent for Hoffmann to make the first publication in England, and then there was a perfect assignment by Hoffmann to the plaintiff by the deed of 1843.

*Cur. adv. vult.*

WILDE, C.J.—(May 12,) delivered the judgment of the Court (9).—This was an action on the case for the infringement of the copyright of a musical publication. The defendant pleaded Not guilty; secondly, that there was no subsisting copyright in the publication; and, thirdly, that the plaintiff was not the proprietor of the copyright. The cause was tried before

(9) Wilde, C.J., Maule, J., Cresswell, J., and Williams, J.

Mr. Justice Erle, when a verdict was found for the plaintiff, subject to a special case, which stated in substance that the plaintiff is an Englishman domiciled in England, and Joseph Labitzky, a native of Carlsbad, in the empire of Austria, and domiciled there, was the author of the work. By the law of Austria, which prevails at Prague, where Johann Hoffmann is domiciled, as well as at Carlsbad, an author has copyright in his works for his own life and thirty years after, and may assign it by word of mouth. Johann Hoffmann became the purchaser and assignee of the copyright of the work in question from Labitzky, and afterwards sold it to the plaintiff, by a letter, dated the 8th of August 1842, written and signed by authority of Hoffmann, which letter was set out in the case, and stated, amongst other things, that the period of publication was fixed for the 1st of September. On the 1st of September 1842 the plaintiff made an entry in the register at Stationers' Hall, and stated therein that he was the publisher and proprietor, and that the date of the first publication was the 1st of September 1842. On the 18th of July 1843 a formal assignment of the copyright of this and other musical compositions was made to the plaintiff by indenture between Labitzky and Hoffmann of the one part, and the plaintiff of the other part. The defendant sold a copy of the same work, published by himself, on the 7th of August 1845. The jury found that there had been no publication abroad prior to the publication in England; but that the publications abroad and in this country were simultaneous. Three points were raised and discussed at the bar: first, whether a foreigner domiciled abroad can have a copyright in this country; secondly, whether he can have it where there is not a publication here before publication abroad; and, thirdly, if it can exist under such circumstances, whether the plaintiff had derived a good title from the original author. As to the first point no legal principle was suggested as the foundation of the argument that an alien friend is not to have copyright in a work composed by him abroad, and first published in England. There are, indeed, some dicta in the books, to the effect that a foreign author is not protected against a publication of his work in England. Probably those dicta were intended to apply only to

cases where a foreign author has published his work abroad, and not in England. In *Chappell v. Purday*, this subject is fully discussed; and although an opinion was expressed that a foreign author has not any copyright in England, unless he publishes his works here, yet it was decided that when he publishes here he has such copyright, unless he has, by previous publication abroad, made the work *publici juris*, as was said in *Guichard v. Mori* (12). There are two cases of *D'Almaine v. Boosey* and *Beniley v. Foster*, where it has been expressly held that a foreigner composing a work abroad, and first publishing it in England, has copyright, and is protected; and in *Clementi v. Walker*, where it was held that, after a publication abroad, no copyright was acquired by publication here after a considerable interval, and after another person had without fraud, and in the regular course of trade, published the same work in this country, an opinion was expressed that the case would have been different had the publication here promptly followed that which had preceded it abroad, and been the first publication in this country. The cases of *De Londre v. Shaw* and *Page v. Townsend*, which were cited during the argument, are not authorities the other way. The first was an application for an injunction to restrain the defendant from imitating certain labels and seals made and printed in France, and it was refused on the ground that *De Londre* had no interest in them, although the Vice Chancellor of England added that the Court does not protect the copyright of a foreigner. If this dictum was intended to apply to foreign authors who have not published in this country, it does not apply to the present case; if it was intended to apply to the case of a foreign author who has published his work here, the same learned Judge in *Beniley v. Foster*, where the point was raised, expressed a deliberate opinion in opposition to that which he had before thrown out. In the second (*Page v. Townsend*), an application was made for an injunction to protect the supposed copyright in certain engravings executed and published abroad, and the question turned on the meaning of certain statutes which were held to have been passed only for the protection of prints en-

(12) 9 Law J. Rep. (n.s.) Chanc. 227.

graved, etched, drawn, or designed in Great Britain, and the last of them, the 17 Geo. 3. c. 57, is in express terms so limited in its operation. The general rule is, that an alien may acquire personal rights and maintain personal actions in respect to injuries to them. He cannot maintain real actions because he cannot hold land: see *Pisani v. Lawson*. It appears to us, then, upon the authorities, as well as upon principle, that an alien *ami*, the author of a work of which he is also the first publisher in England, and which has not been made *publici juris* by a previous publication elsewhere, has a copyright in that work whether it be composed in this country or abroad.

The second question argued at the bar is scarcely separable from the first, viz., whether the copyright, which the author or his assignee would otherwise have had in this country, was defeated by the contemporaneous publication abroad. If it be correct to say that a foreigner, the author of a work composed abroad and published in this country, is, by the municipal law of this country, entitled to a copyright in the work, how can such a right be defeated by a contemporaneous publication abroad? In the popular sense of the word each would be the first publication; but if neither could be so called, the result would be the same, for, in order to defeat the claim of copyright, a prior publication in some other place or by some other party should be proved.

The third question raised was, whether the plaintiff had proved a good derivative title under the original author. It is stated in the case that by the law of Austria, which prevailed where Labitzky, the author, and Hoffmann, his assignee, were respectively domiciled, the author had a copyright, and that such copyright might be assigned by word of mouth; that Labitzky sold and assigned his copyright to Hoffmann, and that Hoffmann, before the publication of the work, sold his copyright to the plaintiff. But it is also stated that the sale was effected by a letter written from Leipzig, which was set out in the case, and some discussion took place as to the sufficiency of that letter to effect a sale. The terms of it are ambiguous, and it certainly has as much the aspect of evidence of a previous sale as of an instrument by which the sale was effected. But the parties themselves have stated

that it was a sale, and we think they must be bound by that statement. Now the recent statute, 5 & 6 Vict. c. 45. s. 3, enacts, "that the copyright of every book published in the lifetime of the author shall endure for the time there specified, and shall be the property of such author or his assigns." And the 2nd section (the interpretation clause) had before provided that "the word *assigns* shall be construed to mean and include any person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book," &c. There being, then, a sale in this case, valid by the law of Austria, where it was made, the interest of the author became vested in the plaintiff before publication, so as to make him an assign within the meaning of the 3rd section; and he, therefore, had a good derivative title. This view of the case renders it unnecessary to consider the arguments that were offered to the Court on the supposition that the plaintiff might be compelled to rely on the assignment by the deed executed in 1843; and as we think that a foreign author, publishing his work in this country before anything had been done either here or abroad to prevent the acquisition of copyright, has a copyright protected by the 5 & 6 Vict. c. 45, and that his interest may be assigned before publication, and in this instance was well assigned to the plaintiff, and the plaintiff's publication took place before anything had happened to prevent his becoming entitled to protection, our judgment must be in his favour.

*Postea to the plaintiff.*

1848.

Jan. 12;

May 12.

ELDERTON v. EMMENS.

*Costs, Taxation of—Costs of the Cause—Costs of Witnesses—Arrest of Judgment—Practice.*

*A declaration contained four counts. The defendant pleaded the general issue to the whole declaration, and special pleas to each count. The verdict was for the defendant on the general issue to the first, third, and fourth counts, and on all the other issues for the plaintiff. Judgment on the second count (upon which the plaintiff succeeded), was*

*arrested:—Held, that the defendant was entitled to the general costs of the cause.*

*The case of James v. Brook overruled.*

In this case the declaration was in assumpsit, and consisted of four counts. The defendant pleaded non assumpsit to the whole declaration, and special pleas to each of the counts. A verdict was found for the defendant on the general issue to the first, third, and last counts, and for the plaintiff on the general issue to the second count; upon the second count judgment was arrested. The special pleas were found for the plaintiff. The Master on taxation allowed no costs to either party upon the issues joined on the second count. He allowed the defendant the general costs of the cause, and also a sum of fifty guineas for three copies of a deed, which the defendant had received notice from the plaintiff to produce at the trial, and he refused to allow the plaintiff the costs of witnesses called to prove the special pleas upon which he succeeded, upon the ground that their evidence was not solely applicable to those pleas. A rule had been obtained, calling upon the defendant to shew cause why the Master should not review his taxation of costs.

*Byles, Serj. and H. Hill* shewed cause (Jan. 12).—The defendant is entitled to the general costs of the cause, in which he has succeeded, and the count upon which judgment was arrested must be considered as struck out of the record. At common law neither party is entitled to costs, which are given to the plaintiff in all cases in which he recovers damages by the Statute of Gloucester, 6 Edw. 1. c. 1. The 23 Hen. 8. c. 15. gives the defendant costs if the verdict happen to pass against the plaintiff in certain actions, since extended to all actions by 4 Jac. 1. c. 3, and the practice, under these statutes, has always been to give the defendant his costs, although he does not obtain a verdict on every part of the record. In *Archbold's Practice*, vol. 2, 1376, it is said, "If there are several issues, and one is found for the plaintiff, and the others for the defendant, if that found for the plaintiff be the substantial issue in the cause, and upon which he will be entitled to recover his debt or damages, or any part of them, he will be entitled to the postea, and to the

general costs of the cause. If, on the other hand, the defence raised upon the issue found for the defendant furnishes substantially a defence to the whole action, then the defendant will be entitled to the postea, and the general costs of the cause—*Tidd's Practice*, 9th edit. 977, *Hart v. Cutbush* (1), *Frankum v. the Earl of Falmouth* (2). See also *Day v. Hanks* (3), *Thornton v. Williamson* (4), and 1 *Sesand*, 300, notes (b) (c). In *Norris v. Waldren* (5) the plaintiff was entitled to damages, and as that case was decided upon the Statute of Gloucester, it is no authority for the present plaintiff. Here the defendant would be entitled to judgment, except for the bad count, on every part of the record; and it would be an extraordinary result if the plaintiff, by inserting a bad count in the declaration, could deprive the defendant of costs, to which if such count had been omitted he would be entitled. The record must be taken as if the bad count was entirely eradicated therefrom—*Goodburne v. Bouman* (6). It is not easy to distinguish this case from *James v. Brook* (7); but it is submitted, that that decision cannot stand. It was there assumed, that as the Reg. Gen. Hilary term, 2 Will. 4. c. 74, and Hilary term, 4 Will. 4. c. 74, only deprive the plaintiff of the costs of the issues upon which he fails, he is not to pay the costs of the cause when he has succeeded on one issue. The general practice in such cases was entirely overlooked in the argument in *James v. Brook*, and also in the judgment, but the New Rules do not apply to the state of circumstances as they existed in that case, nor is the present to be governed by them. As to the other points, the costs of the particular items are in the discretion of the Master. The plaintiff gave the defendant notice to produce the deed, and it was therefore necessary that copies of it should be made for his counsel. It is settled by *Crowther v. Elwell* (8), that where the evidence of several

(1) 2 Dowl. P.C. 456.

(2) 4 *Ibid.* 65.

(3) 3 Term Rep. 654.

(4) 13 East, 191.

(5) 2 W. Black. 1199.

(6) 9 Bing. 667; s.c. 2 Law J. Rep. (n.s.) C.P. 146.

(7) 16 Law J. Rep. (n.s.) Q.B. 168.

(8) 4 Mee. & Wels. 71; s.c. 7 Law J. Rep. (n.s.) Exch. 251.

witnesses applies to several issues, success on one issue does not entitle the party successful on that issue to all the costs of such witnesses.

*Telford, Serj. and Hoggins*, in support of the rule.—The defendant should not have pleaded over, but ought to have demurred to the bad count. As he has not taken the proper course, he must pay all the costs in respect of the second count, and also of the special pleas. There can be no reason why the plaintiff should not have his costs of the special plea to the second count. If non assumpsit had not been pleaded to that count, he would have received the costs, and why is he to be placed in a worse position when he has succeeded on non assumpsit to that count? The case of *James v. Brook* is not distinguishable from the present case, and was rightly decided. That was an action for slander. The declaration contained three counts. The defendant pleaded the general issue to the whole, and several special pleas to each count, on which issues were joined. Defendant had a verdict on the general issue to the first and second counts. The plaintiff succeeded on all the other issues. Judgment was arrested on the third count; and it was held, that the defendant was not entitled to the general costs of the cause. The statutes 23 Hen. 8. c. 15. and 4 Jac. 1. c. 3. contemplate cases in which the defendant succeeds upon the entire record. The cause exists as a whole, and the costs are of the same nature. If the defendant does not wholly succeed he is only entitled under the New Rules to the costs of the particular issues found for him; and the Master was wrong in allowing the defendant the general costs of the cause, when there is not a general and complete judgment in his favour. The copies of the deed were wholly unnecessary, and it cannot be said that evidence of witnesses was not exclusively applicable to the special plea to the first count, because it also applied to the special plea to the second count. The justification in both special pleas was the same in substance, varied only in form so as to meet the respective averments in the first and second counts of the declaration.

*Cur. adv. vult.*

WILDE, C. J. now (May 12,) delivered the

judgment of the Court (9).—The plaintiff declared against the defendant, as secretary of the Church of England United Life and Fire Assurance Trust and Annuity Company, on two counts, on two different contracts to employ him as attorney and solicitor to the company. There were also counts for work and labour, and on an account stated. The defendant pleaded to the whole declaration, that the company did not promise, and a special plea to the first and second counts respectively, justifying the discharge of the plaintiff. Replication *de injuriâ*. To the third and fourth counts, payment and satisfaction. At the trial, a verdict was found for the plaintiff on the issue joined on the pleas to the first and second counts, subject to a motion to enter a verdict for the defendant on the issue of non assumpsit, as to the first count. The verdict was for the defendant on the general issue as to the third and fourth counts, and for the plaintiff on the special pleas. A rule nisi was afterwards obtained by the defendant, to enter a verdict for the defendant on the plea of non assumpsit to the first count, and to arrest the judgment on the second count; which rule was after argument made absolute. The Master, on the taxation of costs, allowed to the defendant the general costs of the cause, and allowed, as part of them, the costs of three copies of the company's deed of settlement, which was very long; he also refused to allow the plaintiff the costs of certain witnesses called by him in support of the issue on the special plea to the first count, on which he succeeded, because their evidence was applicable to other issues also. A rule nisi for reviewing the Master's taxation was granted, and the points were fully discussed on shewing cause. As to the first point, (which was the most important,) it was contended that the right of the defendant to costs depended upon the statute 23 Hen. 8. c. 15, (extended to all actions by the 4 Jac. 1. c. 3,) which enacts, that in certain actions, "if the plaintiff, after the appearance of the defendant, was nonsuited, or that on any trial a verdict happen to pass by lawful authority against the plaintiff, the defendant in every such action shall have judgment to recover his costs against the plaintiff, to be

(9) Wilde, C.J., Maule, J., Cresswell, J. and Williams, J.



assessed and taxed at the discretion of the Court," &c., and that this statute did not entitle the defendant to costs, unless the verdict was in his favour on the whole record, whereas in this case the verdict was in favour of the plaintiff on both the issues raised as to the second count, upon which the judgment was arrested. The case of *James v. Brook*, decided by Mr. Justice Erle, in the Bail Court, reported in 16 *Law J. Rep.* (N.S.) Q.B. 168, is certainly expressly in point, and if that was rightly decided this rule should be made absolute. But after mature consideration, it appears to us that the statute 23 Hen. 8. c. 15. (as it has been construed in several cases) applies, although the defendant cannot have the verdict in his favour on every part of the record. Thus in *Day v. Hanks*, in which the declaration contained two counts in case, for the disturbance of two distinct commons, and as to the first the defendant suffered judgment by default, and as to the second took issue, and obtained a verdict, the Court held, that as to that the defendant was entitled to judgment and his costs, although he could not have a verdict and judgment on every part of the record. And in *Thornton v. Williamson*, (an action of trespass *quare clausum fregit*,) the defendant pleaded two different rights of way, on which the plaintiff took issue, and new assigned *extra viam*, as to which the defendant suffered judgment by default. At the trial, the damages were assessed on that judgment, and the plaintiff obtained a verdict on the issue as to one right of way, and the defendant on the issue as to the other; and it was held that the defendant was entitled to the general costs of the cause, although it was manifest that he had not a general verdict in his favour, nor could have judgment upon every part of the record. *Cross v. Johnson* (10) is to the same effect. The attention of Mr. Justice Erle does not appear to have been drawn to those cases by the counsel who argued in *James v. Brook*. It was there assumed that the statute 23 Hen. 8. c. 15. did not give the defendant costs in such a case, and the question was treated as

depending on the New Rules as to the allowance of costs on particular issues found for the plaintiff or defendant; but we think that the statute does apply to this case, which differs from those only in the circumstance, that as to the second count the plaintiff obtained a verdict, and judgment was arrested. But it seems difficult to say upon what principle a plaintiff is to be in a better position when he has obtained a verdict, on an issue joined on a count so defective that he could have no judgment, than where he has a judgment by default on a good count, as in *Day v. Hanks*. As far as costs are concerned, the count on which judgment is arrested is moved out of the way. There is no effective verdict where judgment is arrested; and although it may be true that the defendant cannot have judgment on every part of the record, yet on the whole record the judgment is in his favour, and we think the Master was right in allowing him the general costs of the cause. As to the issues found for the plaintiff, on the pleas to the first, third, and fourth counts, the Master would not allow him the costs of his witnesses, because they were not exclusively applicable to those issues, but also to others which were found against him. The Master was the proper party to judge whether the evidence of the witnesses was exclusively applicable to the issues found for the plaintiff, and as he has decided that it was not, the plaintiff, not being entitled to the general costs of the cause, was not entitled to have them allowed according to the several decisions—*Lordster v. Dick* (11), *Knight v. Woore* (12), *Crowder v. Elwell*. The remaining point, namely, the allowance of the copies of the deed, we think was in the discretion of the Master, and we see no reason for saying that the manner in which he exercised that discretion was in contravention of any rule of law or practice of the Court. The rule therefore for reviewing his taxation must be discharged.

*Rule discharged.*

(11) 2 Cr. & M. 383; s.c. 7 *Law J. Rep.* (N.S.) Exch. 140.

(12) 3 Bing. N.C. 3; s.c. 6 *Law J. Rep.* (N.S.) C.P. 135.

(10) 9 B. & C. 613.

# CASES ARGUED AND DETERMINED

IN THE

## Court of Common Pleas.

TRINITY TERM, 11 VICTORIÆ.

1847. }  
Dec. 6. } BROWN v. DE WINTON.  
1848. }  
June 28. }

*Promissory Note*—3 & 4 Anne, c. 9. s. 1.  
—*Indorsement*—*Negotiability*—*Pleading*.

*A note payable to the maker's own order is not a promissory note negotiable under the stat. 3 & 4 Anne, c. 9. s. 1. But the maker of such a note may, by indorsing it, give the holder a right of action on it against him.*

*A declaration describing such a note as a "promissory note" might be bad on demurrer, but is good after being pleaded over to. So, though an allegation that the defendant indorsed such a note might be bad on demurrer, it is sufficient after plea.*

**Assumpsit.** The declaration stated that the defendant on the 11th of September 1845 made his promissory note in writing, and thereby promised to pay to his, the defendant's, own order, 75*l.* for value received, two months after the date thereof, which period had elapsed before the commencement of the suit, and the defendant then indorsed the same to the plaintiff, whereof the defendant had due notice, and then, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenour and effect thereof.

Pleas, traversing the making and in-  
NEW SERIES, XVII.—C.P.

dorsing of the note by the defendant; and others not material to be adverted to.

At the trial, before Erle, J., at the London Sittings after Trinity term, 1846, a note in the following form, stamped with a three shilling stamp, was given in evidence:—

"London, September 11, 1845.

"£75.—Two months after date I promise to pay to my own order the sum of 75*l.* for value received.

"C. L. De Winton, Lieut. 16th Regt.  
"To Sir J. Kirkland & Co.

80, Pall Mall, London."

Indorsed—"C. L. De Winton, Lieut. 16th Regt."

A verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

*Byles, Serj.* having obtained in Michaelmas term, 1846, a rule *nisi* to enter a verdict for the defendant, or to arrest the judgment,

*Channell, Serj.* and *Atherton* (Dec. 6th, 1847) shewed cause.—The question in this case is, whether the plaintiff has a right to sue as the indorsee of a promissory note made by the defendant, payable to the defendant's own order. It is contended for the defendant, that such a note is not within the provisions of the 3 & 4 Anne, c. 9. s. 1, so as to become negotiable by virtue thereof. The case of *Flight v. Maclean* (1) in the Exchequer seems to support that view, while the case

(1) 16 Mee. & Wels. 51; s. c. 16 Law J. Rep. (N.S.) Exch. 23.

of *Wood v. Mylton* (2), in the Queen's Bench, decides that such a note is negotiable under the statute. In *Flight v. Maclean* the plaintiff had judgment on the second count of the declaration, and therefore he had\* no necessity for pressing the point upon the first count. *Wood v. Mylton* was exactly like the present case, except that there was an intermediate indorsement there, which, of course, does not affect the question. The argument for the defendant in *Flight v. Maclean* resolved itself into two parts: the first purporting to shew that the note was not negotiable by law, and the other that it disclosed no contract on the face of it. The case of *De la Chaumette v. the Bank of England* (3) was the only one cited on the first point. Lord Tenterden is there reported to have said, "Before the statute of Anne a promissory note was not transferable in England by indorsement; but by the law of France and other countries such an instrument is transferable by indorsement: if so, is it by the law of merchants or by positive enactment?" Of the cases cited on the other point, *Champion v. Plummer* (4), *Cooper v. Smith* (5) and several others turned on the question, whether the memorandum sufficiently shewed a contract under the Statute of Frauds; and *Green v. Davies* (6) merely decided that a memorandum which was held to be a promissory note ought to be stamped as such. In a case of *Hooper v. Williams* (7), tried at the Spring Assizes for Surrey in 1847, before Lord Denman, C.J., a note like this was treated as one payable to bearer; and it was objected that the note was incorrectly described, and that the stamp was insufficient, the stamp on a note payable to bearer being different from that on one payable to the maker's order. A verdict was agreed to be taken for the defendant, with liberty to the plaintiff to move to enter the verdict for him. The Court of Exchequer granted a rule *nisi* accordingly, and the case is now pending for argument. The application for the rule *nisi* in the present case was based on

the ground that the paper produced at the trial did not prove the averments of the making and indorsing of a *promissory note*. Whether the statute of Anne applies or not, the instrument was such an one as is described in the declaration, and the plaintiff has therefore made out the affirmative of the issues. All that the declaration means, and the pleas deny, is, that the defendant put his name to the instrument described, and on the back of it.

The next question then is, whether an action lies on such an instrument as the one described,—and undoubtedly it does not, unless the statute of Anne is applicable. The preamble of the 3 & 4 Anne, c. 9. may be taken as a legislative statement of the law as it existed before the act, and it recites that "notes in writing signed by the party who makes the same, whereby such party promises to pay unto any *other person or his order*, are not assignable or indorsable by the custom of merchants." The 1st section enacts, "That all notes in writing, whereby any person promises to pay a sum of money to *any other person*, or his order, or to bearer, shall be construed by virtue thereof due and payable to such person to whom the same is made payable," and then proceeds, "and also every *such* note payable to *any person or persons*, body politic and corporate, his, her, or their order, shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the custom of merchants." When the whole of the provisions of the 1st section are looked at, this note must be taken to come within them. The recital, no doubt, is narrow; and if it is to be taken as restricting the enactments, this case must fall to the ground, for this note is certainly not such a one as is mentioned in the preamble, that is, a note payable to *another person or his order*. There are four beneficial provisions with regard to promissory notes in this section. The first does not relate to negotiability at all, but merely makes the money payable by virtue of the notes themselves. The words and spirit of the second provision are distinctly applicable to the present case,—"*and every such note payable to any person or his order.*" If there are two possible constructions, one of which will carry out the apparent intention of the act, and give

(2) 16 Law J. Rep. (N.S.) Q.B. 446.

(3) 9 B. & C. 208; s. c. 7 Law J. Rep. K.B. 179.

(4) 1 New Rep. 252.

(5) 15 East, 103.

(6) 4 B. & C. 235; s. c. 3 Law J. Rep. K.B. 185.

(7) Not yet reported.

effect to all its parts, and the other is not in conformity with such intention, nor applicable to all the parts, the former construction is to be adopted. The statute of Anne, being a remedial one, is to be liberally construed. The cases of *Clerke v. Martin* (8) and *Buller v. Cripps* (9) shew the state of the law, for the amendment of which the statute was afterwards passed. In *Brown v. Harraden* (10), where it was held that promissory notes and bills of exchange were put on the same footing in all respects by the statute, the Judges shew that the object for which the statute was passed was to give relief to the merchants who had previously been inconvenienced by the non-negotiability of their notes. In *Burchell v. Slocock* (11) and *Smith v. Kendall* (12) the statute was held to extend to notes payable to a particular person, without adding "or to his order," or "to bearer." These two cases shew that the operation of the statute is not to be limited by the preamble, for the instruments there were not "payable to any person or his order." In *Milne v. Graham* (13) the statute was held to apply to promissory notes made in Scotland. The word "such" in the second provision of the act cannot be taken as restricted to the notes mentioned in the preamble, and if it is to be restricted at all, it must apply to the last antecedent which includes notes payable to bearer. But the language of the second provision differs from that of the first, as it applies to notes payable to any person, not any other person, and if construed liberally, must be taken to apply to a note payable to the maker's own order. Such instruments are common, and till now no doubt has been raised that they fall within the statute. For these reasons, the plaintiff makes out a good title to sue, and there is no ground for arresting the judgment or entering the verdict for the defendant.

*Byles, Serj. and Peacock*, in support of the rule.—The authorities are equally balanced as to the point in dispute. The Court of Queen's Bench gave the grounds

of their judgment in the case of *Wood v. Mytton*, but they do not seem satisfactory. They say, "the second clause of the statute by the words 'every such note' adopts the description in the first, exclusive of the payee, and adds a different description of the payee, omitting to specify the bearer, but extending to any person; it includes, therefore, in terms notes payable to the maker or his order." But the object of changing the phraseology may have been to comprehend the *bearer*, while the construction adopted by the Queen's Bench is inconsistent with the third and fourth provisions, which enact, that the payee or indorsee of *such* notes may bring actions upon them as upon inland bills of exchange, against the maker or indorser. If this note can be considered as one payable to the bearer, it ought to have been so described. An instrument should be set out in pleading according to its legal effect. The cases, of which *Baker v. Lade* (14) is the leading one, are collected in 2 *Wms. Saund.* 97, *b*, &c. It is quite another question, whether an indorsement may not amount to a new making of the note. In order to make the indorsement equivalent to a new making, it would require to be special, and if that be relied on it must be taken to be traversed in that sense, and was not so proved at the trial. A note payable to *blank*, there being no fraud, is not a good promissory note. In *The King v. Randall* (15), a bill payable to *blank* or order was held not to be a bill of exchange on a trial for forgery; and in *The King v. Richards* (16), an instrument payable to *blank* or order was held not to be an order for the payment of money. A promissory note payable to *blank*, and one payable to bearer, are different; and different stamp duties are payable in respect of them—*Moyser v. Whitaker* (17).

*Cur. adv. vult.*

COLTMAN, J. (June 28) delivered the judgment of the Court (18).—This was an action of assumpsit, in which the plaintiff,

(8) 2 Lord Raym. 757.

(9) 6 Mod. 29.

(10) 4 Term Rep. 148.

(11) 2 Lord Raym. 1545.

(12) 6 Term Rep. 123.

(13) 1 B. & C. 192; s. c. 1 Law Rep. K.B. 91.

(14) 3 Lev. 291.

(15) Russ. & Ry. C.C. 195.

(16) Ibid. 193.

(17) 9 B. & C. 409; s. c. 7 Law J. Rep. K.B. 228.

(18) Coltman, J., Maule, J., Cresswell, J., and Williams, J.

in the first and only material count of his declaration, stated that the defendant made his promissory note in writing, and thereby promised to pay to his, the defendant's, own order, 75*l.* for value received, two months after the date thereof, which period had elapsed before the commencement of the suit; that the defendant thereupon indorsed the same to the plaintiff, whereof the defendant then had notice, and then in consideration of the premises promised to pay the amount of the said note to the plaintiff according to the tenour and effect thereof. To this count the defendant pleaded, first, that the defendant did not make the said promissory note in manner and form; and secondly, that the defendant did not indorse the said promissory note in manner and form, &c. The other pleas are not material to be adverted to. On the trial, it appeared that the note was a note drawn payable to the order of the maker, and indorsed by him in blank. A verdict was found for the plaintiff. There was leave reserved to the defendant to enter a verdict, if the Court should think the verdict ought to be entered for him. In the ensuing term, my Brother Byles moved for and obtained a rule *nisi*, in the alternative, for entering a verdict for the defendant, or for arresting the judgment. On the argument before us, it was insisted that the note in question being made payable to the order of the maker, was not a promissory note within the statute of the 3 & 4 Anne, c. 9; and if so, it was contended that the plaintiff could maintain no action upon it. Upon the proper construction to be put on this statute, the Court of Queen's Bench and the Court of Exchequer have differed; and in this conflict of authorities it will be necessary to examine minutely the provisions of the act, having regard to the nature of the instrument referred to. In considering them, with reference to the question in this case, a doubt arises, whether if a man makes a note payable to his own order, he can, with any propriety of language, be said to have made a promissory note at all. It is true, no precise form of words is necessary to constitute a promissory note, but still it ought to have the essentials of a contract. Now, no man can make a contract with himself. There ought to be two parties to a contract. See *Champion v. Plummer*.

In the case of a promissory note there ought to be a promisor and a promisee. It is indeed not necessary that the payee of a note should be expressly named, as decided in *Green v. Davies* and *Chadwick v. Allen*; but the person to whom the note is to be paid ought, at least, to appear by implication, as in the cases just cited. The legislature may indeed make use of a term in a sense not strictly appropriate to it; but it is to be presumed until the contrary appears that the terms made use of are intended to bear their appropriate meaning. *Prima facie* then, a statute, when it speaks of promissory notes ought to be understood to mean what answers to the proper notion of a promissory note, that is to say, an instrument whereby one man promises to pay some one else a sum of money. Is there in the act anything to shew that the legislature had in contemplation, among others expressly referred to, notes payable to the makers' own order. The first part of the section of the statute, as was observed in the case of *Wood v. Mytton* in the Queen's Bench, consists of a preamble to the four enacting clauses. Looking first to the preamble we see it expressly refers to notes payable to another person or his order. When we look at the enacting clauses, the description of notes referred to is enlarged; the first clause referring to notes payable to any other person, his, her or their order, or to bearer, but not comprising notes payable to the order of the maker. The second clause requires a more particular examination. It runs thus: "every such note payable to any person or persons, his or their order, shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants. Now, the word "such" is a word of reference, and cannot upon the ordinary rules of reference be understood as referring to any other notes than such notes as had been mentioned before. It is said, however, and truly said, that the phraseology in the second clause differs from that in the first. The words "any person" being substituted in the place of the words "any other person," it was said may well include the maker himself. But the words of the clause are "notes payable to any person or persons, his, her, or their order." Now, a note payable simply to the order of the maker cannot with pro-

piety be said to be payable to any person whatever: for to whom is it payable? Not to the maker, for it does not purport to be so; nor yet to any other person. It imports, in fact, no existing obligation to pay money to any person whatever; and if lost or stolen before indorsement, and afterwards circulated, can in no way bring a charge upon the maker. If we proceed to the third clause we find it has reference, in terms perfectly general, to the person or persons to whom such money is or shall be by such notes made payable. What are the notes here referred to by the words "such notes"? Those words are equivalent to "the notes before mentioned;" and the clause ought to be understood as referring to the notes mentioned in the preceding clause, or at least as including them; and therefore the provisions of the third clause may furnish a further key for the determination of the question, what description of notes are included in the second clause. The provisions of the third clause are, that the person or persons to whom such sum of money is or shall be by *such* notes made payable, shall and may maintain an action for the same against the person or persons who signed the same. Such a provision is clearly inapplicable to a note made by the maker payable to his own order, since it is impossible for him to sue himself. It follows that the third clause is not intended to comprehend within it notes payable to the order of the maker; and if the third clause includes within it, as we think it does, all the notes mentioned in the second clause, that clause is also to be understood to have reference only to notes on which the maker is liable to be sued by the payee or the bearer. It seems to us, therefore, that the act of parliament, in speaking of promissory notes, is to be considered as referring to notes payable to the order of some other person than the maker, and to notes payable to bearer, but not to notes payable to the order of the maker. An instrument so drawn is an incomplete instrument, being in the nature of a conditional engagement, in case he should afterwards indorse the note, to pay to the person to whom, by such indorsement, he should direct it to be paid. Such an instrument is of no legal or binding effect, until something further is done to give it validity. It is another question, what is the nature of

such a note after it has been indorsed and put in circulation. As no particular form of words is essential to form a valid promissory note, such a note, if indorsed to J. S. or order, imports a promise to pay J. S. or order the money therein mentioned: yet if the maker of such a note indorses it in blank, and circulates it, he must, we think, be considered as engaging to pay the amount to that person who may be the lawful holder of it for value, that is, in effect, to the bearer. It must be taken as against the person indorsing such an instrument that he intended it to be a valid instrument, when he paid it away, and that his indorsement should have the same effect as the indorsement by the payee of a note, payable to the order of a person other than the maker would have. It remains to consider what is the result of that as far as the present case is concerned. In order to decide whether the verdict for the plaintiff is right we must consider what the declaration means. It alleges that the defendant made his promissory note in writing, and thereby promised to pay to his own order 75*l.*, and that the defendant indorsed it to the plaintiff.

The first of those two allegations is open to the observation that there is an inconsistency in calling that a promissory note which appears not to be one. This may have been ground of demurrer; but the defendant having pleaded over to it, it must have a reasonable construction put upon it, and although the words "promissory note" are inappropriate, yet coupling them with the explanation given by the subsequent part of the allegation, which shews in what sense the words "promissory note" are used, they are intelligible, and the allegation may be taken to mean that the defendant made a note in writing, containing a promise to pay to his own order 75*l.* The plea denies that the said defendant made the promissory note in the declaration mentioned. This traverse must be understood as denying the making of the promissory note in the same sense in which the declaration alleges it,—that such a note as is alleged was actually made. The second allegation is, that the defendant indorsed the said note to the plaintiff. What must be understood to be the meaning of this allegation when pleaded over to? The term "indorsing" may not be strictly applicable to such an

instrument, which is not properly indorsed over; but not being demurred to, it may be understood in any sense which the words will bear, and which will make the pleading good. In the case of bills or notes which are indorsed over, the allegation that the defendant indorsed the bill to the plaintiff means that he indorsed the bill under circumstances which give the plaintiff a right to sue upon it—*Marston v. Allen* (19) and *Adams v. Jones* (20). The allegation in this declaration respecting the indorsement may well bear that sense, and the plea, when it denies the indorsement, must be understood in the same sense. Now the fact of indorsing the note in blank, and delivering it to the plaintiff, was proved, and if the right to sue was thereby vested in the plaintiff, the verdict was properly found for him. The question, then, stripped of all technicalities, comes to this: can the maker of such a note, by indorsing it, give a right of action? and upon the grounds already pointed out we are of opinion that he may. The verdict, therefore, which has been found for the plaintiff, will stand. On the same ground, the motion to arrest the judgment must fail. The allegations on the record shew substantially, if not in a correct technical form, the true facts of the case, and those facts, as we have already intimated, do, we think, shew a title in the plaintiff to recover.

*Rule discharged.*

1847.	}	GAY AND ANOTHER v. LANDER.
Dec. 6.		
1848.		
June 28.		

*Promissory Note—Statute 3 & 4 Anne, c. 9.—Indorsement—Negotiability—Pleading.*

*The declaration stated that the defendant made a promissory note payable to his own order, and indorsed it to Smith & Co., who indorsed it to the plaintiff:—Held, that as against the maker and indorser this was a valid promissory note payable to Smith & Co. or order; that the note before indorsement*

*was in the nature of a promise to pay to the person to whom the maker should afterwards indorse it; and that the declaration would have been bad on special demurrer for not setting out correctly the legal effect of the instrument.*

**Assumpsit.** The declaration stated, that the defendant, on the 8th of March 1845, made a promissory note in writing, and thereby promised to pay to the order of him, the said defendant, the sum of 500*l.*, for value received, six months after the date thereof, which period had elapsed before the commencement of the suit, and the defendant then indorsed the said note to certain other persons, using and trading under the name, style, and firm of Smith & Co., and the said persons so using the name, style, and firm of Smith & Co., by and under the name, &c., indorsed the said note to the plaintiffs, and the defendant then, in consideration of the premises, promised the plaintiffs to pay the amount of the said note, according to the tenour and effect thereof.

To this declaration there were special pleas in confession and avoidance, but no traverse.

A verdict having been found for the plaintiffs on all the issues, a rule nisi was obtained to arrest the judgment, on the ground that the note stated in the declaration was not a negotiable instrument under the 3 & 4 Anne, c. 9. s. 1.

*Bovill* (6th Dec.) shewed cause.—The declaration must be taken since the New Rules, as if it averred that the defendant "according to the usage and custom of merchants," made the note in question. The note is within the statute of Anne. The "making" of a note consists in putting the maker's name to it and his delivering it to another person, and "indorsing" a note means indorsing the name and delivering the note so indorsed—*Marston v. Allen* (1). On the declaration, as it stands, this must be taken to have been a special indorsement to Smith & Co. The case of *Allen v. Walker* (2) shews that an indorsement is a new drawing.

(19) 8 Mee. & Wels. 494; s. c. 11 Law J. Rep. (N.S.) Exch. 122.

(20) 4 Per. & Dav. 174; s. c. 9 Law J. Rep. (N.S.) Q.B. 407.

(1) 8 Mee. & Wels. 494; s. c. 11 Law J. Rep. (N.S.) Exch. 122.

(2) 2 Mee. & Wels. 317; s. c. 6 Law J. Rep. (N.S.) Exch. 78.

[CRESSWELL, J.—Is it a new drawing in the same form?]

It is no note at all till it is delivered.

[CRESSWELL, J.—Then the drawing is an original one.]

The note becomes incorporated in the indorsement, and this indorsement was a promise to pay Smith & Co.; and then it is a note payable to another under the statute of Anne. Putting the name on the back of it made it negotiable.

[CRESSWELL, J.—This does not state an indorsement to Smith & Co. or order. The power to indorse is derived from the body of the instrument. There lies the difficulty.]

If it is an indorsement in blank it is payable to bearer, and so within the stat. of Anne.

J. Henderson, in support of the rule.—The question here is as to the arrest of judgment. It is said, on the other side, first, that the indorsement was a new drawing; and, secondly, that this was a promissory note payable to bearer. With regard to the first point, if the note can be taken as made payable to Smith & Co., it is not payable to their order, and therefore has no negotiable quality under the statute. The plaintiffs have no right to contend that the note is other than it appears to be in the declaration. A note payable to a person's order is payable to that person—*Smith v. M'Clure* (3), and therefore this note was payable to the defendant himself. Under any view of the case this document could be of no avail till it was indorsed. As to the second point, the instrument is not properly described in the declaration. It is said that it may be considered as payable to bearer, but then it should have been so described. In *Gibson v. Minett* (4), where the payee was a fictitious person, and it was held that an innocent indorsee might recover, the bill was described as payable to the bearer. If the words of the note itself do not imply that it is payable to the bearer the statute of Anne will give no assistance. It is admitted that this is not a negotiable instrument unless it comes within the statute, and also that it does not fall within the description of instruments mentioned in the preamble. The construction of the second clause now contended for is reasonable; and any other construction is inconsistent with the third and fourth clauses, which give a right of action

to the payee or indorsee against the party signing the note. Was this note before indorsement a note payable to any person or persons? A note is not good if there is not a distinctly ascertained payee—*Blanckenhagen v. Blundell* (5). It was not decided in the case of *Flight v. Maclean* (6) whether a note like the present could be described as payable to bearer.

*Cur. adv. vult.*

COLTMAN, J. (June 28,) delivered the judgment of the Court (7).—In this case, a motion was made to arrest the judgment. The declaration stated that the defendant made a promissory note, and thereby promised to pay to his own order 500*l.* six months after date, and then indorsed it to Smith & Co., who indorsed it to the plaintiffs. The defendant pleaded several pleas, on which issue was joined, all of which were found for the plaintiffs. On the hearing of the motion in arrest of judgment, the general line of argument with respect to the statute of Anne was referred to, which had been fully discussed in the case of *Brown v. De Winton* (8), and which it is not necessary to advert to in this case with particularity, as we have expressed our opinion upon it at length in giving judgment on that case. In the case of *Brown v. De Winton*, this Court held, in conformity with the judgment of the Court of Exchequer, in the case of *Hooper v. Williams* (9), that if a man makes a note payable to his own order, and afterwards indorses it in blank and circulates it, it thereby becomes a valid note payable to bearer. It was contended, on the hearing of this motion in arrest of judgment, that however the case might be when the note was indorsed in blank, the first indorsement in this case must be taken to be a special indorsement, making the note payable to Smith & Co. only, and not to them or their order, and that they could not indorse it to the plaintiffs; but we think the principle on which the case of *Brown v. De Winton* was decided will extend to this case. The principle on which that case was decided is,

(5) 2 B. & Ald. 417.

(6) 16 Mee. & Wels. 51; s. c. 16 Law J. Rep. (N.S.) Exch. 23.

(7) Coltman, J., Maule, J., Cresswell, J. and Williams, J.

(8) *Ante*, p. 281.

(9) Not yet reported.

(3) 5 East, 476.

(4) 1 H. Black. 569.



that the note before it was indorsed was in the nature of a promise to pay to the person to whom the maker should afterwards by indorsement order the amount to be paid; and then, after that note is indorsed and circulated, it must be taken as against the party so making and indorsing the note, that he intended his indorsement should have the same effect that an indorsement by the payee of a note payable to the order of a person other than the maker would have had. Now, it is well established that if a note be made payable to J. S. or order, and J. S. in such a case indorses the note specially to Smith & Co., without adding "or order," Smith & Co. may convey a good title to any other person by indorsement—*More v. Manning* (10), *Edie v. the East India Company* (11), and other cases there cited. We think the effect of so making and indorsing the note in question was to make it, as against the maker and indorser, a valid promissory note, payable to Smith & Co. or order; and, therefore, that the declaration is open only to an objection upon special demurrer, for not setting out correctly the legal effect of the instrument. The rule for arresting the judgment must, therefore, be discharged.

*Rule discharged.*

[IN THE EXCHEQUER CHAMBER.\*]

1848. } NEWTON v. LORD ALBERT  
June 20. } CONYNGHAM.

*Execution*—Ca. sa.—7 & 8 Vict. c. 96.  
s. 57.—*Costs of Nonsuit*—*Interest*—*Testatum Writ*.

*The 7 & 8 Vict. c. 96. s. 57, taking away the writ of ca. sa. in actions wherein the sum recovered does not exceed 20l., exclusive of the costs recovered by such judgment, applies only to cases where something is recovered by the plaintiff for debt and something for costs, and where the sum recovered for debt does not exceed 20l. A ca. sa. may therefore issue for costs of nonsuit.*

*Under the 1 & 2 Vict. c. 110. s. 17, interest may be recovered on a judgment for costs of nonsuit.*

*An award of a ca. sa. into a different*

(10) Com. Rep. 311.

(11) 2 Burr. 1216.

\* Before Parke, B., Alderson, B., Patteson, J., Coleridge, J., Rolfe, B., Wightman, J., Erle, J., and Platt, B.

*county, without any testatum clause, is error on the record.*

Error from the Court of Common Pleas.

The plaintiff in error had brought an action of assumpsit against the defendant, for money had and received, and on an account stated. The venue was laid in Middlesex. The defendant pleaded non assumpsit; and at the trial the plaintiff was nonsuited. The record, after setting out the issue and the judgment of nonsuit in the usual way, proceeded thus:—"And it is further considered that the defendant do recover against the plaintiff 10*l.* 11*s.* 9*d.*, for his costs and charges for him about his defence in this behalf laid out and expended, by the Court here adjudged to the defendant, &c., with his assent, according to the form of the statute in such case made and provided; and that the defendant have execution thereof, &c. Afterwards, to wit, on the 29th day of January A.D. 1848, the defendant comes here into court, by his attorney aforesaid, and prays the writ of our Lady the Queen of *capias ad satisfaciendum*, to be directed to the sheriff of Middlesex, commanding him that he take the plaintiff, if he be found in his bailiwick, and him safely keep, so that he may have his body before the Justices of our said Lady the Queen, at Westminster, immediately after the execution thereof, to satisfy the defendant 10*l.* 11*s.* 9*d.*, which, lately in our court, before our Justices at Westminster, were awarded to the said defendant, according to the form of the statute in that case made and provided, for his costs and charges by him laid out and expended about his defence in a certain action on promises lately brought in our said court by the said plaintiff against the said defendant, for that the said plaintiff did not prosecute the said action whereof the said plaintiff was convicted, together with interest upon the said sum of 10*l.* 11*s.* 9*d.*, at the rate of 4*l.* per centum per annum, from the 25th of January, A.D. 1848, on which day judgment aforesaid was entered up, and have you there this writ; and it is granted to him, &c. Afterwards, to wit, on the 9th day of February, A.D. 1848, before the said Justices at Westminster, comes the defendant, by his attorney aforesaid, and the sheriff, to wit, William Cubitt and Charles Hill, sheriff of the county aforesaid, returns to the said Justices that the plaintiff is not found in his

bailliwick. Whereupon the defendant prays another writ of the said Lady the Queen of *capias ad satisfaciendum*, to be directed to the sheriff of Surrey, commanding him in form aforesaid. And it is granted to him returnable before the Justices at Westminster, immediately after the execution thereof."

Upon this record it was assigned for error, that this action was commenced, that the said judgment was given, and the said writs of *capias ad satisfaciendum* were respectively awarded subsequent to the passing of the 7 & 8 Vict. c. 96; and that since the passing of the said act, to wit, on the 9th day of August, A.D. 1844, it hath been and is contrary to law to take or charge in execution the body of any person upon any judgment obtained in any of her said Majesty's superior courts, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment; and therefore, and by the law of the land, the said writs of *capias ad satisfaciendum* are and each of them is illegal, oppressive, and erroneous; prayer of judgment and that the awards of execution be set aside as erroneous.

*Newton*, in person.—The error assigned is, that by the 7 & 8 Vict. c. 96. s. 57, execution by *ca. sa.* is taken away for costs of nonsuit in actions of debt and *indebitatus assumpsit*. That section is as follows: "That no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment." The origin of the writ of *ca. sa.* is explained in *Cassidy v. Stewart* (1). There Tindal, C.J. says, "The writ of *capias ad satisfaciendum*, except in actions of trespass *vi et armis*, was unknown to the common law; nor is it given by the express words of any statute: it arises by consequence of law. The Statutes of Marlbridge, 52 Hen. 3. c. 23, and of Westminster, 13 Edw. 1. c. 11, having given the writ of *capias ad respondendum* in actions of account, and subsequent statutes having extended it to other actions—the 25 Edw. 3.

s. 5. c. 17, to debt and detainue, and the 19 Hen. 7. c. 9. to all actions on the case—the *ca. sa.* was, as a necessary consequence, held to lie upon the judgment to enable the plaintiff to obtain its fruits." The *ca. sa.* being thus in force, when costs were given to the plaintiff by the Statute of Gloucester, 6 Edw. 1. c. 1, the defendant would be entitled to have it under the 23 Hen. 8. c. 15; the principle of which was to give to defendants a parity of execution with plaintiffs. Then the 7 & 8 Vict. c. 96. s. 57. takes away the writ where the debt recovered is not above 20*l.*, exclusive of the costs, within which words this case falls, as here nothing is recovered besides costs.

[ALDERSON, B.—How can it ever apply to defendants at all? They never recover any debt exclusive of costs, but costs only.]

The 48 Geo. 3. c. 123, in which very similar words were used, was held to apply to plaintiffs in execution for costs of nonsuit—*Roylance v. Hewling* (2) and *Bradley v. Webb* (3). Those words are "persons in execution upon any judgment, for any debt or damages not exceeding 20*l.*, exclusive of the costs recovered by such judgment."

[ALDERSON, B.—In *Roylance v. Hewling* the costs became a debt by the judgment.]

[COLERIDGE, J.—Does not the statute contemplate that a sum is to be recovered besides costs?]

There is another objection to the present record. The award of the second *ca. sa.* is bad. It is like an ordinary *alias* writ, whereas being into another county, there should be a *testatum* clause—*Towers v. Newton* (4). Lastly, the *ca. sa.* is indorsed to levy interest. A judgment for costs only is not within 1 & 2 Vict. c. 110. s. 17.

[PARKE, B.—Do not the costs become a debt; and, therefore, interest recoverable as upon any other judgment debt?]

*Bramwell*, for the defendant in error.—The *testatum* clause is certainly omitted; but at any rate this will not affect the judgment; and the Court will only quash the award of the second *ca. sa.* (He was then stopped by the Court.)

PARKE, B.—All the Court are agreed that the 57th section of the 7 & 8 Vict.

(2) 3 Mau. & Selw. 282.

(3) 7 Dowl. P.C. 588.

(4) 9 Ibid. 576; s. c. 10 Law J. Rep. (n.s.) Q.B. 106.

(1) 3 Man. & Gr. 575; s. c. 10 Law J. Rep. (n.s.) C.P. 57.

c. 96. does not apply, and that the writ of *ca. sa.* is not taken away. The true construction is, that that section only applies to cases where something is recovered for debt, and something for costs, and where the sum recovered for the debt does not exceed 20*l.* then there is no *ca. sa.* It has been argued, that by analogy to the 48 Geo. 3. c. 123, this section may include the costs of nonsuit. But if the costs be treated as a debt, then the amount exceeds 20*l.*, so that the *ca. sa.* would not even then be taken away. But we are all of opinion that it only applies to judgments for the plaintiff, partly for debt and partly for costs. The award of the *ca. sa.* is therefore right. As to the second process into a different county that is wrong, without some reason being assigned. The usual reason is a suggestion that the party runs up and down, and is secreting himself in the second county. But this record is silent, and the award therefore bad. The second award of process must, therefore, be annulled, and set aside; and the rest of the judgment affirmed.

*Judgment accordingly (5).*

1847. }  
June 6. } PETERSON v. DAVIS.

*Practice—Jurisdiction—Application on fresh Affidavits—Local Court—Costs—Suggestion on the Roll.*

*The plaintiff having recovered a verdict for less than 20*l.*, the defendant applied to a Judge at chambers for leave to enter a suggestion to deprive the plaintiff of costs, on the ground that the matter was within the jurisdiction of a local court. The Judge at chambers refused to grant the defendant leave, on the ground that the affidavits were insufficient. Two fresh applications at chambers were disposed of, on the ground that the matter had been previously decided:—Held, that the Court might entertain an application upon affidavits of new and material facts.*

*The city of London Local Court Act, 10 & 11 Vict. c. lxxi., gives a concurrent jurisdiction to the superior courts "where the plaintiff dwells more than twenty miles from the defendant:"—Held, that this means twenty miles from the place where the defendant dwells.*

(5) *Tinmouth v. Taylor*, 10 B. & C. 114, s. c. 8 Law J. Rep. K B. 104, throws great doubt upon the correctness of *Royle v. Hewling*.

*Held, also, that an affidavit stating that the defendant carried on business at No. 133, Fenchurch Street, in the city of London, and dwelt in the city of London, did not sufficiently shew his dwelling-place to entitle him to a suggestion on the record to deprive the plaintiff of costs. The Court, however, gave the defendant leave to suggest that the plaintiff did not live more than twenty miles from the place where the defendant carried on business.*

This was an action for goods sold and delivered; and at the trial of the cause, the plaintiff obtained a verdict for 12*l.* 3*s.* 6*d.*

*Lush* obtained a rule nisi, calling on the plaintiff to shew cause why so much of the final judgment as related to costs should not be set aside, or why the plaintiff should not be restrained from taking out execution for more than the amount of the debt recovered at the trial, or why upon payment by the defendant of the taxed costs of the judgment, the judgment should not be set aside and the plaintiff should not carry in the record, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs, the verdict having been for a sum not exceeding 20*l.*, for the recovery of which a plaint might have been entered in the sheriff's court of the city of London, pursuant to the local statute, 10 & 11 Vict. c. lxxi.

The affidavits in support of the rule contained allegations to the following effect: that the defendant is a merchant carrying on business at No. 133, Fenchurch Street, in the city of London, where the writ of summons was directed and served; that the defendant, at the time of the issuing of the writ, dwelt and carried on his business in the city of London, with which the plaintiff was well acquainted; that both parties residing within the jurisdiction of the court established within the city of London for the more easy recovery of small debts and demands, pursuant to the said act of parliament, the plaintiff ought to have entered his plaint there; that at the commencement of the suit the plaintiff did not dwell more than twenty miles from the defendant; that he dwelt at No. 33, Poultry, in the city of London; that the defendant carried on his business as a merchant within the city of London for upwards of six calendar months next before the commencement of the action, and has continued to carry on his business

there; that immediately after the trial, and on the same day, the defendant took out a summons before a Judge at chambers, calling on the plaintiff to shew cause why a suggestion should not be entered to deprive him of his costs, the verdict being for less than 20*l.*, or why the proceedings should not be stayed till the first four days of this term to enable the defendant to apply to enter a suggestion; that on the following day the summons was attended before Coltman, J., when it was objected, on behalf of the plaintiff, that the summons was premature, and that the application ought to have been made to the Court, and that the affidavit filed in support of the application was not sufficient, inasmuch as it did not state that the plaintiff was not an officer of the local court; that the summons was dismissed without costs, upon which the affidavit was amended, and a similar application made on a fresh summons; that the Judge refused to hear the fresh application and dismissed the summons, and another summons calling on the plaintiff to shew cause why on payment of the verdict all proceedings should not be stayed, and for the like stay of proceedings to enable the defendant to move the Court to enter a suggestion; that the plaintiff's attorney immediately afterwards proceeded to tax the costs, whereupon, on the 19th of May, and before taxation, he was served with notice of the defendant's intention to apply to the Court for the present rule.

From affidavits, in answer, filed on behalf of the plaintiff, it appeared, that on the attendance of the summons before Coltman, J., the counsel for the plaintiff before entering into the merits of the case, offered the defendant's attorney an order as to the latter part of the summons, that all further proceedings should be stayed till the fifth day of the then next term to enable the defendant to make his application, but the defendant's attorney refused to take such an order; that the final judgment was signed on the 17th of May, and the costs taxed after the summons was dismissed. It was also stated that the house 133, Fenchurch Street was divided into offices, and let out to various persons only as offices for business, and not as a place of residence; that the defendant, at the commencement of the suit, had offices in the house, but never resided there. A clerk of the plaintiff swore that before the action he had frequently called at the offices

without being able to see the defendant, and generally saw a clerk who informed him that the defendant had not yet come, and that on the 1st of April, while the plaintiff's clerk was waiting to serve the defendant with the writ, he was informed by the defendant's clerk that the defendant resided out of town, and did not dwell in the city of London.

*Paterson* (June 6) shewed cause.—The first objection is, that the application has already been heard and determined by a Judge at chambers, and the defendant is not entitled to come to the Court upon amended affidavits, which are amended not in the title or jurat, but in respect of something in the body which might have been brought before the Judge on the previous application. The authorities shew that if an affidavit is defective in the body of it, it cannot be amended so as to form the ground of a second application—*The Queen v. the Great Western Railway Company* (1). In that case there was a mere misdescription in the body of the affidavit, and yet the Court held that they could not amend it. *Patteson, J.* said there that he was wrong in a case of *Sherry v. Oke* (2), where he had held otherwise. In *The King v. the Sheriff of Devon* (3), it was held, that the full Court of Queen's Bench would not review the decision of a Judge in the Bail Court. So also in *Thompson v. Becke* (4). It may perhaps be said, on the other side, that the Judge at chambers had no jurisdiction to order a suggestion to be entered under the statute, because it does not contain, as such acts usually do, a direction to apply to the Court for that purpose; but the Judge has by his common law jurisdiction power to order such a suggestion, and in this case he has assumed that he had such jurisdiction. In *Sir E. Wilmot's Notes*, *The King v. Almon* (5), the jurisdiction of a Judge in chambers is considered, and it is said that "it is still the business of the Court that is done at chambers"—see also *Lush's Practice*, p. 799. The next objection is, that the application comes too late. The verdict was given on the 12th of May, about half-past twelve p.m. The defendant might have gone to the court the same day (which

(1) 5 Q.B. Rep. 597; s. c. 13 Law J. Rep. (N.S.) Q.B. 129.

(2) 3 Dowl. P.C. 349.

(3) 2 Ad. & El. 296.

(4) 4 Q.B. Rep. 759; s. c. 12 Law J. Rep. (N.S.) Q.B. 305.

(5) *Wilmot's notes*, 264.

was the last day of term), or might have applied to the vacation Judge, if he had jurisdiction. Lastly, the affidavits are insufficient on the merits. They do not shew where the defendant dwells so as to negative the concurrent jurisdiction of the superior courts under the act (6). The words of the act are indeed negated; but the meaning of the words "where the plaintiff dwells more than twenty miles from the defendant," must be from the place where the defendant dwells, and that should have been stated.

*Lush*, in support of the rule.—As to the first point, whatever may be the jurisdiction of the Judge at chambers, it never has been the practice to apply to him to enter a suggestion.

[MAULE, J.—Archbold in his *Practice* cites *Baddley v. Oliver* (7) to shew that a Judge at Nisi Prius has no power to make such an entry.]

It is not usual in Court of Requests Acts to specify the manner of application. In *Smith v. Temperley* (8) it was held, that the application should have been made to the Court within the first four days of Michaelmas term, judgment having been signed on the 7th of August; but if there had been any power to apply to a Judge at chambers in vacation, it would have been laches not to do so. The cases that have been cited on the other side are cases where the party has come twice to the Court. *Pike v. Davis* (9) expressly decides, that where a Judge at chambers dismisses a summons on the merits, the party may apply to the Court on additional affidavits. The cases of *Baddley v. Oliver*, *Bond v. Bailey* (10), *Heale v.*

*Erle* (11), and *Johnson v. Beale* (12) shew, that after a judgment in vacation, it is sufficient to come to the Court within the first four days of the ensuing term for a suggestion. Lastly, the affidavits are sufficient. The statute does not speak of the plaintiff's distance from where the defendant dwells: it is sufficient if it is not more than twenty miles from the place where the defendant carries on his business. The 112th section of the act must be construed along with the 40th section, which provides, that a summons may issue provided the defendant or one of the defendants shall dwell or carry on his business within the city of London or the liberties thereof at the time of the action brought. Under the act of the old City Court, which had a similar jurisdiction to the present court, a person occupying half a counting-house in London was held to seek his livelihood in London, and so to be within the act—*Croft v. Pitman* (13).

[CRESSWELL, J.—The words of the modern act clearly refer to the dwelling of the defendant.]

At all events, as the allegations in the suggestion are held to be traversable—*Watson v. Quilter* (14)—the Court will not refuse to grant it.

WILDE, C.J.—Two questions have arisen in this case; one of which is, whether the defendant is precluded from making the present application by reason of prior applications to a Judge at chambers. It appears that this matter was heard at chambers and disposed of on the merits, on the ground that the affidavits were not sufficient to entitle the defendant to the suggestion which he sought. The last two applications to a Judge at chambers were not disposed of on the merits, but because the matter had before been decided on by another Judge. The question which now arises is, whether the party can come to the Court upon affidavits of new and material facts. The Court is of opinion that the party is not precluded from doing so. Considering the vast quantity of business at chambers, and that there is not time there for very

(6) The 112th section of the 10 & 11 Vict. c. lxxi. enacts, "That all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where any officer of the Court holden under the provisions of this act shall be a party, except in respect to any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought or determined in any superior court at the election of the party suing or proceeding as if this act had not been passed."

(7) 1 Cr. & M. 219; s. c. 2 Law J. Rep. (n.s.) Exch. 76.

(8) 16 Mee. & Wels. 273; s. c. 16 Law J. Rep. (n.s.) Exch. 105.

(9) 6 Ibid. 546; s. c. 9 Law J. Rep. (n.s.) Exch. 322.

(10) 2 Cr. M. & R. 246; s. c. 4 Law J. Rep. (n.s.) Exch. 197.

(11) 2 Mee. & Wels. 383.

(12) 5 Ibid. 276; s. c. 8 Law J. Rep. (n.s.) Exch. 255.

(13) 5 Taunt. 648.

(14) 11 Mee. & Wels. 760; s. c. 12 Law J. Rep. (n.s.) Exch. 405.

deliberate judgment, it would be very inconvenient if parties were to be concluded by the Judge's decision there, and it would be a hardship if such decision could not be reviewed, or a fresh application be made upon additional facts. The defendant asks for leave to enter a suggestion to deprive the plaintiff of costs. In order to induce the Court to grant his application, he ought to shew reasonable grounds for it; and the grounds are not sufficient if he does not furnish proper information from which the facts to be suggested on the record appear. It could not be contended, that where it is necessary to shew a party's residence, it would be sufficient to say that he resided in a particular county—in the county of York, for instance. There is an equal difficulty when it is alleged that a party resided in the city of London. The affidavits, on behalf of the defendant, shew that the defendant carried on his business in Fenchurch Street, and dwelt in the city of London. That does not furnish sufficient means of inquiry as to the residence. In every case like the present the affidavit should be such as to furnish fair information as to the residence, by stating the place of residence, or giving distinct means of inquiry. It appears to me that the defendant has not sufficiently shewn that he dwells in the city of London, so as to entitle him to the suggestion for which he applies. I think he is entitled to a suggestion that the plaintiff did not at the commencement of the suit live more than twenty miles from the place where the defendant carried on his business in the city of London; and the rule will be made absolute to set aside the judgment, and to enter a suggestion in those terms on payment of the costs of the judgment.

*Rule accordingly.*

1848. } EDWARDS AND OTHERS v. LAW-  
June 26. } LESS.

*Attorney's Bill, Delivery of—Provisional Committeeman.*

*In an action against one of the members of a provisional committee for work done as an attorney, the defendant pleaded that no signed bill had been delivered. It was proved that a signed bill had been delivered to another member of the same committee at his place of business, and that the defendant was ap-*

*pointed a committeeman after part of the work had been done:—Held, not such a delivery within the statute 6 & 7 Vict. c. 73. as to render the defendant liable in this action. The bill should be delivered either at the office of the company, or at least to some person who can reasonably be considered to represent the committee.*

Debt for work and labour done as attorney in respect of a railway project to be brought before parliament; for money paid; and on an account stated.

Third plea, except as to the account stated, that the action was brought after the passing of the 7 & 8 Vict. c. 73, and that the plaintiffs did not one calendar month before the commencement of the suit, deliver unto the defendant (he being the party to be charged therewith) or send by post to or leave for him at his counting-house, office of business, dwelling-house, or last known place of abode, or at either of such places, any signed bill in compliance with section 37. of that act.

Replication, that the plaintiffs did one calendar month before action deliver unto the defendant a signed bill in compliance with the said statute. Issue thereon.

At the trial, before Rolfe, B. at the Leicester Summer Assizes, 1847, it appeared that this action was brought against the defendant as a member of the provisional committee of the Great Manchester, Rugby and Southampton Railway Company; that the signed bill was delivered to one Moore (another member of that committee) at his place of business in Wood Street, Cheapside, and that the defendant was appointed a committee-man after a portion of the business, in respect of which the action was brought, had been performed, and retired from that office before some of the latter charges in the bill had been incurred. A verdict was found for the plaintiff for 492l. 10s.; and leave was reserved for the defendant to move to enter a nonsuit.

*Whitchurst* had obtained a rule accordingly on the ground (amongst others) that there was no delivery of a signed bill to the defendant. [The arguments on the other points are omitted, as the judgment of the Court was confined entirely to the point reported.]

*Humfrey* and *Phipson* shewed cause.—The bill was made out and headed to the provisional committee. It was delivered

personally to Moore, one of the committee. This is equivalent to personal delivery to one of two joint contractors, and therefore sufficient as against the other, or to both, or at their joint office of business within the language of 6 & 7 Vict. c. 73. s. 37. The witness said, "I delivered a duplicate of this bill to Mr. Moore, in Wood Street, Cheap-side, his place of business:" that is a delivery of a bill against the provisional committee to one of the members at his place of business.

[WILDE, C.J.—Part of this business was done before the defendant joined the committee.]

[CRENSWELL, J.—Suppose a bill made out to Thompson & Co. (who as a firm are not liable) and delivered to Williams, a partner. It turns out that Williams and a third party, Johnson, are liable. Is Johnson bound by this delivery?]

Suppose a bill made out to the Equitable Company and delivered to A, a director, B. and C, co-directors, would be liable.

[CRENSWELL, J.—But the provisional committee are not the contracting parties. The managing committee are the contractors.]

There is no evidence to shew that the provisional committee are not liable.

[CRENSWELL, J.—I think there is some evidence. *Prima facie* they are not liable.]

The heading the bill to the provisional committee will not vitiate the bill, or its delivery to parties to be charged therewith.

[WILDE, C.J.—Is the defendant charged therewith if not mentioned *nominatim*, or as a partner in a firm which is liable?]

In *Manning v. Glynn* (1), where the bill was not addressed to any one, the words were "chargeable thereby." *Crowder v. Shee* (2), *Finchett v. How* (3), and *Vincent v. Slaymaker* (4), shew this delivery to have been sufficient, and *Taylor v. Hodgson* (5) decides that a letter accompanying a bill of costs may be referred to, to shew who is the party chargeable therewith. Suppose a bill made out to A, B, C, and D, *nominatim*, of whom three only are liable. Delivery to one of those three would be good as against him and the other two, notwithstanding the fourth is not liable. Thus, assuming there was a delivery to the provisional committee,

(1) 1 Jones's Irish Exch. Rep. 513.

(2) 1 Campb. 437.

(3) 2 Ibid. 275.

(4) 12 East, 372.

(5) 3 DowL & L.P.C. 115; s.c. 14 Law J. Rep. (N.S.) Q.B. 310.

which comprises all the members of the managing committee, is not that a good delivery to the latter body? Again, this bill has been taxed.

[WILDE, C.J.—Not by the defendant. Could he have taxed it here?]

That will depend on the question whether he was a co-contractor with Moore.

*Whitehurst*, contra (*Keane* with him).—This is not such a delivery as is required by the statute, or as will support the issue in its present form. The plaintiff's replication avers a delivery to the defendant. The statute provides several modes of delivery, all of which are material.

[WILLIAMS, J.—You must negative all the statutable modes of delivery.]

(He was then stopped by the Court.)

WILDE, C.J.—The Court are of opinion that, under the particular circumstances of this case, there was no sufficient delivery of the bill. This must not be looked on as an ordinary case of co-contractors, as the present concern is one of a particular nature. The parties came into it at different times. Moore joined prior to the defendant, and there are many and heavy items in the bill respecting work done as well before as after the defendant was a member of the committee. Now, what was the relation of Moore to the defendant? It must be borne in mind that this bill was not delivered to the provisional committee at their known place of business, but to Moore at his place of business. Without expressing an opinion as to how far in general a delivery to one of several is equivalent to a delivery to all the co-contractors; but looking at the defendant as a member of the managing committee, the Court are of opinion that the relative position of its members is of such a particular nature that this delivery cannot bind such of them as might be partially liable for a portion of the bill. This bill ought to have been delivered either at the office of the company, or, at least, to some person who can reasonably be considered as representing the committee.

COLTMAN, J.—There is a clear distinction between the case of provisional committeemen and the connexion *generis*.

WILLIAMS

(6) C

1848. } KEPP AND ANOTHER v. WIGGETT  
June 9. } AND OTHERS.

*Pleading—Debt on Bond—Form of Declaration—False Recital on Oyer—Inrolment and Demurrer—Plea—General Performance.*

*The declaration was in debt on a bond given by the defendants and L. for 8,000*l.* to be paid by them to the plaintiffs, or Everett, on request, whereby and by reason of the non-payment, &c. The defendants by their plea craved oyer and set out the bond and condition and recitals. The condition was that the defendants and L. should pay over sums of money assessed and collected by L. and that L. should demand the sums assessed and proceed against defaulters. Averment, that the defendants performed all things on their part to be performed.*

*The plaintiffs replied praying that the deed and condition might be inrolled, and being set out on inrolment, demurred, on the ground, that they were falsely set out by the defendants on account of the recitals being introduced, and that the plea of general performance was bad:—Held, first, that it was not necessary to state a request in the declaration. Secondly, that the allegation "by reason of the non-payment," &c. was a sufficient denial of payment to the plaintiffs or Everett, after plea. Thirdly, that the plea was bad for not shewing performance by L. as well as by the defendants. Fourthly, that the plea was bad for averring general performance, instead of shewing what was done in performance of the condition.*

*Semble—First, that it is not the practice to demur for misrecital on oyer. Secondly, that the effect of the inrolment is to make the matter set out part of the declaration.*

*Debt on bond. The declaration stated that the defendants and one James Lee, who died before the commencement of the suit, theretofore, to wit, &c. by their certain writing obligatory, &c. acknowledged themselves to be jointly and severally held and firmly bound unto the plaintiffs in the sum of 8,000*l.*, of &c., to be paid to the said plaintiffs, or to one William Everett, Esq. on request, whereby and by reason of the non-payment thereof an action hath accrued, &c.*

*Plea—and the defendants crave oyer of the said writing obligatory in the said declaration.*

NEW SERIES, XVII.—C.P.

ration mentioned, and it is read to them in these words:—"Know all men by these presents that we, James Lee, of No. 50, Drury Lane, in the parish of St. Martin in the Fields, in the county of Middlesex, collector; James Wiggett, of No. , Drury Lane, in the parish of St. Giles in the Fields, in the said county, brush-maker; Richard Robinson, of No. , Bloomsbury Square, in the said parish of St. Giles in the Fields, and county aforesaid, gentleman; George Robinson, of No. , Wigmore Street, in the parish of St. Marylebone, in the said county, auctioneer, which said James Lee is a collector for the wards of New Street, Bedfordbury, Drury Lane, and Long Acre, in the parish of St. Martin in the Fields in the division of the city and liberty of Westminster, in the county of Middlesex, duly nominated and appointed by the Commissioners acting for the said parish of St. Martin in the Fields, in the execution of an act of parliament passed in the sixth year of the reign of Her present Majesty, intituled 'An act for granting to Her Majesty duties on profits arising from property, professions, trades, and offices until the 6th day of April 1845,' and of the several other acts therein referred to, and of another act passed in the eighth year of the reign of Her said Majesty, intituled 'An act to continue for three years the duties on profits arising from property, professions, trades, and offices,' and which said James Wiggett, Richard Robinson, and George Robinson, as sureties for the said James Lee, are jointly and severally held and firmly bound unto Richard Kepp, Esq. and Charles Lewis, Esq., being two of the said Commissioners acting in the execution of the said acts for the said parish of St. Martin in the Fields, in the said county of Middlesex, in the sum of 8,000*l.* of lawful money of Great Britain, to be paid to the said Richard Kepp, Esq. and Charles Lewis, Esq., or to William Everett, Esq., their executors or administrators, for which payment to be well and truly made we bind ourselves and each of us bindeth himself for the whole and entire sum, our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this 6th day of October, in the tenth year of the reign of our Sovereign Lady Victoria, &c. A.D. 1846."

And whereas the above bounden James



Lee hath been duly nominated and appointed a collector for the year ending the 5th day of April 1847 of the several duties granted by the said recited Acts which have been or hereafter shall be assessed, within the said wards and parish of Saint Martin in the Fields for the said last-mentioned year, under and by virtue of the said acts, and the said James Lee, together with the said James Wiggett, Richard Robinson, and George Robinson as his sureties, have entered into and executed the above written obligation, to give good and sufficient security for the faithful discharge and due performance by the said James Lee of his said office of collector as aforesaid ; and whereas duplicates of the assessments have been delivered and given in charge to the said James Lee, with a warrant or warrants for collecting the same. They also crave oyer of the condition of the said writing obligatory, and it is read to them in these words :—"Now, the condition of the above-written obligation is such, that if the above-bounden James Lee, James Wiggett, Richard Robinson, and George Robinson, or either of them, their or either of their heirs, executors or administrators, shall and do duly in pursuance of the directions of the said acts, pay all such sums of money which now are assessed and collected for the year ending the 5th of April 1847, or which hereafter may be assessed and to be collected in the said ward and parish of Saint Martin in the Fields by the said James Lee as such collector as aforesaid ; and if the said James Lee shall and do duly in pursuance of the said act, demand the sums assessed of the respective persons from whom the same are payable, and in case of non-payment thereof shall duly enforce the power of the act against such as shall make default, then the above-written obligation to be void, otherwise the same shall be and remain in full force and virtue." Which being read and heard, the said defendants say, that they, the said defendants, did from time to time and at all times after the making of the said writing obligatory and the said condition thereof well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory specified, comprised, and mentioned in all things

therein contained on their part and behalf to be observed, performed, fulfilled and kept according to the tenour and effect, true intent and meaning, of the said condition of the said writing obligatory. Verification.

The plaintiffs, as to the plea of the defendants, replied that the defendants had not truly set out the said writing obligatory and the condition thereto, and prayed that they might be inrolled ; which being done, and the bond and condition set out in the same words as in the plea, the plaintiffs demurred on the grounds that the plea sets out the recitals to the condition as if they were part of the writing obligatory itself, and that it is uncertain whether the defendants intend to allege that those recitals form part of the deed or part of the condition, or that they do not form part of either, but are mere averments ; and also that the general mode of pleading performance is insufficient, and the plea should have shewn that the defendants and Lee, or some or one and which of them, did pay all sums assessed and collected for the year ending the 5th of April 1847, and did duly demand the sums assessed, and did duly enforce the powers of the act against defaulters.

*Needham (Channell, Serj. was with him),* (June 9th,) in support of the demurrer.—The defendants, upon oyer, have mis-recited the deed ; and in such a case the plaintiff is entitled either to sign judgment as for want of a plea, or to pray in his replication, as he has done here, that the deed may be inrolled, and procure it to be inrolled, and then demur—*Com. Dig. 'Pleader,' P. 1, 1 Wms. Saunders, 9, c. Wallace v. the Duchess of Cumberland (1) and Ferguson v. Mackreth (2).*

[*WILDE, C.J.*—The Court would quash such a plea for irregularity. In *Ferguson v. Mackreth*, although the plaintiff demurred after the enrolment, the Court did not act upon the demurrer, but made a rule for quashing the pleadings of the defendant.]

[*CRESSWELL, J.*—The case of *Smith v. Yeomans* (3) throws some light on the question. In a note to that case it is said that a party is not bound in all cases to set out the whole of the condition. But if the defendant by his mode of setting out a bond has

(1) 4 Term Rep. 370.

(2) *Ibid.* 371, n.

(3) 1 Wms. Saund. 316, a.

placed the plaintiff in a different position from that which he would otherwise be in, that cannot be said to be good.]

[MAULE, J.—If *Ferguson v. Mackreth* be looked at closely, it would appear that the Court thought they could not deal with the case on demurrer. But you say, that if this is a matter of practice, you may waive your right to strike out the plea, and may demur. You would have been entitled to say that, if the plea had set out the bond rightly, yet contained no answer to the declaration.]

[CRESSWELL, J.—You say, that on the defendants cravingoyer, the condition which is improperly stated becomes a part of the declaration. But then you get the true condition inrolled, and that becomes part of the declaration, and then the plea is good.]

[MAULE, J.—The proceeding is this. The bond is supposed to be produced in sight of the Court. The defendants say that it is read in its words. The officer reads it, and then it is the defendants' business to set out the contents. You say that the allegation by the defendants, that it is read in *these words* is false, and you pray that the Court may set them out. The bond is still the same as in the declaration.]

[WILDE, C.J.—The Court will allow you to withdraw your demurrer. It is not the practice to demur. It leads to unnecessary delay and expense.]

But the plea is bad in other respects. It is calculated to embarrass the plaintiffs, a portion of it being false and not traversable.

[MAULE, J.—You must take the inrolled condition as part of the declaration. The inrolment puts an end to the erroneous averment.]

The substantial objection is, that whereas the condition is for the performance by the defendants and Lee of certain matters, and by Lee himself of other matters, the plea is one of performance by the defendants. They aver that they have done their part, but not that Lee has done his. Besides, a plea of general performance is not sufficient when the condition is to do several things—*Com. Dig.* tit. 'Pleader,' 2, W, 33, *Wimbleton v. Holdrip* (4), *Woodcock v. Cole* (5).

(4) 1 Lev. 303.

(5) 1 Sider. 215.

*Ogle*, contra.—The general form of pleading performance is quite sufficient. Can it be said that if it was the duty of the collector to collect and pay over ten thousand different sums of money, the collecting and payment of those sums should have been set out? The argument for the plaintiffs goes to that extent. Those facts were more within the knowledge of the plaintiffs than of the defendants. At all events the declaration is bad. The breach here does not agree with the condition. The condition was to pay to the plaintiffs or Everett, and the breach is that the defendants have not paid to the plaintiffs. They may, consistently with this, have paid to Everett. When a contract is to do one of two things in the alternative, the breach should shew that the defendant has done neither. Thus, where the defendant undertook to return a horse in good plight, or pay so much money, and the breach was that he did not return the horse, the declaration was held bad—*Wright v. Johnson* (6). So also it was held that if a person promised to indemnify the plaintiff, or pay him 1,000*l.*, the declaration should shew that he had done neither—*Gibbons v. Northcott* (7). See also *Com. Dig.* tit. 'Pleader,' C, 44, 45. In the next place, the bond declared on was stated to be payable on request, and no request is averred. The request was a condition precedent to the payment. The case of a deed differs from that of a bill of exchange, in which the action is a sufficient request—*Carter v. Ring* (8), *Nicholl v. Bromley* (9), *Simpson v. Sikes* (10).

*Needham*, in reply.

WILDE, C.J.—The declaration is free from any objection. It is in the common approved form. It states that the bond was given for the payment of money on request, and it is not necessary to state, as it has been argued, that a request of payment was made. The plea consists of two parts,—the condition that the defendants should pay, and that Lee should do certain duties. The performance by the sureties would not be a performance under the bond. The

(6) 1 Sider. 440.

(7) Ibid. 447.

(8) 3 Campb. 459.

(9) 2 Brod. & Bing. 464.

(10) 6 Mau. & Selw. 295.

sureties have contented themselves with saying that they have performed the condition on their part, but not that Lee has done what he was bound to do. It is said that it was not necessary for them to plead more, because the plaintiffs have more cognizance of the facts. But the defendants did not require to set out the particular sums received; and it would have been enough to state that Lee paid over all the sums which he had received. It appears to me that the declaration is good, and the plea insufficient; and, therefore, that there should be judgment for the plaintiffs.

COLTMAN, J.—It is not necessary to decide whether the party has set out truly what he intended to set out on oyer. I am rather disposed to think that the effect of setting out the deed on the inrolment is merely to substitute it for the other, and shew what is really the true document. I think the plea is clearly bad in substance, on the grounds pointed out by my Lord, and that the declaration is good.

MAULE, J.—I also am of opinion that the judgment should be for the plaintiffs. The defendants have set out as parcel of the bond something which is no part of it. In such a case the plaintiffs may choose to have the accurate instrument set out, so that the Court may see the true statement of that of which a false statement has been set out by the defendants. It is not necessary to consider the remedy under such circumstances; but the cases shew that there is a remedy in practice. As to the question on the pleadings, it is said that the declaration is bad, because the penalty of the bond being payable to the plaintiffs or to Everett, it ought to have negatived payment to the plaintiffs or to Everett. But it does so, for it says, "whereby and by reason of the non-payment, &c. an action hath accrued." That is a sufficient denial after plea. As to the declaration not stating a request, the old forms contain a statement that the money was payable on request, but never set out a request. The request here was not a condition precedent. Then comes the question on the plea, and it seems to me that the plea is bad in substance, for not shewing that everything had been done which was necessary to satisfy

the condition. The form is objectionable. It should not have stated that the defendants had performed the condition—that being only an argumentative allegation—but should have shewn what they had done. But supposing that objection to be waived, yet there is this substantial matter left out. The condition was that Lee should pay the money received, and proceed against the defaulters; and the plea should have shewn that he had done so. The terms of the condition are, that Lee shall demand the sums assessed, and proceed against defaulters; and that Lee and the defendants shall pay the money over. It does not say they shall pay all the sums of money which may be assessed and collected, but which may be assessed and to be collected. I cannot think that this means that they were to pay all the money assessed, and that it was to be collected by Lee. But if these words were to have that force, and the general averment was to be taken to mean that the defendants had paid all that was to be collected, the plea was still open to the objection of form, that it averred general performance, instead of shewing what had been done in performance of the condition.

CRESSWELL, J.—I am of the same opinion. I thin  
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reasonable time marry him, the defendant promised, &c.

*A rule nisi having been obtained for a nonsuit:—Held, first, that the consideration, as it originally stood, was sufficient to support the promise; secondly, that the Judge at Nisi Prius had power to make the amendment; and that it is not a sufficient objection to prevent a Judge from amending a declaration, that he would thereby deprive the defendant of the means of moving in arrest of judgment.*

Assumpsit for breach of promise of marriage. The declaration stated, that whereas heretofore and before and at the time of the making of the promise of the defendant next hereinafter mentioned, to wit, on &c., the plaintiff was sole and unmarried, and resided at parts beyond the seas, to wit, at Toronto, in America, and thereupon, to wit, on the day and year aforesaid, "in consideration that the plaintiff so then being sole and unmarried as aforesaid, at the request of the defendant, would go to Lisahoppin, in the county of Tyrone, in that part of the United Kingdom of Great Britain and Ireland called Ireland, for the purpose of marrying him, the defendant," he, the defendant, then promised the plaintiff to marry her, the plaintiff, in a reasonable time after her arrival at Lisahoppin aforesaid. And the plaintiff avers that she, confiding in the said promise of the defendant, in a reasonable time in that behalf after the making of the said promise, and before the commencement of this suit, to wit, on the day and year aforesaid, did, at the request of the defendant, go to and arrive at Lisahoppin aforesaid, in the county of Tyrone aforesaid, in that part of the United Kingdom of Great Britain and Ireland called Ireland, for the purpose of marrying the defendant, of all which the defendant then in a reasonable time in that behalf afterwards, to wit, on the day and year last aforesaid, had due notice; and although the plaintiff, after the making of the said promise, from the time of her said arrival at Lisahoppin aforesaid, till the expiration of a reasonable time next after her said arrival at Lisahoppin aforesaid, for the defendant to marry the plaintiff, was and continued to be sole and unmarried, and ready and willing to marry him the defendant, of which last-

mentioned premises respectively the defendant also, to wit, during all such last-mentioned time, then had due notice, and although a reasonable time in that behalf after the arrival of the plaintiff at Lisahoppin as aforesaid for the defendant to marry the plaintiff had elapsed before the commencement of this suit, yet the defendant, not regarding his said promise, did not nor would in a reasonable time after the arrival of the plaintiff at Lisahoppin as aforesaid, or at any time before or afterwards, marry the plaintiff, but wholly neglected and refused so to do. By reason whereof, &c. (special damage).

Pleas—Non assumpsit, and several special pleas.

At the trial, before Wilde, C.J., at the Hampshire Summer Assizes, 1847, the counsel for the defendant applied for a nonsuit, on the grounds, first, that the evidence did not shew an acceptance by the plaintiff of the defendant's offer of marriage; and secondly, that the consideration for the promise was not sufficiently alleged in the declaration. The plaintiff's counsel contended that the declaration was sufficient, but applied for leave to amend, which was granted. A verdict was found for the plaintiff for 400*l.* damages, leave being reserved to the defendant to move to enter a nonsuit.

The declaration was afterwards amended by altering the consideration thus: "In consideration that the plaintiff, so then being sole and unmarried as aforesaid, at the request of the defendant, then promised the defendant to marry him, and would go to Lisahoppin, in the county of Tyrone, &c., for the purpose of marrying him the defendant, and would within a reasonable time of her arrival there marry the defendant, he, the defendant, promised," &c.

*Kinglake, Serj.* having, in Hilary term, obtained a rule *nisi* for setting aside the verdict, and entering a nonsuit,—

*Cockburn* and *Phinn* now shewed cause.\*  
—In the first place, the Judge had full power to make the amendment; and secondly, even if he had not, the declaration, as it originally stood, was not bad in arrest of

\* The parts of the argument and judgment referring to the evidence of the acceptance of the offer of marriage, are omitted, as unnecessary to be reported.

judgment. In *Goldshede v. Swan* (1), where the declaration stated an executory consideration for a guarantie, and the guarantie produced in evidence was ambiguous as to the consideration on the face of it, the Court held that the declaration might have been amended if it had been necessary. In *Duckworth v. Harrison* (2) the declaration was on an agreement of reference, and omitted to state a provision as to costs, which the agreement on its production was found to contain, and the Court held that this was a variance which would have been fatal but for the 3 & 4 Will. 4. c. 4. s. 23, and that the declaration might be amended under that statute. It is said, on the other side, that the consideration for a promise laid in a declaration cannot be amended under the statute; but there is no case in which that doctrine has been laid down. The statute is in general terms, and the object of it is to prevent a party from being defeated by reason of a variance which could not alter the conduct of the other party's case. But supposing the Judge at Nisi Prius had no power to amend, the next question is, whether the declaration, as it originally stood, was bad on motion in arrest of judgment. It is contended, on behalf of the defendant, that in order to constitute a good contract to marry, there must be reciprocal promises to marry, and that in this respect such a contract differs from others. In most cases of this sort reciprocal promises do exist; but why should not another consideration be sufficient to support a promise of marriage? In this case the defendant said, "If you will come from America for the purpose of marrying, and you are ready to do so, I will marry you;" and the plaintiff says she has done so in the spirit and terms of the communication. Contracts, according to the Roman and French law, are divided into synallagmatic or bilateral, and unilateral. There are many instances of unilateral contracts in our law. Thus a guarantie was held binding on the defendant, although it created no obligation on the part of the plaintiffs — *Kennaway v. Treleavan* (3).

(1) 1 Exch. Rep. 154; s. c. 16 Law J. Rep. (N.S.) Exch. 284.

(2) 5 Moo. & Wels. 427; s. c. 8 Law J. Rep. (N.S.) Exch. 286.

(3) 5 Moo. & Wels. 408; s. c. 9 Law J. Rep. (N.S.) Exch. 20.

So forbearance by the assignee of a bond to sue the obligors is a good consideration for a promise by the obligors to pay at a certain time, although if the assignee sued in the obligee's name, the promise to forbear would be no answer — *Mortin v. Burn* (4); and see the notes in *Forth v. Stanton* (5), *Barber v. Fox* (6), and *Mills v. Blackall* (7). There is another class of cases in which the contract is unilateral, where a reward is claimed for the apprehension of a felon, as in *England v. Davidson* (8).

[MAULE, J.—There is the common case of master and servant, where the servant is bound to obey his master's lawful commands; the master is not bound to give him lawful commands.]

In *Holt v. Ward Clarencieux* (9) it was held that an infant might sue on a contract of marriage, although the other party could not enforce the contract. Bonds to marry or pay a sum of money have been held binding, although there was no mutuality — *Atkins v. Farr* (10) and *Cock v. Richards* (11). Probably the notion that promises of marriage must be reciprocal has arisen from the dicta in the Roman law, and the French law taken thence. The *Digest*, lib. xxiii. tit. 1, says, "Sponsalia sunt nuptio et repromissio nuptiarum futurarum;" but that refers to the ceremony of "sponsalia," or betrothal: a solemn act by the consent of the parties, not a mere promise to marry on a future occasion. For these reasons, it is submitted that the declaration was good as it stood originally; but if bad in arrest of judgment, that it was amendable, and that the amendment made was within the power of the Judge under the 3 & 4

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tionally to meet the particular case—*Bye v. Bower* (12), *Bowers v. Nixon* (13). In *Atkinson v. Raleigh* (14), Lord Denman said that the object of the statute was “to prevent nonsuits on variances, and not to make pleadings good which are vicious in themselves.” In the same case Patteson, J. says, “the only effect of the amendment (there) would have been to prevent a motion in arrest of judgment. I doubt whether an amendment could have been made for this purpose at the trial.”

[CRESSWELL, J.—The ground for asking the amendment in that case failed. It was not sought for on the ground of variance.]

[MAULE, J.—Supposing there is a variance, is it an answer to an application for an amendment, that it would make a good pleading bad?]

That was decided latterly in the case of *Laves v. Brown* (15). The declaration, when amended, stated the promise in the usual form, the sufficiency of which was established in *Harrison v. Cage* (16).

[CRESSWELL, J.—Do you mean to say that there can be no consideration for a promise of marriage, except another promise to marry?]

There is none other mentioned in the books.

[MAULE, J.—If it were necessary to have a previous promise for a consideration, then that previous promise would be void for want of a previous one to support it, and thus no such transaction could take place.]

WILDER, C.J.—I am of opinion that the rule for the nonsuit must be discharged. The first ground, in support of the rule, is, that the declaration was amended at Nisi Prius, without authority, the amendment being made in a part of the declaration material to the merits of the case. The meaning of the words in the statute “material to the merits of the case” has been so often considered as to render it unnecessary to say much about it at present. I take it they are something material to the real substantial question raised by the parties on the

record in the case. Here the real question is, whether the defendant promised to marry, and whether there was a breach of that promise. The precise mode of laying the promise, or the consideration for the promise, does not seem to me to be material to the merits of the case. The doubt existing in my mind at Nisi Prius has since been removed, namely, whether if the declaration were open, as it at first stood, to a motion in arrest of judgment, that would affect the power of amendment. I thought it no part of my duty to consider what might be the consequential effect of my decision at Nisi Prius; and, therefore, I thought it right to make the amendment. Since the trial, this point has been considered by the Court—whether it is any objection to the power of amendment proper in all other respects, that when made it would have the effect of removing a ground for arresting the judgment. The party may, if he likes, reserve the ground of objection in arrest of judgment, by forbearing to move for a nonsuit on the ground of variance. It appears to me that the amendment asked for here did not affect the merits of the case properly so considered.

COLTMAN, J.—I am of the same opinion.

MAULE, J.—I also think that this was a proper case for amendment. The declaration, as it originally stood, stated a promise of marriage; and the question whether that promise was made constituted the merits of the case. The consideration stated originally seems to me quite sufficient, that is, the consideration that the plaintiff would go from Toronto to Lisahoppin, for the purpose of marrying the defendant. It was suggested that there was a variance between that statement and the consideration proved, which was that the plaintiff would go to Lisahoppin and would marry the defendant. That is a difference which nobody but a special pleader could appreciate. There is probably not one witness in a hundred who could understand the distinction. I therefore think that the amendment was properly made.

CRESSWELL, J.—I am entirely of the same opinion. I think the amendment was properly made. The only objection to it which I could understand was, that it might deprive the defendant of the means of moving in arrest of judgment; and that objection

1 Car. & Mar. 262.

2 Car. & Kir. 372.

3 Q.B. Rep. 379; a.c. 11 Law J. Rep. (N.S.)

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Not reported.

1 Ld. Raym. 386.



and the evidence was properly submitted to them; and as the verdict is not impeached, supposing the case to have been properly left to them, there is no ground for granting the rule.

*Rule refused.*

1848. }  
May 29. } CORDER v. THE UNIVERSAL  
GAS LIGHT COMPANY.

*Joint-Stock Companies Act—Execution against Shareholder—Notice—7 & 8 Vict. c. 110. s. 68.*

*The plaintiff obtained judgment against a joint-stock company, and being unable to obtain satisfaction of his judgment against the property of the company, gave notice to a shareholder that application would be made to the Court or a Judge for leave to issue execution against him on the judgment. A summons for that purpose was taken out and dismissed, before a Judge at chambers; and on application by the plaintiff to this Court, —Held, that the notice was exhausted by the application to a Judge at chambers, and that no second application could be made on the same notice.*

Judgment in an action commenced in this court had been signed against the Universal Gas Company, for the sum of 110*l.* and costs. There were no assets of the company to satisfy the amount, and the notice set out below having been served upon Dominique Causse one of the parties named therein, an application to issue execution against him was made before Parke, B., at chambers, who decided, that under the 68th section of the 7 & 8 Vict. c. 110, he had no power to adjudicate upon the matter.

“Whereas a judgment was obtained on the 3rd day of February inst., in Her Majesty’s Court of Common Pleas, for the sum of 110*l.* damages and 10*s.* 2*d.* costs, in a certain action brought by the above-named plaintiff against the above-named defendants, being a company completely registered under an act made and passed in the 7th and 8th year of the reign of her present Majesty, intituled ‘An act for the registration, incorporation and regulation of Joint-Stock Companies;’ and whereas the said plaintiff hath used due diligence to obtain satisfaction of the said judgment against the property and effects of the said

company, but there is not any property nor are there any effects of the said company out of which the said judgment, or any part thereof, can be satisfied. And whereas you, Edmund Boulter, James Shayler, Joseph Field, *Dominique Causse*, Joseph Replow, Edward Suter, Henry Alt, and Anthony Kent, *some or one* of you, were respectively shareholders or a shareholder in the said company, at the time when the contract or engagement with the above-named plaintiff, for which the said judgment was obtained, was entered into, or became shareholders or a shareholder during the time the said contract or engagement remained unexecuted or unsatisfied, or were respectively shareholders or a shareholder at the time the said judgment was obtained. Now, we do hereby give you notice, that upon the expiration of ten days from the date of the service of this notice upon you, *some or one of you*, or as soon after the expiration thereof as conveniently may be, a motion will be made in Her Majesty’s Court of Common Pleas, or an application to one of the Judges thereof, for a rule or summons, calling upon you, *some or one of you*, to shew cause why execution should not issue against you, *some or one of you*, upon the same judgment, until the same shall be satisfied. Dated this 8th day of February 1848.

To (the parties above named).

(Signed) G. and H., attorneys for the above-named plaintiff.”

*Phipson* had obtained a rule calling upon *Dominique Causse* to shew cause why execution should not issue against him.

*Talfourd, Serj.* shewed cause. — This notice is objectionable in every respect. A notice such as this should be addressed to the party, and should state the character in which he is sought to be charged; for instance, whether as a present or former shareholder. It should define the nature of the application, and the time, and the place when and where it is to be made: here the notice throughout is in the alternative, and therefore the person, the character, the time and the place are uncertain. Secondly, it appears on the affidavits now produced, that after the service of this notice, a summons was taken out before a Judge at chambers, against *Causse* and another shareholder, who appeared thereon, and the summons was dismissed. It is sub-



mitted that that summons exhausted the notice, and then no notice has been given of this application, as required by the 68th section of the Joint-Stock Companies Registration Act.

[MAULE, J.—No notice is required of an application for a summons at chambers.]

That may be so in ordinary cases, but not under this particular statute; and as this notice points out the application to chambers as the proposed object, the notice has been acted on and satisfied. Lastly, the form of the application is wrong, it should have been to set aside or vary the order of the Judge at chambers, under the 68th section of the act, whereas it is here made as an original application. By the 68th section, costs may be given to either party, as the Court shall think fit; and it is submitted, that under these circumstances, the rule should be discharged, with costs.

*Phipson*, in support of the rule.—By the 66th section of the Joint-Stock Companies Act, three classes of shareholders may be proceeded against; and by the 68th section, notice is required to be given before execution can be applied for against any of them, for a debt due from the company. A sufficient notice has here been given to Dominique Causse. The 3rd section of the act defines what a shareholder is; and as the party served with a notice must know to which class of shareholders he belongs, it is not necessary to specify the class in the notice. A plaintiff cannot tell exactly who are shareholders, nor to which class of shareholders any individual shareholder belongs, and as the notice would fail if a shareholder were described as of a class to which he did not belong, a judgment creditor is warranted in adopting as general a form of notice as possible. The intention of the act is, that the party sought to be charged should not be surprised; and if he gets a notice the whole object of the act is accomplished.

[CRESSWELL, J.—If two magistrates act jointly, and a notice of action were given thus: "I shall bring an action against you, or one of you," would that suffice?]

It is submitted that it would, if the notice went on to specify the cause of action, which the act requiring notice to be given to magistrates specially requires.

[WILDE, C.J.—If you give notice to

twenty persons, and apply only against one, how are the others to get their costs?]

None are incurred till the summons is taken out. The party served with a notice need do nothing till the rule nisi is granted. Lastly, the notice was not exhausted by the application before Parke, B., when the summons was dismissed. The 68th section of the act directs, that execution shall issue by leave of a Judge of the court in which the action was originally brought; it is therefore clear the learned Judge had no authority to entertain the question: this is, therefore, the first application in which the interest of Dominique Causse could be jeopardized; the former was an application *coram non iudice*, and therefore in reality no application at all. The notice is not to be construed as strictly as a contract; as for instance, to go to Rome or Marseilles, in which a party could not be compelled to go to both places; but the obvious meaning of the notice is, "I shall apply to a Judge or to the Court," *i. e.* to either or both, so as to be enabled to issue execution against you.

WILDE, C.J.—The last point is decisive against this rule. The legislature has thought fit to enact, that before application is made to issue execution on final process against a person who was not primarily liable thereto, such person should have ten days' notice, and has given the applicant power to go to the Court or before a Judge. This notice informs a party that an application for leave to issue execution will be made to the Court or a Judge; and accordingly, a summons is issued, the parties attend before a Judge at chambers, and he dismisses the summons. Now this comes before us as an original application, but there is no notice to support it, for the only notice given has been acted upon, and its efficiency was exhausted after an application was made to a Judge, and the summons was dismissed. If a new step were to be taken, I think a fresh notice was necessary.

COLTMAN, J.—I give no opinion as to whether a fresh notice may or may not be given so as to bring a person before the Court a second time, under circumstances similar to those now before us. I think that this notice was spent by the application at chambers, and that the rule should be discharged.

MAULE, J. and CRESSWELL, J. concurred.  
Rule discharged, with costs.

[IN THE EXCHEQUER CHAMBER.]

1847.

Nov. 30; }  
 1848. }  
 May 15. }

ELDERTON v. EMMENS, PUBLIC  
 OFFICER, &c.

*Pleading — Contract — Attorney and  
 Client — Arrest of Judgment.*

*In a declaration against a public officer of an insurance and loan company, the second count stated that it was agreed between the company and the plaintiff that from the 1st of January then next the plaintiff, as the attorney of the said company, should receive a salary of 100l. per annum, in lieu of rendering an annual bill of costs for general business, &c.; and in consideration that the plaintiff had promised to fulfil the agreement on his part, the company promised to fulfil the same on their part, and to retain and employ the plaintiff as such attorney. Breach, that the company refused to employ the plaintiff as such attorney, and wrongfully dismissed him, and thence refused to employ him or to pay him the salary:— Held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that such count was good upon motion in arrest of judgment, and that the agreement therein set forth was one which created the relation of attorney and client, and amounted to a promise, on the part of the defendants, to continue that relation at least for one year.*

**Error from the Court of Common Pleas.**

This was an action brought by a solicitor against the secretary for the time being of the Church of England Life and Fire Assurance Trust and Annuity Company, for refusing to employ him as their permanent attorney and solicitor. The second count of the declaration was as follows:—

And whereas also afterwards, to wit, on the 30th day of November 1844, it was agreed by and between the plaintiff and the said company, that from the 1st day of January then next the plaintiff, as the attorney of the said company, should receive and accept a salary of 100l. per annum, in lieu of rendering an annual bill of costs for the general business transacted by the plaintiff for the said company as such attorney, and should and would, for such salary of 100l. per annum, advise and act for the said company on all occasions, in all matters

connected with the said company (the prosecuting or defending of suits, the preparation of bonds or other securities for advances by the said company, and monies disbursed by the plaintiff, being excepted; and the plaintiff being allowed in respect of such matters to make the usual and regular charges of an attorney), and that the plaintiff should attend the secretary of the said company as well as the board of directors thereof, and the meetings of the proprietors thereof, when required. And the said agreement being so made, afterwards, to wit, on the said 30th day of November, in consideration that the plaintiff had, at the request of the company, promised the company to perform and fulfil the same in all things on his part, the said company promised the plaintiff to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney of the company on the terms aforesaid. And although the company did for a certain small space of time thereafter, to wit, for the space of four months, in pursuance and fulfilment of the said agreement and of their promise in that behalf, retain and employ the plaintiff as such attorney, on the terms aforesaid, and did pay him a small part of the said salary, to wit, 50l., and although the plaintiff was at all times from the making of the said agreement hitherto ready and willing to advise and act for the said company, and accept the said salary on the terms aforesaid, and in all other respects to fulfil the said agreement on his part, of which the said company always had notice, yet the company, *disregarding the said agreement and their promise, did not nor would continue to employ the said plaintiff as such attorney of the company on the terms aforesaid*, but on the contrary thereof, afterwards and before the commencement of this suit, to wit, on the 25th day of May 1845, *wrongfully and without any reasonable cause dismissed and discharged the plaintiff from such employment and retainer*, and then and from thence hitherto have wholly refused to retain or employ him as such attorney of the company, or to pay him the salary aforesaid, by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived entirely of the said salary of 100l., and also of divers great gains and profits which he might and otherwise would have

derived from such employment in and about the prosecuting and defending of divers suits respectively brought by and against the said company, and in and about the preparing of divers bonds, contracts and securities for the said company and otherwise, to wit, to the amount of 5,000*l.*, and has been and is in other respects greatly injured and damaged.

Pleas as to the second count—First, non assumpsit; secondly, a justification of the dismissal.

At the trial, the jury returned a verdict for the plaintiff, and assessed the damages upon the second count at 200*l.*

A rule nisi was afterwards obtained arresting the judgment upon the second count, which rule was made absolute in Trinity term, 1847 (1). Upon this judgment of the Court of Common Pleas the present writ of error had been brought.

*Hoggins*, for the plaintiff (Nov. 30, 1847), argued that the agreement set forth in the second count proved a good consideration for the promise therein alleged on the part of the defendant, and cited the following authorities:—

*Lamplough v. Brathwait*, Hob. 106.

*Thornton v. Jenyns*, 1 Man. & Gr. 166; s. c. 9 Law J. Rep. (n.s.) C.P. 265.

*Kaye v. Dutton*, 7 Ibid. 807; s. c. 13 Law J. Rep. (n.s.) C.P. 183.

*Rol. Abridg.* pl. 11, 'Action sur case.'

*Hunt v. Bate*, Dyer, 272.

*Roscorla v. Thomas*, 3 Q.B. Rep. 234; s. c. 11 Law J. Rep. (n.s.) Q.B. 214.

*Hugh Hill*, contra, contended that the second count of the declaration did not disclose any consideration for the promise by the defendants, in respect of which the breach was alleged; and that the judgment of the Court below was therefore right. He cited in support of his argument,—

*Aspdin v. Austin*, 5 Q.B. Rep. 671; s. c. 13 Law J. Rep. (n.s.) Q.B. 155.

*Dunn v. Sayles*, Ibid. 685; s. c. 13 Law J. Rep. (n.s.) Q.B. 159.

*Williamson v. Taylor*, Ibid. 175; s. c. 13 Law J. Rep. (n.s.) Q.B. 81.

*Pilkington v. Scott*, 15 Mee. & Wels. 657; s. c. 15 Law J. Rep. (n.s.) Exch. 329.

*Hopkins v. Logan*, 5 Ibid. 241; s. c. 8 Law J. Rep. (n.s.) Exch. 218.

*Granger v. Collins*, 6 Ibid. 458; s. c. 9 Law J. Rep. (n.s.) Exch. 172.

(1) 16 Law J. Rep. (n.s.) C.P. 209.

*Jackson v. Cobbin*, 8 Ibid. 790; s. c. 10 Law J. Rep. (n.s.) Exch. 389.

*Osborne v. Rogers*, 1 Wms. Saund. 264, n. 1.

*Parkinson v. Whitehead*, 2 M. & Gr. 329; s. c. 11 Law J. Rep. (n.s.) C.P. 241.

*Hoggins* replied.

*Cur. adv. vult.*

The judgment of the Court (2) was now (May 15) delivered by—

**PARKE, B.**—In this case the plaintiff obtained a verdict on all the pleas to the second count, and had a verdict against him on the first and third counts. The Court of Common Pleas, on a motion in arrest of judgment, held the second count to be bad, and arrested the judgment. The question on this writ of error is, whether that decision was right. We have felt considerable doubt on this question, but after much consideration, we think that the judgment of the Court of Common Pleas is wrong, and ought to be reversed. The second count was as follows:—[His Lordship here read the second count and then proceeded] According to the current of legal authorities, beginning with *Hopkins v. Logan* and ending with *Roscorla v. Thomas*, when the consideration is past and executed, it will support only such a promise as the law will imply from the executed consideration. The count in question is upon mutual promises to perform the agreement therein stated, and the promise of the plaintiff, which is the consideration for that of the defendant, is alleged to be past when the defendant's promise was made, and is therefore classed with an executed consideration. But, whether the promise had been stated as past, contemporary or future, we apprehend that the question with respect to the defendant's promise would be the same, namely, what is the promise which is expressed in or to be implied from the agreement? The consideration of the agreement determines the nature of the promise. What then is the promise of the defendant to be inferred from the agreement according to the true construction of it? It is, undoubtedly, to perform everything therein contained on his part to be performed. If to "retain and employ" the plaintiff as attorney and

(2) Consisting of Parke, B., Alderson, B., Parsonson, J., Rolfe, B., Wightman, J., Erle, J., and Platt, B.

solicitor is a thing "to be performed" by the defendant, according to the true construction of the agreement, it is no objection, at least on general demurrer, that the promise to "retain and employ" is added to the promise to perform everything; it is only a redundant expression; no more. Now, in considering this agreement, it is to be borne in mind that the word "agreed" is the word of both, as was held in the case of *Portage v. Cole* (3), where it was decided that an agreement between two parties, in an instrument under the seals of both, that one should give the other a sum of money for certain of his lands, amounted to a covenant by the vendor to convey, as well as by the vendee to pay. In the present case, where it is said "it was agreed between the plaintiff and the defendant that from the 1st of January then next the plaintiff, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs," as there is on the part of the plaintiff a promise to accept, so there is, undoubtedly, a corresponding promise by the defendant to pay a salary for a year, not at the rate of an annual salary, but a sum of 100*l.* for one year. The agreement goes on to state that for this annual salary the plaintiff should advise and act for the said company in all matters connected with it, with certain exceptions to be otherwise paid for, and would attend the secretary and directors when required. This provision binds the plaintiff to give his services when required; it does not bind the directors to require them on any particular occasion, or to the exclusion of every other person. What, then, is the effect of an agreement to give a certain salary, for one year at least, to a person who engages for it to give his services, if required? We think that this creates the relation of attorney and client, and amounts to a promise to continue that relation at least for a year. "To retain," according to *Johnson's Dictionary* and *Webster's Dictionary*, is "to keep in pay," or "to hire." It cannot be doubted that this is an agreement to "keep in pay" and "to hire." We think, therefore, that it implies a promise to retain. Does it also imply a promise to "employ"? This is a matter which appears to us much more doubtful than the other. It depends upon the mean-

(3) 1 Wms. Saund. 319, *c.*

ing of the term "employ." If that term means that the company shall be bound to furnish him with business as an attorney and solicitor at all events, or to require his advice or use his services as attorney or solicitor whenever they have occasion to require the services of an attorney or solicitor, we think it is clear there is no such promise on their parts. To hold there was a promise to the former effect would be to hold that they must be bound to incur expense as well as to create occasion for legal advice,—a difficulty similar to that which was pointed out by Lord Denman in the case of *Aspdin v. Austin*, hereafter referred to, as an objection to the inference in that case of a covenant to employ in a particular trade. But if the word "employ" means only to engage in his service (for the meaning of that term see *Webster's Dictionary*), then there appears to us to be a promise to that effect. Many cases of employment may be suggested in different capacities where the use of actual service is optional or conditional, and yet the employment may be said to take place contingently. Medical advisers may be employed at a salary to be ready in case of illness; members of theatrical establishments in case their labours should be needed; household servants in performance of their duty when their masters wish; in these and other similar cases the requirement of actual service is distinct from the employment by the party employing. These are instances of the use of the term "employ" in the sense of engaging for a service. We are to determine, then, in what sense the term "employment" is used in this case. Does it mean to furnish the plaintiff with actual business to transact, or that he shall transact it if they have any, or merely to continue the relation of attorney and client? If the breach assigned had been that the defendants did not give the plaintiff business to transact, although they had business, it would have been necessary to understand the word "employ" in the former sense, in order to make the declaration consistent. The breach actually assigned does not require it, but it was quite consistent with, and indeed more proper to the latter interpretation of the word "employ." It alleges that they "dismissed him from his employment and retainer, and from thence hitherto have refused to retain and employ him,"

the words "employment" and "employ" not being there used in the sense of the actual performance of service. But what weighs chiefly with us, in the consideration of the agreement, is that in one mode of understanding the word "employ," the promise is properly inferred from the agreement, and the declaration is sufficient; in the other it is not; and as this is not a question arising on demurrer, we think we ought to read the ambiguous word in a sense which will render the declaration good. We are, therefore, of opinion, that the legal effect of the defendant's agreement is properly set out.

The consequence of this decision is not unimportant in a practical point of view. If it had been held that such a contract as this is for service and pay respectively, and that although the employer had determined the relation by an illegal dismissal, yet the employed might entitle himself to wages for the whole time by being ready to serve, that doctrine, if sanctioned, would be productive of pernicious consequences in case of the business being discontinued, or a dismissal for misconduct without legal proof. According to the plaintiff's construction, the agreement creates the relation of employer and employed, and the illegal determination of the relation entitles him to indemnity, the measure of damages being the actual loss, which may be much less than the wages, when another employment may be easily obtained.

According to the defendant's construction it is a contract for service and pay, and the whole salary for all the time comprised in the contract would be due if the plaintiff served or was ready to serve. Our decision in this case does not conflict with that of the Queen's Bench, in the two cases of *Aspdin v. Austin* and *Dunn v. Sayles*. Both those cases turn upon the construction of a covenant between the parties. In the former, the defendant covenanted with the plaintiff to perform all the stipulations in a former agreement between the defendant and a third person and the plaintiff; and the question was, whether that former agreement, which was on the part of the plaintiff to make cement for the defendant and one Seeley, and to teach them how to make it, and on the defendant and Seeley's part to pay a weekly salary for three years, and then take the plaintiff into partnership, implied a promise by them to continue to employ him as the manufacturer of cement

for the intermediate period. The Court could not draw any such inference, and Lord Denman, in giving judgment, assigned a very strong reason, that "the breach assigned by the plaintiff assumed that the defendant, at however great loss to himself, was bound to continue his business for three years, but the defendant had not covenanted to do so; he had covenanted only to pay weekly sums for three years to the plaintiff, on the condition of his performing the conditions precedent, and that the plaintiff would be entitled to recover those sums whether he performed them or not, so long as he was ready and willing and offered to perform them, and was prevented by the defendant from so doing."

The other case also turns upon the construction of the defendant's contract. The indenture there did not confine the term "agreed" further than made the words of such indenture the words of both parties. It was simply a covenant by the plaintiff. The plaintiff covenanted there that his son should serve as an apprentice to a surgeon-dentist. The defendant, in consideration of his services, covenanted to pay a weekly sum for five years; and the Court held, that there was no covenant that the defendant should continue him in his employ as an assistant. Lord Denman held, that the reason that applied to the former case equally applied to that: it would be a strange thing to say that the defendant covenanted to carry on the business of surgeon-dentist at whatever loss and inconvenience, for five years. In the present case, we have to consider the mutual agreement of two parties, one, a company which was sure to continue for the term of a year, and which would, without doubt, have many occasions for the advice and service of an attorney and solicitor; and applying ourselves to the construction of this particular contract, we think there is an implied undertaking to retain and employ the plaintiff in the sense in which we understand that word. We think, therefore, the judgment should be reversed, and judgment be given for the plaintiff for 200*l.*, the amount found due on the second count. There is no occasion for a *venire de novo*. The judgment will be reversed and given for the plaintiff for the amount found due.

*Judgment reversed.*

1847. }  
 April 23; } CUNDELL AND ANOTHER v.  
 May 8. } DAWSON.

*Statute—Illegality—Goods sold and delivered—Coal Acts.*

*When a statute, for the purpose of protecting the buyers, prescribes regulations to be followed in the sale and delivery of an article the vendor cannot recover the price of such article sold and delivered by him without observing the regulations.*

*By the 1 & 2 Vict. c. ci. s. 3, with any quantity of coals exceeding 560 lb., delivered by any cart, within the city of London, &c., the seller shall deliver or cause to be delivered to the purchaser or his servant, immediately on the arrival of the cart, &c. in which such coal shall be sent, and before unloading, a ticket, according to a certain form, under a penalty, unless the coals are purchased at the coal market.*

*To debt for goods sold and delivered, the defendant pleaded in substance that the goods were quantities of coals sold and delivered by him to the plaintiffs, respectively exceeding 560 lb. and respectively delivered within the city of London, in divers, to wit, two carts, without delivering, before any such quantities of coals were unloaded, a ticket signed by the plaintiffs according to the form of the statute; and that the defendant did not purchase the same at the coal market:—Held, that the statute being passed for the protection of the purchasers of coal, the plea was an answer to the action.*

*Also, on special demurrer, that the statute applies if the quantity at one delivery exceeds 560 lb. though delivered in carts each containing less than 560 lb.; that if the vendor be prevented, by any act of the purchaser, from delivering the ticket, that is matter to be replied; that the vendor's name must be written in the ticket as a signature, though it would be sufficient if written by an agent; and that the negation in the plea of the delivery of a ticket was sufficiently applied to each delivery.*

*In this action the declaration was in debt for goods sold and delivered, and on an account stated.*

*Plea to the first count only—That the*

NEW SERIES, XVII.—C.P.

goods in the said first count mentioned to have been sold and delivered were divers quantities of coals, by the defendant purchased of the plaintiffs, and by the plaintiffs sold and delivered to the defendant; and that the said quantities of coals were respectively delivered by the plaintiffs to the defendant, after sixty days after the passing of a certain act of parliament, made and passed in a certain session of parliament holden in the 1st and 2nd years of the reign of Her Majesty Queen Victoria, intituled 'An act to continue for seven years an act for regulating the vend and delivery of coals in London and Westminster, and in certain parts of the adjacent counties.' That each of the said quantities of coals so delivered by the plaintiffs to the defendant as aforesaid, at the respective times of the sales and of the deliveries thereof to the defendant as aforesaid, respectively exceeded 560 lb.; and that each of the same quantities of coals were respectively so delivered as aforesaid by the plaintiffs to the defendant, within the city of London, by and in divers, to wit, two carts and two waggons; that the plaintiffs were the sellers of each and every of the said quantities of the said coals so sold and delivered to the defendant as aforesaid; and that the plaintiffs so being the sellers of the said quantities of the said coals, did not deliver or cause to be delivered to the defendant, he, the defendant, being the purchaser of each and every of the said quantities of coals, or to his, the defendant's agent or agents, or servant or servants, immediately on the arrival of the said carts and waggons in which each of such quantities of coals were respectively sent, and before any of such quantities of coals were unloaded, a paper or ticket with each of the said quantities of coals, nor with any or either of them, according to the form in Schedule (A.) to the said act annexed, respectively signed by the plaintiffs, the sellers of the said quantities of coals, with their names in words at full length, according to the form and effect of the said statute, but wholly neglected so to do, contrary to the said statute; that the defendant, at the times of the said sales and of the said deliveries of the said coals to him as aforesaid, was not a seller or dealer in coals, nor did he, the defendant, purchase the same

or any part thereof at the coal market. Verification.

Special demurrer, assigning as causes that the plea is pleaded to the whole of the first count of the declaration, which is admitted by the said plea to be founded upon several distinct sales, and several distinct deliveries of coals at several distinct times, and yet the defendant in and by the said plea pretends that the whole of the said sales and deliveries are illegal and void, because the plaintiffs did not immediately on the arrival of the carts and waggons, and before any of the said quantities of coals were unloaded, deliver to the defendant a paper or ticket, according to the form in the schedule to the said act annexed. And the defendant thereby seeks to avoid all the sales and deliveries of the said coals, and all the contracts upon which the plaintiffs have declared in their first count, because they did not comply with the enactment of the statute upon the first delivery of the said coals, and it is consistent with the said plea that the plaintiffs, on the second and every subsequent occasion did deliver a paper and ticket as required by the said statute, and the plea being bad in part is bad altogether. And also for that the same plea is uncertain and repugnant in this, (to wit) it is therein alleged that the plaintiffs did not immediately on the arrival of the said carts and waggons, and before the unloading of any of the said quantities of coals, deliver a paper or ticket, and the non-delivery of the paper and ticket which the defendant there alleges is a non-delivery after all the carts and waggons had arrived, and before any of the coals were unloaded, and as it appears that the said coals were delivered at different times, some of the coals must have been unloaded before all the carts and waggons had arrived; and also for that the said last plea is further uncertain in this (to wit) that it does not appear thereby whether the defendant means that no paper or ticket was delivered, or that an informal paper and ticket was delivered with the said quantities of coals, and the said plea by argument and inference admits that a paper and ticket was delivered with the said quantities of coals, but that such paper or ticket was not signed by the plaintiffs, the sellers thereof, with their names in words at full length; and also for that the said act of parliament in the said plea mentioned does

not require that any such paper or ticket should be delivered with coals as the said paper and ticket in the said plea mentioned; and also for that it does not appear that the defendant ever returned, or offered to return to the plaintiffs, or is ready to return to them the said coals. Joinder in demurrer.

*Unthank*, in support of the demurrer (1).—This plea is founded on the 1 & 2 Vict. c. ci. (local and personal). That act continues the 1 & 2 Will. 4. c. lxxvi. except in so far as altered by the act. The 43rd section of the 1 & 2 Will. 4. c. lxxvi. enacts, that coals sold in London or Westminster shall be sold by weight and not by measure. The 47th section directs, that a ticket of a form there given shall be delivered with any quantity of coals exceeding 560lb., and imposes a penalty on the seller and on the carman for neglect. The 52nd section directs, that the carman shall carry a weighing machine in his cart. The 1 & 2 Vict. c. ci. repeals so much of the 1 & 2 Will. 4. c. lxxvi. as directs that a seller's ticket shall be delivered, and substitutes an enactment in section 3. (2).

(1) April 23, 1847, before Wilde, C.J., Colman, J., Cresswell, J. and Williams, J..

(2) Sect. 3. "And be it enacted, that with any quantity of coals exceeding 560lb. delivered from and after sixty days after the passing of this act, by any cart, waggon, or other carriage within the cities of London and Westminster, or within the distance of twenty-five miles from the Post-office aforesaid, the seller or sellers thereof shall deliver or cause to be delivered to the purchaser or purchasers thereof, or to his or their agent or agents, servant or servants, immediately on the arrival of the cart, waggon, or other carriage in which such coals shall be sent, and before any of such coals shall be unloaded, a paper or ticket, according to the form in the schedule to this act annexed; and in case any such seller or sellers do not deliver or cause to be delivered such paper or ticket as aforesaid to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, servant or servants, before any part of such coals are unloaded, every such seller shall for every such offence forfeit and pay any sum not exceeding 20*l*.; and in case the carman, driver of, or other person attending any such waggon, cart, or other carriage laden with any such coals to whom any such paper or ticket shall have been given by or by the orders of the seller in order to be delivered to the purchaser, shall (having so first received the same from the seller or any person by the direction of the seller) refuse or neglect to deliver such paper or ticket to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals shall be unloaded, such carman, driver, or other person so offending shall for

The plea is founded on this enactment, and if it is to be supported it must be held that though the goods are delivered they are not to be paid for unless there has been a ticket in that precise form delivered. But this is not so. The cases depend upon the particular enactments on which they are decided; and it will be found that where a contract has been held void because it was not in compliance with a statute, the statute either expressly made the contract void, and declared that the party should not sue upon it, or made the transaction illegal; so that, to use the language of Lord Brougham, in delivering the judgment of the House of Lords, in *Swan v. Blair* (3), it is a consequence drawn by argument from the statutory enactment that the contract is made void. But no case establishes that a contract is void because a penalty is incurred in something collateral to, and not

contemporaneous with the contract. Here it does not appear that the seller has not given a ticket to his carman, or that at the time of the contract to sell it was contemplated that no ticket should be delivered; and a contract is not vitiated by an illegal act, unless the contract be such that it cannot be performed without doing the illegal act—*Armstrong v. Lewis* (4).

[WILDE, C.J.—That case is not in point. I there contended, as counsel, that the written contract of partnership was merely colourable and a cloak for an usurious contract, and the Court in error said that it did not appear on the record that there was such a collateral usurious agreement; and not, as you now cite the case, that the written contract could be enforced by the one partner against the other, though there was such a collateral agreement.]

*Wetherell v. Jones* (5) is a direct authority for the proposition; so is *Redmond v. Smith* (6). The illegal act here is collateral to the contract.

[CRESSWELL, J. and WILLIAMS, J.—The contract declared on is the contract implied by law from the sale and delivery, and the plea shews that the delivery is itself in breach of an enactment made for the protection of the purchaser. How, then, can it support a promise?]

*Wetherell v. Jones* was a case of goods sold and delivered, and yet the plaintiff recovered, though there was a penalty incurred by delivering the goods without a permit. And there is no distinction between fiscal regulations and others. The question is whether the legislature prohibits the contract or not—*Smith v. Mawhood* (7). All the cases are distinguishable: in *Law v. Hodson* (8) there was an implied contract to deliver bricks of a legal size: in *Foster v. Taylor* (9) the vendor was guilty of fraud, and must have known of the illegality.

every such offence forfeit and pay any sum not exceeding 20*l.* Provided always, that coals delivered to any seller or dealer in coals, or to any person or persons purchasing the same at the coal-market may be delivered without any such paper or ticket."

The Schedule above referred to is as follows:—

"Mr. A. B. [*here insert the name of the buyer*] take notice that you are to receive herewith [*here insert the number*] tons [*here insert the name of the coal if any particular sort is ordered or contracted for, and if ordered or contracted for as Wallsend, specify the name of the colliery*] coals in [*here insert the number*] sacks containing [*here insert the weight*] pounds of coal in each sack.

(Signed) C. D. [*here insert the name or names of the sellers in words at full length.*]

E. F. [*here insert the name of the carman in words at full length.*]

"It is directed that with any quantity of coals exceeding 560*lb.* a paper or ticket describing the quantity, and if any particular sort is ordered or contracted for the sort of the coals sent by the seller shall be delivered to the purchaser, or his agent or servant, before any part of such coals shall be unloaded; that a weighing machine or proper scales and weights shall be carried with every waggon, cart, or other carriage, and the carman is required to weigh gratuitously any sack or sacks of coal which shall be chosen by the purchaser, or his agent or servant; and if any carman refuses to weigh such sack or sacks of coals as aforesaid, or drives away the waggon, cart, or other carriage before the coals are weighed, or otherwise obstructs the weighing thereof, he is liable to a penalty not exceeding 20*l.*; also that a proper machine or proper scales and weights for weighing coals shall be kept at every watch-house or police station, and at any other place appointed for that purpose by two or more of her Majesty's Justices of the Peace."

(3) 3 Cl. & Fin. 610.

(4) 2 Cr. & M. 274; a. c. 3 Law J. Rep. (N.S.) Exch. 359.

(5) 3 B. & Ad. 221; s. c. 1 Law J. Rep. (N.S.) K.B. 139.

(6) 7 Man. & Gr. 457; a. c. 13 Law J. Rep. (N.S.) C.P. 159.

(7) 14 Meo. & Wels. 452; a. c. 15 Law J. Rep. (N.S.) Exch. 149.

(8) 11 East, 300.

(9) 5 B. & Ad. 887; s. c. 3 Law J. Rep. (N.S.) K.B. 137.



or any part thereof at the coal market. Verification.

Special demurrer, assigning as causes that the plea is pleaded to the whole of the first count of the declaration, which is admitted by the said plea to be founded upon several distinct sales, and several distinct deliveries of coals at several distinct times, and yet the defendant in and by the said plea pretends that the whole of the said sales and deliveries are illegal and void, because the plaintiffs did not immediately on the arrival of the carts and waggons, and before any of the said quantities of coals were unloaded, deliver to the defendant a paper or ticket, according to the form in the schedule to the said act annexed. And the defendant thereby seeks to avoid all the sales and deliveries of the said coals, and all the contracts upon which the plaintiffs have declared in their first count, because they did not comply with the enactment of the statute upon the first delivery of the said coals, and it is consistent with the said plea that the plaintiffs, on the second and every subsequent occasion did deliver a paper and ticket as required by the said statute, and the plea being bad in part is bad altogether. And also for that the same plea is uncertain and repugnant in this, (to wit) it is therein alleged that the plaintiffs did not immediately on the arrival of the said carts and waggons, and before the unloading of any of the said quantities of coals, deliver a paper or ticket, and the non-delivery of the paper and ticket which the defendant there alleges is a non-delivery after all the carts and waggons had arrived, and before any of the coals were unloaded, and as it appears that the said coals were delivered at different times, some of the coals must have been unloaded before all the carts and waggons had arrived; and also for that the said last plea is further uncertain in this (to wit) that it does not appear thereby whether the defendant means that no paper or ticket was delivered, or that an informal paper and ticket was delivered with the said quantities of coals, and the said plea by argument and inference admits that a paper and ticket was delivered with the said quantities of coals, but that such paper or ticket was not signed by the plaintiffs, the sellers thereof, with their names in words at full length; and also for that the said act of parliament in the said plea mentioned does

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every such offence forfeit and pay any sum not exceeding 20*l*. Provided always, that coals delivered to any seller or dealer in coals, or to any person or persons purchasing the same at the coal-market may be delivered without any such paper or ticket."

The Schedule above referred to is as follows:—

"Mr. A. B. [here insert the name of the buyer] take notice that you are to receive herewith [here insert the number] tons [here insert the name of the coal if any particular sort is ordered or contracted for, and if ordered or contracted for as *Walsend*, specify the name of the colliery] coals in [here insert the number] sacks containing [here insert the weight] pounds of coal in each sack.

(Signed) C. D. [here insert the name or names of the sellers in words at full length.]

E. F. [here insert the name of the carman in words at full length.]

"It is directed that with any quantity of coals exceeding 560*lb*. a paper or ticket describing the quantity, and if any particular sort is ordered or contracted for the sort of the coals sent by the seller shall be delivered to the purchaser, or his agent or servant, before any part of such coals shall be unloaded; that a weighing machine or proper scales and weights shall be carried with every waggon, cart, or other carriage, and the carman is required to weigh gratuitously any sack or sacks of coal which shall be chosen by the purchaser, or his agent or servant; and if any carman refuses to weigh such sack or sacks of coals as aforesaid, or drives away the waggon, cart, or other carriage before the coals are weighed, or otherwise obstructs the weighing thereof, he is liable to a penalty not exceeding 20*l*.; also that a proper machine or proper scales and weights for weighing coals shall be kept at every watch-house or police station, and at any other place appointed for that purpose by two or more of her Majesty's Justices of the Peace."

(3) 3 Cl. & Fin. 610.

[WILDE, C.J.—The goods there were delivered without a brand on the casks, here without a ticket. If the present enactment had been that the form in Schedule A. should be branded on the sacks the cases would be identical.]

[CRESSWELL, J.—And in that case the defendant, at the time he received the casks, had notice of the want of a brand precisely as the defendant here had notice of the want of a ticket, and was, to exactly the same extent, a party to the illegal act.]

*Little v. Poole* (10) was a case decided on the old Coal Act, which gave the purchaser more protection than the present, as it required the ticket to be signed by the meter; and besides, in that case there was a false ticket; yet that case is impliedly overruled by *Wetherell v. Jones*.

[CRESSWELL, J.—It was sufficient to support the decision in *Little v. Poole* that there should not be a true ticket. Besides, I do not see how it is worse to deliver an imperfect ticket than to deliver none at all.]

[WILDE, C.J.—And it seems to me that if the delivery on which you found your contract was illegal, because it was in breach of an enactment, the object of which was to protect the purchaser, it is not material whether the degree of protection was greater or less.]

[WILLIAMS, J.—And *Little v. Poole* was certainly not overruled by name in *Wetherell v. Jones*, and is referred to as an authority in *Cope v. Rowlands* (11).]

At all events, the plea is bad for the causes specially assigned: first, the words of the statute are, "with any quantity exceeding 560lb. delivered in a cart;" the averment in the plea is "a quantity exceeding 560lb. delivered in divers, to wit, two carts;" so that the delivery might, consistently with that averment, be of 281lb. in one cart and 281lb. in the other, not of 560lb. in any cart.

[*Per Curiam*.—The material averment is, that the quantity delivered exceeded 560 lb. If it be one delivery of a quantity exceeding 560 lb. the statute applies, whatever be the number of carts.]

Secondly, the plea does not aver the un-

loading to be by the plaintiffs, so that it may have been by the defendant. The plea ought to negative this. It is not sufficient in pleading to follow the words of the statute—*Fletcher v. Calthorp* (12).

[*Per Curiam*.—The vendor is to deliver the ticket before the coals are unloaded. If the purchaser, by any act, prevented him from doing so, that is a matter to be replied.]

Thirdly, the plea avers that there was no ticket delivered "signed by the plaintiffs, with their names in words at full length." This is not required by the statute; the name must be written in the ticket, but not as a signature; and it will do if written by any one.

[*Per Curiam*.—The name must be written in the ticket as a signature; and whatever would prove a signature within the meaning of the act would prove it within this averment. *Qui facit per alium facit per se*: if an agent signed for the plaintiffs, they signed.]

Fourthly, the averment negating the defendant being a dealer should have been, that he was not at any of the times of such sales a dealer in coals; but by this averment he calls on the plaintiffs to prove that he was at all the times a dealer in coals, which is too large—*Gorom v. Sweeting* (13); and the averment cannot be taken distributively, as it might be if it were a positive averment, for it is in the negative. Lastly, the plea avers that the plaintiffs did not deliver a ticket before any of such quantities were delivered. What the plea should have averred is, that they did not deliver a ticket before each or either quantity was unloaded. For aught that is averred here, there may have been a perfectly good and legal delivery of the second quantity; and if so, the plea, which is to the whole count, being bad in part is bad in the whole.

*Dowling, Serj.*—The first three grounds of special demurrer have been answered by the Court. As to the fourth, the averment is in its nature distributive; and there is no such rule in pleading as that a negative averment cannot be distributive.

[WILLIAMS, J.—*Yates v. Tearle* (14) and

(12) 6 Q.B. Rep. 380; s.c. 14 Law J. Rep. (N.S.) M.C. 49.

(13) 2 Saund. 207, a.

(10) 9 B. & C. 192; s.c. 7 Law J. Rep. K.B. 158.

(11) 2 Mee. & Wels. 149; s.c. 6 Law J. Rep. (N.S.) Exch. 63.

(14) 6 Q.B. Rep. 282; s.c. 13 Law J. Rep. (N.S.) Q.B. 289.

*Wood v. Peyton* (15) are instances of a negative averment being distributive.]

As to the last objection in form, the word "any" when coupled with the early part of the plea has evidently the meaning of "each respectively," and must be so construed.

[The Court then said that unless on consideration they changed their present opinion, they would not hear him on the matter of substance.]

[*Dowling, Serj.*, however, mentioned *Tyson v. Thomas* (16).]

*Unthank*, in reply, relied on the last objection in form.

*Cur. adv. vult.*

The judgment of the Court was (on the 8th of May 1847) delivered, by—

**WILDE, C.J.**—In this case, the plaintiffs have declared in *indebitatus assumpsit* for goods sold and delivered; to which declaration the defendant pleaded in substance that the goods mentioned in the declaration were certain quantities of coals sold and delivered by the plaintiffs to the defendant, on divers days and times, and that the said quantities of coals were respectively so delivered in quantities exceeding in weight 560lb. each, and that each of the same quantities was respectively so delivered within the city of London, in divers, to wit, two carts and two waggons, and that the plaintiffs being such sellers did not deliver or cause to be delivered to the defendant, or any one on his behalf, immediately on the arrival of the said carts and waggons, and before any of such quantities of coals were unloaded, a ticket according to the form of the statute 1 & 2 Vict. c. ci, signed by the plaintiffs, as required by the said statute, and that the defendant at the time of such delivery was not a seller or dealer in coals, nor did the defendant purchase the same at the coal market. To this plea the plaintiffs specially demurred, and assigned several causes of demurrer, which will be presently more particularly adverted to.

The main and general question which arises upon this demurrer is, whether the plaintiffs are precluded from recovering the price of the coals delivered by them to the defendant, by reason of their having omitted

previous to such delivery of coals to deliver to the defendant, or some one on his behalf, a ticket referred to in the statute, stating the quantity and description of the coals about to be delivered; and this question depends upon the construction and effect of such statute.

This declaration is not framed upon a special contract, but upon the promise implied by law from the sale and delivery of the coals; and the question therefore is, (regard being had to the statute referred to and to the omission to deliver a ticket in the form mentioned therein,) will the law imply a promise to pay for the coals so delivered?

The statutes which have given rise to the question of the right to recover the price of goods by sellers or vendors who have not complied with the terms of such statute, are of two classes: the one class of statutes having for their object the raising and protection of the revenue; the other class of statutes being directed either to the protection of buyers and consumers, or to some object of public policy. The present case arises upon a statute included in the latter class. The statute which governs the present case is the 1 & 2 Vict. c. ci, which continued the 1 & 2 Will. 4. c. lxxvi. There had been some previous statutes relating to the same subject for limited periods, one of which statutes was the 47 Geo. 3. c. lxxviii. These statutes had varied somewhat from each other in regard to the means by which the same general object was sought to be attained, but the legal effect of an omission to comply with the regulations prescribed in them respectively must be the same. It is obvious from the contents of the statute, that its provisions are directed to the purpose before mentioned, namely, to secure the purchasers of coals from fraud, in respect of quantity and quality of the coals, and that the delivery of the tickets is required as a part of the means for the attainment of that object; and that such was the object of the statute was determined in the case of *Little v. Poole*. The class of statutes simply for the security of the revenue do not apply to the present case; and the various determinations which are contained in the books upon the construction of these statutes and the effect of non-compliance with these enactments by the seller of goods, rest upon principles not applicable to the

(15) 13 Mee. & Wels. 30; s. c. 14 Law J. Rep. (N. S.) Exch. 28.

(16) 1 M'Clel. & Y. 119.

present case; and, therefore, it will not be necessary particularly to advert to them.

The decisions of cases which have arisen upon the class of statutes which embrace the present case all recognize the same general principle and are consistent in the application of it. The case of *Little v. Poole*, before mentioned, was an action for the price of a quantity of coals which had been sold and delivered by the plaintiffs to the defendant; and it was contended that the plaintiffs were not entitled to recover, because a ticket had not been delivered with the coals, as required by the then existing statute, 47 Geo. 3. c. lxviii. s. 113. Two tickets were required under that statute to be delivered; and the objection was, that one of those tickets, called the vendor's ticket, had not been signed by the meter, nor had his name been inserted therein. Upon the argument, a rule *nisi* having been obtained in that case to enter a nonsuit, the various cases were cited and considered—*Law v. Hodson*, *Bensley v. Bignold* (17), *Langton v. Hughes* (18), and *Cannan v. Bryce* (19). Lord Tenterden, in giving judgment, said, the regulations introduced by this act of parliament appear to be intended to prevent fraud in the vend and delivery of coals, and that for that purpose it was required that the ticket should be signed by the coal-meter; and that as the ticket was not signed as required for that purpose, the plaintiff, the seller of the coals, was not entitled to recover. Bayley, J. said, the case fell within the principle of *Law v. Hodson*, in which case the Court held that the policy of the act being to protect the buyer against the seller, it would be best effected by holding that the vendor could not recover the value of the bricks which had been delivered, such bricks having been less than the statutable size, and that the object of the legislature in the statute then in question, the 47 Geo. 3. c. lxviii, would also be best effected by holding that a seller of coals could not recover the value of them where he had omitted to deliver a ticket pursuant to the statute. Littledale, J. and Parke, J. recognized the same principles, and a nonsuit was accordingly entered. That case appears to the Court to have been correctly decided,

and to be directly in point to the present, and must govern the decision of it. The statute 1 & 2 Will. 4. c. lxxvi. continued by 1 & 2 Vict. c. ci. has precisely the same object in view as the 47 Geo. 3. c. lxviii, and seeks to effect it by similar means, namely, by requiring the seller to deliver to the buyer a ticket in a prescribed form. The judgment in *Little v. Poole* is consistent with the cases of *Forster v. Taylor*, *Marchant v. Evans* (20), *The King v. Gravesend* (21), and, we believe, every other case in the books depending upon this class of statutes. We are, therefore, of opinion that the plea in this case, if well pleaded, furnishes a legal answer to the declaration, and that the judgment of the Court must be for the defendant. It remains to be considered whether the defendant has well pleaded this matter of defence. Various objections of form were taken by the special demurrer; but all but one were disposed of during the argument. It seems to us that the negation in the plea of the delivery of a ticket before the unloading of the coals is applied with sufficient distinctness to each delivery, and, consequently, that no one of the objections to the plea set forth in the special demurrer is well founded, and that the plea is sufficient. The judgment, therefore, must be for the defendant.

*Judgment for the defendant.*

1847.	}	PLENTY v. WEST.
April 30;		
May 5.		
1848.		
June 14.		

*Will, Construction of—What Devise gives a legal Estate.*

*A testator made and published a testamentary paper in 1839 in the following words:—* "This is the last will and testament of me, the undersigned, A. B, relating to all my freehold and copyhold lands, tenements, hereditaments, and all my real estate whatsoever, which I hereby give, devise and bequeath to the intent that the rents, issues and profits thereof may be divided into three equal shares and proportions, one third

(17) 5 B. & Ald. 335.

(18) 1 Mau. & Selw. 593.

(19) 3 B. & Ald. 179.

(20) 2 Moore, 14.

(21) 3 B. & Ad. 240; a. c. 1 Law J. Rep. (N.S.) M.C. 20.

whereof I give and devise to Caroline, the daughter of C. D, for her natural life, independent of any husband she may hereafter marry, and for which her receipts alone shall from time to time, notwithstanding her coverture, be a sufficient discharge, subject, nevertheless, to an annuity of 50*l.* per annum, payable to her mother, during her life, independent of her present or any other husband, payable quarterly, and for which her receipt alone, notwithstanding her coverture, shall from time to time be a sufficient discharge. Then as to the other two thirds of the said rents, issues, and profits, I hereby direct the said annual rents and profits to be paid to all the children of W. W, or that he be permitted to receive the annual rents, issues, and profits of my said freehold and copyhold estates for the use and maintenance, education and putting forth in the world of all his said children until their arrival at the age of twenty-one years. I appoint the said W. W. executor of this my will, so far as the same is necessary to the performance of the trusts relating to my real estate."

The testator died, leaving the persons named in this will and four children of W. W. surviving. He also left other instruments, prior in date to this will, duly executed and uncanceled, by which he devised the whole legal and beneficial interest in his estate:—Held, first, that the instrument of 1839 alone was valid as a disposition of the legal estate of the testator. Secondly, that it operated as a devise to W. W. of the legal estate in one undivided third of the real estate, and a devise to him of a chattel interest during the minority of his children in the other two thirds, determinable as to the respective shares of his children in the said two thirds on their respectively attaining the age of twenty-one years, and, subject thereto, a devise of the said two thirds to his children as joint-tenants in fee. As to the beneficial interest in one third after the decease of Caroline—*quære*.

This was a special case stated for the opinion of this Court, by order of the Master of the Rolls. The case stated, that on the 5th of October 1837, William Budd, formerly of Burghclere, in the county of Southampton, and late of Newbury, in the county of Berks, gentleman, and for many years clerk of the peace for the county of Berks, since deceased,

duly made and published his last will in his own handwriting, dated the 5th of October 1837, and executed and attested in such manner as was then by law required for rendering valid devises of freehold estates of inheritance, and thereby gave, devised, and bequeathed all his estate and effects, both real and personal or mixed, unto and to be divided equally between the three boys of William West and Caroline Plenty, then Caroline Simmons, at their respective ages of twenty-one years, the same to be vested interests.

On the 13th of April 1838 the said testator made and executed in manner then required by law two other testamentary instruments, both in his own hand-writing, and both written on one and the same sheet of paper. These instruments (with the signatures and attestations thereto) are as follows:—

"This is the last will of me, William Budd, late of Burghclere, in Hants, but now of Newbury, in Berks, gentleman. I give and bequeath all my estate and effects as hereinafter mentioned, namely, all my household goods at Newbury to Caroline, the daughter of William and Frances Simmons, for ever. I also give all my real estate, as well freehold, copyhold, or leasehold, to the said Caroline Simmons for her life, and after her decease to William West, of Speen, ironfounder, for the term of his life, and after both their deceases to William and George West, the sons of the first-named William West, or all my interest therein during the term of their natural lives, and to the survivor of them for their life; and then as to all my copyhold estate at Burghclere to the Rev. Henry Budd, of White Roothing, in Essex, and his heirs for ever, subject to the payment of 500*l.* to Caroline Simmons, and 500*l.* to the said William West first named, as soon as the said Henry Budd shall come into possession thereof, or within one year after."

The words in the twelfth and thirteenth lines, "And their heirs, executors, and administrators for ever," being first drawn through with the pen as erased.

"Dated this 13th day of April 1838.

"W. Budd (l.s.)."

"Signed, sealed, published, and declared by the testator, William Budd, as and for his last will, in the presence of us, who at

his request, in his and each other's presence, have hereunto set our hands, this 13th day of April 1838.

"Bromley Challenor,  
"Henry Geirs,  
"Henry Geirs.

"Of this my will I appoint the said Caroline Simmons and William West the father executrix and executor. As witness my hand and seal the day and year above written.

"W. Budd." (L.S.)

"Bromley Challenor,  
"Henry Geirs,  
"Henry Geirs, junior."

In the month of November 1839, the said testator made and executed in manner then required by law, one other testamentary instrument in his own hand-writing. This instrument, with the signature and attestation thereto, was as follows:—

"This is the last will and testament of me, the undersigned William Budd, of Newbury, in the county of Berks, gentleman, relating to all my freehold and copyhold lands, tenements, hereditaments, and all my real estate whatsoever, which I hereby give, devise, and bequeath to the intent that the rents, issues, and profits thereof may be divided into three equal parts, shares, and proportions, one third whereof I give and devise to Caroline, the daughter of William and Frances Simmons, for her natural life, independent of any husband she may hereafter marry, and for which her receipts alone shall from time to time, notwithstanding her coverture, be a sufficient discharge, subject nevertheless to an annuity of 50*l.* per annum, payable to her mother, Frances Simmons, during her life, independent of her present or any other husband, payable quarterly, and for which her receipt alone, notwithstanding her coverture, shall from time to time be a sufficient discharge. Then as to the other two thirds of the said rents, issues, and profits, I hereby direct the said annual rents and profits to be paid to all the children of William West, of Speenhamland, ironfounder and engineer, or that he be permitted to receive the annual rents, issues, and profits of my said freehold and copyhold estates for the use and maintenance, education, and putting forth in the world of all his said children until their arrival at the age of twenty-one years. I appoint the said William West executor of

this my will, so far as the same is necessary to the performance of the trusts relating to my real estate.

"W. Budd (L.S.)."

"Signed, sealed, and published by the said testator, in the presence of Benjamin Weston, B. Challenor, R. Gray."

The testator died in the month of August 1840. At the time of making his will of the 5th of October 1837, and thenceforth up to and at the time of his death, the testator was seised and possessed of freehold estates in the county of Berks and elsewhere, and was entitled in fee according to the custom of the manor whereof the same were holden to a copyhold farm and lands at Burghclere, in the occupation of William Vincent, as his tenant, and to two copyhold cottages, also at Burghclere, in the occupation of William Simmons, as his tenant.

William West, in the said will of the 5th of October 1837 named, and William West, described in the said testamentary instruments of the 13th of April 1838, as of Speen, ironfounder, and as William West, the father, and William West, described in the said testamentary instrument of November 1839, as of Speenhamland, ironfounder and engineer, is one and the same person, and he had four children and no more born in the testator's lifetime, namely, three boys, William West, born the 5th of May 1833, George West, born the 10th of October 1834, and Frederick West, born the 11th of May 1836, and one girl, Ann West, born the 18th of June 1838.

Caroline Simmons, named in all the said testamentary writings, is the daughter of William Simmons and Frances his wife, and was born in April 1822, and was married, in 1841, to Edward Pellew Plenty, now her husband.

A cause is now depending in the High Court of Chancery between the said Caroline Plenty, by her next friend, plaintiff, and the said William West, the father, Henry Budd, William West the son, George West, Frederick West, Ann West, Edward Pellew Plenty, William Simmons and Frances his wife, and others, defendants, and by the decree made on the hearing of this cause, before his Lordship the Master of the Rolls, on the 29th of April 1846, it was ordered that this case should be made for

the opinion of the Judges of the Court of Common Pleas, on the following questions:—First, Whether all or any, and which of the said testamentary instruments constituted the said testator's last will, at the time of his death, as to his freehold and copyhold estates, or any, and what parts thereof; and, second, what, if any, estate and interests the following persons respectively took in the testator's freehold and copyhold estates, or any, and what parts thereof, under the said testamentary instruments, or such of them as, at the said testator's death, constituted his last will as to his freehold and copyhold estates or any part thereof, that is to say—first, the said Edward Pellew Plenty and Caroline his wife, in her right, and each, or either, and which of them; second, the said William West the father; third, the said William West the son, and George West; fourth, the said Frederick West; fifth, the said Ann West; sixth, the said Henry Budd; and seventh, the said William Simmons and Frances his wife, in her right, or either, and which of them.

The following is a copy of the points for argument:—

First, for the defendants William West the son, and George West:—The defendants William West the son, and George West, will contend, that the three testamentary instruments taken together, constituted the last will of the testator, at the time of his death, as to all his freehold and copyhold estates. Secondly, that William West the son and George West took, under the said three testamentary instruments taken together, immediate estates for life in joint tenancy with the two other children of William West, living at the death of the testator in two thirds of all the testator's freehold and copyhold estates, and they took remainders for life to them and the survivor of them after the deaths of Caroline Plenty and William West the father, in the remaining one third in such freehold and copyhold estates, and remainders in fee as tenants in common with Caroline Plenty and Frederick West, after such deaths as aforesaid, in all the testator's freehold estates; or, thirdly, that William West the son and George West took, under the three testamentary instruments, two several fourth shares of the rents and profits of two thirds of the testator's

freehold and copyhold estates till their respective ages of twenty-one, with remainder for life to them and the survivor of them after the deaths of Caroline Plenty and William West the father, in the whole of the testator's freehold and copyhold estates, with remainder in fee, as tenants in common with Caroline Plenty and Frederick West, in the whole of the testator's freehold and copyhold estates, with remainders in fee, as tenants in common with Caroline Plenty and Frederick West, in the whole of the testator's freehold estates.

Points to be insisted on by the plaintiff Caroline Plenty, and her husband (the defendant) Edward Pellew Plenty:—First, that the will of the 5th of October 1837, and the several testamentary instruments of the 13th of April 1838 and November 1839, together constituted the said testator's last will at the time of his death as to his freehold estates. Secondly, that the several testamentary instruments of the 13th of April 1838 and November 1839 (containing a complete disposition of the entire interest in the testator's copyholds) wholly revoked the disposition thereof contained in the will of the 5th of October 1837, and together constituted his last will at the time of his death as to his copyhold estate. Thirdly, that the plaintiff Caroline Plenty took for her separate use an estate for her life in one third of the testator's freehold and copyhold estates, subject to the annuity to Frances Simmons of 50*l.* a year during her life. Fourthly, that the disposition contained in the testamentary instrument of November 1839, as to the remaining two thirds of the income of the testator's freehold and copyhold estates is void for uncertainty or (if not void) is restricted in duration to the minority of the defendants, William West the son, George West, Frederick West, and Ann West, so that each of these four children took one fourth of these two thirds during his or her minority, or, at all events, that these two thirds belonged to these four children, as joint tenants, during the minority of any of them, or to their father during the same period. Fifthly, that subject to the life estate of Caroline Plenty, for her separate use in one third of the freehold and copyhold estates, and subject to the estates, if any, of the defendants, William West the son, George West, Frederick West, and Ann



West, or the estate, if any, of their father in the remaining two thirds, the defendant Edward Pellew Plenty and his wife the plaintiff in her right took an estate for her life in the freehold and copyhold estates, with remainder to the defendant William West the father, for his life, with remainder to his sons William West and George West and the survivor of them during their lives, with remainder as to the testator's copyhold estate to the defendant Henry Budd in fee, charged with the payment of 500*l.* to the defendant Plenty and his wife the plaintiff in her right, and 500*l.* to William West the father, within one year after the last remainder in fee should come into possession. Sixthly, that subject to the life estate of the plaintiff for her separate use in one third of the estates, if any, of the defendants William West the son, George West, Frederick West, and Ann West, or the estate, if any, of their father in the remaining two thirds, and the life estates of the defendant Plenty and his wife the plaintiff in her right, and the life estates of William West the father, and of his sons William West and George West, in the testator's freehold estates, the defendant Plenty and his wife the plaintiff took an estate in fee in one fourth of the testator's freehold estates.

Points to be insisted on by the defendants William Simmons and Frances his wife:—First, that the testamentary instrument of November 1839, either alone or together with both or one of the other testamentary instruments, constituted the testator's last will at the time of his death as to his freehold and copyhold estates. Secondly, that the defendant Frances Simmons took for her separate use a yearly rent-charge or sum of 50*l.* payable during her life out of one third of the testator's freehold and copyhold estates.

Points for the Rev. Henry Budd:—Henry Budd, one of the defendants in the said suit in Chancery, will contend that the testamentary papers, dated the 13th of April 1838, constituted the last will and testament of William Budd deceased; and that they effectually revoked any testamentary document of an earlier date, and were not in any manner affected by the testamentary paper, alleged to have been executed by William Budd, deceased, in the month of November 1839. And the said Henry Budd will also

contend, that under the testamentary papers, dated the 13th of April 1838, he is entitled for an estate of inheritance in fee simple, according to the custom of the manor or manors whereof the same are holden to all the copyhold estate at Burghelere, of which the said William Budd died seised, or of which he had power to dispose by will.

Points for the Rev. Richard Budd, heir-at-law:—Richard Budd, one of the defendants in the said suit in Chancery, the heir of William Budd, deceased, will contend that the said William Budd died intestate as to his freehold and copyhold estates, or in any event that his freehold estates are undisposed of except during the lives of Caroline Plenty, late Caroline Simmons, the plaintiff in the said suit in Chancery, William West the father, and William West the son, and George West the son of the said William West the father (three of the defendants in the said suit), and the life of the survivor of them; and the said Richard Budd will contend that the alleged testamentary paper, dated the 5th of October 1837, was entirely revoked by the testamentary papers dated the 13th of April 1838; and he will also contend that the testamentary paper alleged to have been executed in the month of November 1839 has no operation or effect as a testamentary disposition by the said William Budd, deceased; or if this Court shall be of opinion that the same has any effect or operation, then that the same only took effect to the extent of giving to the said Caroline Plenty for her life, one third of the rents and profits of the freehold estates of the said William Budd, subject to an annuity of 50*l.* to Francis Simmons for her life, and giving the remaining two thirds of such rents and profits to or for the benefit of the children of William West, of Speenhamland, ironfounder or engineer, until their arrival at the age of twenty-one years.

Points for the defendant William West the father:—The defendant William West the father, on the argument of the case, will contend that the testamentary instruments of 1838 and 1839 constituted the testator's last will at the time of his death as to all his freehold and copyhold estates, and that the said defendant William West the father was and is under the said testamentary instrument of 1839, entitled to receive the annual rents,

issues, and profits of two thirds of all the said freehold and copyhold estates, until his the said William West the father's four children, namely, the defendants William West the son, George West, Frederick West, and Ann West, shall arrive at the age of twenty-one years, for the use and maintenance, education, and putting forth in the world of all his said children until their arrival at such age. And that he, the said defendant William West the father, whether he did or not take or become entitled to such interest as aforesaid, took under the said testamentary instrument of 1838 a life estate in remainder after and subject to the life estate of the plaintiff Caroline Plenty therein, in all the said freehold and copyhold estates. And that he, the said William West the father, also, under such lastly-mentioned testamentary instrument took or became entitled to a legacy or sum of 500*l.* charged on the copyhold estate of the said testator, situate at Burghclere, which legacy or sum will become payable at the expiration of one year after the death of the said plaintiff Caroline Plenty, and the said defendants, William West the father, William West the son, and George West.

Points for the defendant Ann West:—First, the defendant Ann West will contend, that the testamentary instrument of 1839 constituted the testator's last will at the time of his death, as to two thirds of all his freehold and copyhold estate. And by the said will the said Ann West and the other three children of William West, living at the testator's death, took estates in fee as joint tenants of such two thirds of all his freehold and copyhold estate. If that is not the true construction of the said will, then, secondly, that the said Ann West and the said other three children of William West took under the said will estates as joint tenants for life in the said two-thirds of all the testator's said freehold and copyhold estate: or, thirdly, that the said Ann West took at any rate under the said will of 1839, an estate in one fourth of the rents and profits of the said two thirds of all the testator's freehold and copyhold estate until her age of twenty-one years.

Points for the defendant Frederick West:—First, the defendant Frederick West will contend, that the three testamentary instruments constituted (taken together) the

last will of the testator, at the time of his death, as to all his freehold and copyhold estate. That the defendant Frederick West took by the testamentary instrument of 1839 an estate in fee in two thirds of all the testator's freehold and copyhold estate in joint tenancy with the other three children of William West, living at the testator's death, and subject to a life estate in Caroline Plenty, in the remaining one third of the testator's freehold estate, (under the wills of 1838 and 1839,) and to life estates in William West the father, and William West and George West the sons, in such one third, (by the will of 1838,) the defendant Frederick West took by the will of 1837 a vested remainder in fee after the deaths of the said Caroline Simmons, William West the father, and William West and George West the sons, in one fourth of such remaining one third of the testator's freehold estate; or, secondly, that the defendant Frederick West took under the testamentary instrument of 1839 a life estate in the said two thirds of all the testator's freehold and copyhold estates, in joint tenancy with the other three children of William West living at the testator's death, with a vested remainder in fee to him, the said Frederick West, (by the testamentary instrument of 1837,) after the deaths of Caroline Plenty, William West the father, and William West and George West the sons, in one fourth of the said two thirds of the testator's freehold estates; and a vested remainder in fee by the same instrument of 1837, after the deaths of the said four several persons, in one fourth of the remaining one third of the testator's freehold estate; or, thirdly, that he took by the testamentary instrument of 1839 one fourth of the rents and profits of two thirds of the testator's freehold and copyhold estates till his age of twenty-one years, with remainder to him in fee by the will of 1837, after the deaths of Caroline Plenty, William West the father, and William West and George West the sons, in one fourth of all the testator's freehold estate.

On the 30th of April 1847, the case came on to be argued.\*

\* Before Wilde, C.J., Coltman, J., Cresswell, J., and Williams, J.

*Channell, Serj.*, for E. P. Plenty and Caroline his wife.—The three testamentary papers together formed one will. A will is ambulatory till the testator's death. It is admitted that a subsequent testamentary paper revokes a former one, if it appears to be intended as a revocation, either by making a disposition of the property quite inconsistent with that made by the first will, or by express words; but if the second instrument only makes a disposition partially inconsistent with the former disposition, it alters the disposition *pro tanto*, but does not revoke it altogether, unless there be words of revocation. There can be but one last will of the testator, but it may be written on many papers, and published at many times. Here the first instrument disposes of all the testator's property. The other instruments do not dispose of the whole property; and if either or both of them is taken to be the will, exclusively of the first, he is partially intestate, which he certainly did not intend to be. The instrument of 1838 does not dispose of the fee of the testator's freehold lands, and it disposes only of part of the personalty, viz. the household goods. As far, therefore, as the fee of the land and the residue of the personalty are concerned, either they were, in 1838, to go according to the first will, or the testator was then intestate as to them. Then comes the instrument of 1839, which changes the proportions in which the estate is to be divided, and gives life estates, but is silent as to the fee. [He referred to the note to *Duppa v. Mayo* (1), 1 *Jarman on Devises*, and the cases there cited, pp. 158, 162, *Cruise's Digest*, vol. 6, p. 74, *Coward v. Marshal* (2), *Hitchins v. Basset* (3), *Harwood v. Goodright* (4), as shewing that a subsequent will does not revoke a former one, unless there appears an intention to revoke express or implied.] There is no express revocation here. The words, "this is my last will," do not amount to a revocation—*Lord Walpole v. Cholmondeley* (5), *Thomas v. Evans* (6). The present case has been in the Prerogative Court, where the Judge admitted the paper of 1838, and that

only, to probate. The case is reported 1 *Robertson*, 264, and his reasons appear to have been, that the last instrument did not relate at all to personalty, and that the rules of the ecclesiastical court construed the words, "last will," used in the second instrument, as a revocation of all antecedent wills. This, however, cannot affect the rules of law as to the construction of the devise of real estate. It may be that the instrument operated as a revocation as to the personalty, as I admit it does as to the copyhold, but it does not touch the freehold.

[WILDE, C.J. inquired if it appeared by the report that Sir H. J. Fust's attention had been called to *Lord Walpole v. the Earl of Cholmondeley*, and what reasons had been given to distinguish the cases.]

*Channell, Serj.*—It does not appear by the report.

[WILLIAMS, J.—Have you looked at the report of the case in the *Notes of Cases in the Ecclesiastical Courts*? You will generally find a very good report of the arguments in those reports. The decision of this Court in *Doe d. Murch v. Marchant* (7) seems in favour of your argument.]

Then, assuming the three instruments to form one will, Caroline Plenty takes under the last instrument an estate for life in one third of the real estate; under the first she takes an estate in fee in one fourth, subject to her life estate as to one third of it. The devise in the last instrument of the two thirds is void for uncertainty. Who is the devisee? Is it an estate for life, or during minority, or what?

[CRESSWELL, J.—The most favourable construction for your client is to construe the last instrument as a devise to West the father, as a trustee for her as to one third; and as to the other two thirds for the children. There is another construction as to the two thirds, that the children were to have the fee under the new statute with an uncertain alternative devise during the minority, and then the question is, whether that uncertainty avoids the devise in fee.]

*Parsons*, for William West, the father.—The last paper gives the father at least a chattel interest in two thirds during the minority of his children. No doubt the tes-

(1) 1 Wms. Saund. 279, g.

(2) Cro. Eliz. 721.

(3) 2 Salk. 592.

(4) 3 Wils. 497; a.c. Cowp. 87; 7 Bro. P.C. 489.

(5) 7 Term Rep. 138.

(6) 2 East, 488.

(7) 6 Man. & Gr. 813; s.c. 13 Law J. Rep. (n.s.) C.P. 59.

tator intended a gift. The only question is, to whom? The words that "he be permitted to receive the rents," give him a legal estate; and if they are inconsistent with prior dispositions the last must prevail—*Co. Litt.* 112, *b*, *Doe d. Leicester v. Biggs* (8), *Morrall v. Sutton* (9); and, under the second instrument, he has a life estate in reversion.

*Manning, Serj.*, for Henry Budd.—Henry Budd took an interest under the second instrument beyond all question. He was by that substituted for the heir-at-law, and is no more to be deprived of his interest by a subsequent instrument than the heir would be; but the third instrument is too vaguely worded and uncertain to disinherit the heir-at-law.

*Fitapatrick*, for William and George West, the infants.—They take a joint-tenancy in fee in two thirds, under the last instrument; and, under the second, a life interest in the other third, the reversion of which only is given to Caroline Plenty by the third. The father takes no estate at all, he is merely to act as receiver for the infants.

[WILDE, C.J.—Unless the father takes some legal estate, he cannot enforce the permission to receive the rents.]

*Unthank*, for the heir-at-law.—The second instrument revoked the first, and the third instrument revoked the second, so that the last alone is the will—*Kidd v. North* (10). The testator in the last instrument says it is "his last will as to all his real estate whatsoever." Then, as to the two thirds, the devise is void for uncertainty, and the heir-at-law takes it. The cases on devises void for uncertainty as being in the alternative are collected in 1 *Jarman on Devises*, p. 324.

*Drewry*, for Frederick West.—The devise of the rents and profits is a devise of the land; and the children took a joint fee in two thirds of the real estate under the last instrument—*Baines v. Dixon* (11), *Doe d. Goldin v. Lakeman* (12). This estate may be made subject to a chattel interest in the father during the minority of

each child, or he may have a mere authority. If the latter construction is required to support the devise, "or" may be read as "but." In either case the fee in the two thirds is in the children. And the sons are also entitled to be tenants in common in the reversion of the other third. They are tenants in common under the first instrument, and the last instrument leaves the reversion in fee in that third untouched.

On the 5th of May—

*Ogle* was heard, for Anne West.—Anne West claims under the last instrument an estate in fee in two thirds of the real estate, along with her brothers. The words used in the last instrument are large enough to embrace the whole of the testator's interest in the land. He says it is his will "relating to all my freehold and copyhold lands, &c., and all my real estate whatsoever." He not only means to pass all his lands, but all his interest therein. It therefore revoked all prior dispositions of his real estate. Then, it is said, that the devise is void for uncertainty, because the testator, after devising his estate to the children of W. West, adds "or that he be permitted to receive the profits for their use" till their age of twenty-one years, which, it is contended, makes an alternative devise of the freehold. But, it is to be observed, that the children were some of them infants, and the intention of the testator would be fully effectuated by reading "or" "and," so as to construe this as making him a receiver for them. The cases where "or" is read "and" to carry out the intention will be found in a note to 1 *Powell on Devises*, pp. 379, 382, (edition of 1827)—*Price v. Hunt* (13), *Brownswold v. Edwards* (14), *Richardson v. Sprang* (15). Or the construction of the will may be, that William West the father takes the legal estate in the whole during the life of Caroline Plenty, in trust as to one third for her separate use, and as to the other two thirds in trust for the children so long as they are infants, with remainder in fee to each child of its portion as it attains twenty-one; or, if the life of Caroline Plenty dropped during the minority of the infants, there would be a chattel interest in the father during the

(8) 2 Taunt. 109.

(9) 1 Phil. Rep. 533; s.c. 14 Law J. Rep. (N.S.) Chanc. 266.

(10) 16 Law J. Rep. (N.S.) Chanc. 116.

(11) 1 Ves. sen. 41.

(12) 2 B. & Ad. 30.

(13) Pollex. 645.

(14) 2 Ves. sen. 243.

(15) 1 P. Wms. 434.

minority. He has duties to perform under the will, in receiving and paying the rents and profits, and where that is the case a legal estate is vested in the devisee—*Jeffreson v. Morton* (16), *Silvester v. Wilson* (17), *Kenrick v. Beauchlerk* (18), *White v. Parker* (19), *Doe d. Rees v. Williams* (20). *Channell, Serj.* was heard in reply.

The following certificate was afterwards sent :—

"This case has been argued before us, and we are of opinion—First, that the instrument executed in the month of November 1839 is the only one of the instruments mentioned in the case which has any validity as far as the legal rights of the claimants are concerned. Secondly, we are of opinion, first, that Edward Pellew Plenty and Caroline his wife took no legal estate or interest in the real property devised; secondly, that William West, the father, took at law as trustee, an estate in fee in one undivided third part of the real estate, and that he took an interest in the remaining two third parts of the real estate during the minority of his children, determinable, as to the respective shares of his children in the said two thirds, on their respectively attaining the age of twenty-one years. Thirdly, fourthly, and fifthly, that William West, the son, George West, Frederick West, and Ann West, took in remainder in fee as joint tenants, expectant on the determination of the estate of their father, in their respective shares of the aforesaid undivided two third parts of the real estate. Sixthly and seventhly, that Henry Budd, William Simmons, and Frances his wife, took no legal estate or interest in the real property devised.

"THOMAS WILDE,

"THOMAS COLTMAN,

"C. CRESSWELL,

"EDWARD VAUGHAN WILLIAMS."

"June 14, 1848."

(16) 2 Wms. Saund. 11, n. (17).

(17) 2 Term Rep. 444.

(18) 3 Bos. & Pul. 175.

(19) 1 Bing. N.C. 573; s. c. 4 Law J. Rep. (N.S.) C.P. 178.

(20) 2 Mee. & Wels. 749; s. c. 6 Law J. Rep. (N.S.) Exch. 256.

1848. }  
June 15; } LESLIE v. RICHARDSON.  
July 1. } RICHARDSON v. LESLIE.

*Arbitration—Award, Enlargement of Time for making—3 & 4 Will. 4. c. 42. s. 39.*

*The Court has power, under the statute 3 & 4 Will. 4. c. 42. s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator had power to enlarge the time, but had omitted to exercise it.*

*Petersdorff* had obtained a rule, calling on the defendant Richardson to shew cause why the time for making the award in these causes should not be further enlarged, until the first day of Michaelmas term. It appeared from the affidavits that these causes had, by a Judge's order, been referred to an arbitrator, whose award was to be made on the 1st of August 1847, with power to him from time to time to enlarge the time for making his award; that the arbitrator had several times enlarged the time for making his award, but had at last inadvertently omitted to make a further enlargement. It also appeared that both parties had subsequently attended a meeting before the arbitrator, at which witnesses had been examined.

*Byles, Serj. and Phinn* shewed cause.—The Court has only power, under the 3 & 4 Will. 4. c. 42. s. 39, to enlarge the time, where no power is given to the arbitrator to do so. If there be such a power, it is for the arbitrator to exercise it—per Patteson, J. in *Doe d. Jones v. Powell* (1). It is true that in *Parbery v. Newnham* (2), the Court of Exchequer did exercise such a power; but it is submitted, that decision was erroneous. The words of the statute are, that "the Court or any Judge may, from time to time enlarge the term for any such arbitrator making his award." This is an application not to enlarge the time—(time having actually expired cannot be enlarged,) but to revive powers which have ceased to exist. If it had been intended to give the Court authority in such a case, the words would have been not "from time to time," but "at any time." In

(1) 7 Dowl. P.C. 539.

(2) 7 Mee. & Wels. 378; s. c. 10 Law J. Rep. (N.S.) Exch. 169.

*Lambert v. Hutchinson* (3) this Court refused a similar application, Tindal, C.J. intimating a strong opinion that the Court had no power to interfere in such a case. Supposing that at the meeting which took place since the time for making the award expired, one of the witnesses committed perjury, could the Court, by granting this application, give the arbitrator jurisdiction, and would the witness be punishable in that case?

*Petersdorff*, contra.—The object of the section was to prevent the failure of justice either through the wilful act of the parties or the wilful or inadvertent conduct of the arbitrator. *Parbery v. Newnham* is expressly in point. The attendance of the parties before the arbitrator, after the time had expired, operated as an enlargement; and this shews that although the arbitrator may have no power, the time may be enlarged by the mere act of the parties. The statute was meant to give the like powers without the act of the parties. The words that "the Court may from time to time enlarge the term," will be satisfied by interpreting them to mean that where the Court has once interfered to extend the time, it can only be further enlarged by the same authority of the Court, and the arbitrator shall not further extend it.

*Cur. adv. vult.*

The judgment of the Court was delivered (July 8) by—

COLTMAN, J. [after stating the facts].—Three questions have at different times been raised as to the construction of that part of the 39th section of the statute 3 & 4 Will. 4. c. 42. which gives power to the Court to enlarge the time for making an award, viz. First, whether the power to enlarge is confined to cases where there has been an attempt to revoke the authority of the arbitrator: secondly, whether it is confined to cases in which the arbitrator has no power to enlarge; thirdly, whether the Court can enlarge after the expiration of the original or enlarged time, as the Court of Exchequer, in the case of *Parbery v. Newnham*, held they might.

With respect to the first two questions,

(3) 2 Man. & Gr. 858; s. c. 10 Law J. Rep. (N.S.) C.P. 213.

the power conferred by the act is, to enlarge the time for any such arbitrator to make his award. The only description of arbitrator which precedes this word of reference "*such*" is that at the beginning of the section; that is, "any arbitrator appointed by rule of court, Judge's order, or order of Nisi Prius." This description of arbitrator, construed according to the strict and natural sense of the word, comprehends all arbitrators appointed by rule of court, &c.; and, with reference to the first and second questions above mentioned, it is to be observed that there are no words to restrict the power of the Court in the way suggested. In order so to restrict it, some such words as "in case of such revocation," or "when the arbitrator has no power to enlarge," would be necessary. To construe the clause in an unrestricted sense seems to be most consistent with the natural construction of the words of the enactment, and, as an omission to make an award within the time limited may, and often does occur, and when it occurs often produces inconveniences in other cases besides those in which the arbitrator has no power to enlarge, or those in which an attempt to revoke has been made, there is no reason for adopting a construction of the words restrictive of their natural and proper meaning.

With regard to the power to enlarge after the expiration of an original or enlarged time, the power given to the Court is "from time to time" to enlarge the term, &c. If these words occurred, as they often do, in a submission to arbitration, in which power is usually given to the said arbitrator from time to time to enlarge the time for making the award, there seems no doubt that they would not authorize an enlargement made after the time had expired. But it is to be observed, that, in the case of a power given by the submission, it is given to the arbitrator in his character of arbitrator, which character is not absolute and perpetual, but conditional and limited—"if he shall make his award on or before," &c.: whereas, the power given by the act of 3 & 4 Will. 4. is conferred on the Court, which *has* perpetual existence, and is given absolutely, and not conditionally.

It appears therefore to us, that the power

may be so construed as to comprehend the case of an enlargement after the expiration of the time limited; and, as the mischief to be remedied would (as was pointed out in the case of *Parbery v. Newnham*) be very inadequately remedied on a narrower construction, we concur with the Court of Exchequer in thinking that the larger construction ought to be adopted.

The result is, that, in this case, there should be a rule absolute for enlarging the time, as prayed.

*Rule accordingly.*

1848. }  
June 14. } DARRINGTON v. PRICE.

*Venue, Changing—Judge at Chambers—Jurisdiction.*

*A Judge at chambers has jurisdiction to set aside a rule to change the venue, obtained on the common affidavit.*

*The time for pleading expired on the 22nd of February; defendant on the 23rd took out a summons for further time to plead; on the 24th an order was made for further time on the usual terms. The defendant did not draw up the order, but in the afternoon of the 24th (the plaintiff not having signed judgment) delivered a plea, with a rule to change the venue, obtained on the common affidavit. A Judge at chambers having set aside the rule to change the venue, the Court (Cresswell, J. dubitante) rescinded the Judge's order.*

The declaration in this case was filed on the 14th of February 1848. The venue was laid in Essex. The time for pleading expired on the 22nd of February. On the 23rd of February the defendant took out a summons for further time to plead, and at the hearing of the summons on the 24th applied for further time, without prejudice to his right to change the venue. This was refused, and the order was granted for further time "on the usual terms." The defendant did not draw up the order, but in the course of the same day (the 24th) obtained a rule to change the venue from Essex to London, upon the common affidavit, and served the rule, together with the plea of the general issue. On the 25th of

February the plaintiff delivered the issue, with notice of trial for the Essex assizes. On the 26th the defendant took out a summons to set aside the issue and notice of trial; but Coltman, J., on the 28th of February, made an order at chambers to rescind the rule to change the venue, and decided that the issue and notice of trial were sufficient. The cause was tried accordingly as an undefended action at the Essex assizes.

*Hawkins*, in Easter term, obtained a rule calling on the plaintiff to shew cause why the order of Coltman, J. should not be rescinded, and why all proceedings subsequent to the plea should not be set aside.

*Prentice* now shewed cause.—First, the learned Judge at chambers had jurisdiction to make the order: he has the same power as when sitting in court—*The Queen v. Alman* (1), *Joseph v. Perry* (2). Next, supposing the Judge had jurisdiction to make the order, he rightly exercised it; for, first, the rule to change the venue was irregular. Such a rule cannot be obtained after an order has been obtained for further time to plead, unless the order for time to plead is expressly given without prejudice to the right to change the venue—*Shipley v. Cooper* (3), *Waring v. Holt* (4). The order for time to plead was neither asked for nor granted with any such reservation here. And, secondly, the defendant's proceedings were against good faith. The time for pleading had expired before the summons for further time was taken out, and that summons and the order made thereon prevented the plaintiff from signing judgment. The Court has an unlimited power over its own process, and may stay proceedings brought against good faith—*Cocker v. Tempest* (5). A rule to change the venue will be discharged if it be merely obtained for the purpose of postponing the trial—*Amner v. Cattell* (6). There is no affidavit of merits on behalf of the defendant.

[CRESSWELL, J.—Suppose the summons for time to plead had been dismissed, could

(1) *Wilmot's Notes*, p. 264—266.

(2) 3 Dowl. P.C. 699.

(3) 7 Term Rep. 698.

(4) 3 Price, 3.

(5) 7 Mee. & Wels. 502; s. c. 10 Law J. Rep. (N.S.) Exch. 195.

(6) 5 Bing. 208; s. c. 7 Law J. Rep. C.P. 78.

the plaintiff have signed judgment immediately, or would the defendant still have had the whole of the 24th to plead in?]

The time for pleading being already out, if the summons had been dismissed, the plaintiff might have signed judgment immediately. The taking the order at all, though the defendant did not draw it up, was in the nature of a fraud.

*Hawkins*, contrà.—First, a Judge at chambers has no power to rescind or modify a rule of the full Court, unless with the consent of the parties—2 *Chitty's Archbold*, p. 1433, citing *Joseph v. Perry*.

[MAULE, J.—That only refers to cases where the rules have been made after discussion in court; not to rules of course.]

Then, as to the propriety of the order made. The defendant was perfectly regular throughout. The summons for further time to plead was no stay of proceedings, and during the whole of the 23rd the plaintiff might have signed judgment, if he pleased—*Sedgwick v. Allerton* (7). But he did not do so. The taking out a summons for further time to plead is not a waiver of the right to change the venue—*Wilson v. Harris* (8).

[WILDE, C.J.—There the defendant pleaded within the time he originally had to plead in.]

[CRESSWELL, J.—Here the defendant both asks for and obtains the order for further time upon the usual terms, which terms would prevent his changing the venue.]

But the defendant was not bound to take the order. He had a reasonable time to determine whether he would draw it up or not. In *Hughes v. Walden* (9), it was held that where a defendant obtains a rule which stays the plaintiff's proceedings, he has a reasonable time after the rule is discharged for the purpose of taking his next proceeding; and that the whole of the day on which the rule is disposed of is such a reasonable time. And in *Mengens v. Perry* (10), where a summons for particulars was dis-

missed after the time for pleading had expired, it was held that the defendant was entitled to the remainder of the day for pleading.

WILDE, C.J.—I think this rule should be made absolute. As to the power of a Judge at chambers to make an order to set aside a rule of court, the jurisdiction at chambers is a growing jurisdiction, and the public is benefited by the increase of business there, which is disposed of speedily and at little expense. I do not, indeed, remember that it has ever been distinctly held that a Judge at chambers has authority to set aside rules of court. But we must look at the nature of those rules. Some are matters of course, others of discretion. This rule to change the venue is not one of discretion, but of course. The Court merely sees that the affidavit is regular, and the venue is thereupon changed. It is merely a step in the cause. There is, therefore, no danger in allowing a single Judge at chambers to act in such a case, and to set aside such a rule, if he sees good ground for so doing. This is a different thing from his setting aside a rule which the Court has made in the exercise of its judicial discretion. In *Adams on Ejectment*, p. 260, 3rd edit., it is said: "If a party should be admitted to defend as landlord whose title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the Court, or to a Judge at chambers, and have the rule discharged with costs."—*Doe d. Harwood v. Lippencott*, cor. Wood, B., Trin. Vac. 1817. This proposition is founded on the decision of a Judge of great authority, one not likely unduly to encroach on the jurisdiction of the court. It seems to me, therefore, that a Judge at chambers may properly deal with a rule to change the venue obtained on the common affidavit, just as he may deal with many other steps in the cause which are mere matters of practice. But as to the merits of this case, I see nothing which deprived the defendant of his right to change the venue. This is a right which should not be taken away on light grounds. What grounds are there here for so doing? The defendant takes out a summons for time to plead, the effect of which was to deprive the plaintiff of the

(7) 7 East, 542.

(8) 2 Bos. & Pul. 320.

(9) 5 B. & C. 770, n.; s. c. 5 Law J. Rep. K.B. 75.

(10) 15 Meo. & Wels. 537; s. c. 15 Law J. Rep. (N.S.) Exch. 307.



right to sign judgment during the remainder of the day. But what collateral right did the defendant waive by taking out such a summons? He offers to take time to plead on the usual terms, thereby exposing himself to the chance of having terms imposed upon him; but how can it be implied from this that he in any way loses a right to take incidental steps in the cause? Why should a summons for time to plead have such an effect, any more than any other summons—a summons for particulars, for example? How far is such an implication to be carried? It might on the same ground be contended, that having applied in the ordinary form, he bound himself thereby to accept the order upon the usual terms, and to take short notice of trial. I certainly do not think that the fact of the order being made giving him time to plead (which he did not avail himself of) can deprive him of the right which, but for that order, he would have had.

COLTMAN, J.—When the application for time to plead is decided on, the party applying has the option of taking a reasonable time to determine whether he will avail himself of the order made. The ground on which I decided this case was, that the time being out for pleading, and the defendant not having taken the order, it stood as if the summons had been dismissed, and that he had then no right to change the venue; that he could not avail himself of the summons, and the order made thereon, for a collateral purpose. I agree, however, in the judgment given by my Lord.

MAULE, J.—I also think the rule should be absolute. I think the defendant has been quite regular throughout. The plaintiff might have signed judgment before the summons was taken out. He did not do so. The defendant then takes out a summons for time to plead. He is told he may have time upon certain terms. He was entitled to take a reasonable time to determine whether he will take the order on those terms or not. On the same day he determines not to take it. He delivers his plea, and obtains a rule to change the venue. Having been regular throughout, it is difficult to say that he has thereby deprived himself of any collateral right, merely be-

cause he may have had some other motive in this regular proceeding.

CRESSWELL, J.—I am inclined to think the order of my Brother Coltman was right, and that this rule ought to be discharged. If, in the event of the summons being dismissed, the defendant would have had the whole of the 24th of February to plead in, then he may have been right in his proceedings. But all the cases cited are distinguishable from the present, and no case has been cited to shew that where further time to plead has been refused, the party applying has the whole of the day to plead. Where an application is made to set aside proceedings, and that application is refused, and the rule discharged, and it is decided that the party applying is bound to go on, then he has the whole of the day to take the next step; but here, as it seems to me if this summons had been dismissed, the plaintiff might have signed judgment immediately. I am not aware that a party has time given him to deliberate whether he will take the order he has asked for or not. Time he has in many cases to determine whether he will abandon it, but if he has once taken it, he must be bound to admit that he has taken some benefit under it. If he would have been bound, in case the summons had been dismissed, to plead instantly, then by taking the order he took some advantage; for he thereby precluded the plaintiff from signing judgment: and if the learned Judge thought that he was guilty of something like a fraud in obtaining time in this way, then the Judge was right in setting aside the rule to change the venue.

*Rule absolute.*

1848. } HUMPHRIES v. LONGMORE AND  
June 28. } SMITH.

*Trespass—Inferior Court—Process.*

*Justification under a writ out of an inferior court, tested on a day not being a court day, is bad.*

*Trespass de bonis asportatis.* The defendant Longmore suffered judgment by default.

Smith justified, as Longmore's attorney under a writ of *levari facias* out of the court of the Hundred of Offlow, for a debt of 2s. 6d., and 7l. 6s. 11d. costs, recovered in that court by Longmore against the now plaintiff.

The cause was tried, at the last Stafford Assizes, before Coleridge, J., and a verdict found for the plaintiff, with liberty to move to enter a verdict for the defendant.

*Allen, Serj.* having obtained a rule,—

*Talfourd, Serj.* now shewed cause, contending (amongst other grounds), that the writ, under which the defendant justified, being issued out of the jurisdiction, and neither tested nor returnable on a court day, the rule must be discharged; and he cited *Morse v. James* (1).

*Gray*, on the other side, being called upon by the Court, admitted that the case of *Morse v. James* had taken him by surprise, and he could not distinguish it from the present case.

*Per Curiam*—

*Rule discharged.*

1848.

May 4; } BROWN v. CHAPMAN.  
June 29. }

*Trespass—False Imprisonment—Act of Magistrate—Evidence.*

*B. voluntarily attended before a magistrate to answer a charge of embezzlement, which C. then preferred against him. Before taking the depositions formally, the magistrate said, "Do you intend giving him into custody for it?" C. replied, "I do give him into custody." B. was then told by one of the constables to go into the dock:—Held, that the act of C. amounted to no more than calling on the magistrate to exercise his jurisdiction; and that the placing B. in the dock must be referred to the authority of the magistrate, and that C. was not liable in trespass for the consequent imprisonment.*

*Trespass for false imprisonment. Plea—Not guilty.*

The cause was tried, before Coltman, J.,

(1) Willes, 122.

at the Sittings for London, after Hilary term, 1847, when it appeared that the plaintiff was in the service of the defendant, and on being charged by the defendant with embezzlement, the plaintiff consented to appear before a magistrate to answer the charge. The parties met at the police office on the 12th of November 1846, when the magistrate refused to hear the case unless a charge was made. The defendant then charged the plaintiff Brown with embezzlement, upon which Brown was ordered to stand in the dock, and the case was heard. The learned Judge thought the giving into custody was the act of the magistrate, for which the defendant was not liable, and directed a nonsuit.

A rule had been obtained for a new trial on the ground of misdirection.

*Cockburn, Bramwell, and Huddleston* were called on to support the rule (May 4).—There was evidence to go to the jury whether or not the defendant gave Brown into custody, and the case was for them to decide, upon the evidence, and not for the Judge. They also contended that the magistrate had no power to give a person into custody without a warrant, or until he had heard evidence upon oath, and that it could not be presumed the magistrate had acted improperly. The following authorities were cited—*Hale's Pl. Cr.* vol. i. p. 582, vol. 2. 110, *Flewster v. Royle* (1), *Barber v. Rollinson* (2), *Cant v. Parsons* (3).

*Prentice (Byles, Serj. with him)*, contra, contended that there was no evidence to go to the jury; that the statement of the charge by the defendant to the magistrate did not render him liable in trespass, but if made maliciously, it might be made the subject of an action on the case; and that a magistrate has power to direct a person present to be taken into custody—*Vin. Abr.* (D, a), s. 8, *Arrowsmith v. Le Mesurier* (4), *Goslin v. Wilcock* (5), *West v. Smallwood* (6),

(1) 1 Campb. 187.

(2) 1 Cr. & M. 530; s. c. 2 Law J. Rep. (N.S.) Exch. 101.

(3) 6 Car. & Pay. 504.

(4) 2 New Rep. 211.

(5) 2 Wils. 302.

(N.S.) Exch. 144.

(6) 3 Mee. & Wels. 418; s. c. 7 Law J. Rep. (N.S.) Exch. 144.

*Berry v. Adamson* (7), *Carratt v. Morley* (8). They also contended that there was no arrest in point of fact. Words do not constitute an arrest—*Com. Dig.* 'Execution,' c. 12, *Dalton's Jur. Pr.* p. 580, *Genner v. Sparkes* (9).

*Cockburn* was allowed to reply.

*Cur. adv. vult.*

COLTMAN, J., in the absence of, and for, the Chief Justice, now (June 29) delivered the judgment of the Court.—This was an action of trespass and false imprisonment tried, before my Brother Coltman, at the London sittings after Hilary term, 1847, when the plaintiff was nonsuited. A rule was afterwards obtained, calling upon the defendant to shew cause why the nonsuit should not be set aside, and a new trial had; and upon the argument of the rule, the question was, whether the plaintiff had given evidence upon the trial which ought to have been submitted to the jury, that the imprisonment of the plaintiff was the act, and under the authority of, the defendant. It appeared from the report of the Judge who presided at the trial, that the first witness called on the part of the plaintiff was Mr. Gunn, who was clerk to the police magistrate at the public office, Lambeth Street, and the substance of his evidence was, that the plaintiff and defendant, with their respective attorneys, appeared at the police office on the 12th of November, when the plaintiff's attorney informed the magistrate that the plaintiff attended to answer a charge of embezzlement about to be preferred against him by the defendant, and that the defendant then said, also addressing the magistrate, "that he did prefer a charge of embezzlement against Brown," to which the witness added, "Brown was desired to go into the dock by one of us—I think I told him myself," and he added, "they were going into the matter without a charge being formally made, when the magistrate said, "I can't go into the matter unless a charge is made formally;" that the defendant then said, "Well, then I charge him with embezzling 30s.;" that the plain-

tiff was ordered to go into the dock, and the defendant was sworn. It is clear that there is nothing in the evidence of this witness which could properly be submitted to the jury to charge the defendant with this action. A witness named Coles was next called by the plaintiff, and he said, "that the defendant's attorney made some observations to the magistrate to the effect that they had a charge to make against the plaintiff," that the magistrate (as the witness believed) then said, "He could not entertain any charge unless the defendant gave the plaintiff into custody;" that the defendant then said, "He charged the plaintiff with receiving 30s. from Mr. Frances, and not accounting to him (the defendant) for the same." That the officers of the court then took the plaintiff and placed him in the dock for prisoners. This witness said that he believed the expression used by the magistrate was, that unless the defendant gave the plaintiff into custody, but added that he (the witness) would pledge his oath that the magistrate used the word "custody."

It will be observed that no expression is imputed to the defendant by this witness, but that "he charged the plaintiff with receiving 30s. from Mr. Frances and not accounting for it;" and he adds, "that the officers then placed the plaintiff in the dock." This expression of the defendant, addressed to the magistrate, was no evidence upon which to charge the defendant with the restraint or imprisonment of the plaintiff by the act of the officers of the court. What the defendant did, in thus preferring the charge of embezzlement to the magistrate (however it might subject him to another form of action if done without probable cause and maliciously), would not render him responsible in this action as for false imprisonment. The third and last witness called by the plaintiff was Johnson; and it is upon this man's evidence alone that any question can arise whether the case ought to have gone to the jury. This witness Johnson stated that upon the defendant preferring his complaint to the magistrate the magistrate said "he would not hear the charge unless it was brought formally before him;" that the defendant said "Brown had been embezzling some of his money," upon which the magistrate said "Do you intend giving

(7) 6 B. & C. 528.

(8) 1 Q.B. Rep. 18; s. c. 10 Law J. Rep. (n.s.) Q.B. 259.

(9) 1 Salk. 79.

him into custody for it?" that the defendant replied, "I do give him into custody;" and that the plaintiff was told to go into the dock; and then the matter was entered into, and he added "that it was one of the constables that told the plaintiff to go into the dock." The evidence given by the witness in his examination in chief, it will be observed, differed very materially from that of the two former witnesses, although that evidence purported to detail the same transaction as that to which the evidence of this witness referred, and if the case had depended on the comparative accuracy or credit due to the witnesses, that credit and accuracy would, of course, have been for the decision of the jury; but it did not so depend, because this witness, upon being cross-examined, said "that the statements which the two former witnesses had made as to what had passed before the magistrate were correct," thus leaving the case as it stood upon the evidence of these two witnesses. But, supposing this witness's evidence as given in his examination in chief to be correct, and disregarding the qualification of that evidence upon the cross-examination, still that evidence does not, as it appears to us, present any case for the consideration of the jury. In considering the effect of Johnson's evidence, as contained in his examination in chief, it is to be observed that the defendant, neither before his attendance at the police office nor at that time made any application for a warrant against the plaintiff, nor did any act voluntarily to cause the plaintiff to be taken into custody.

When at the police office he preferred his charge to the magistrate. All his communications and expressions were addressed to the magistrate alone, and the important expression which Johnson imputed to the defendant to have used, that is, "I do give him (the plaintiff) into custody," was said to have been so used in answer to the statement of the magistrate, "that he could not hear the charge unless it was brought formally before him;" and to the question, "Do you intend to give him into custody?" The question, therefore, upon the evidence, is whether the defendant should be considered as merely calling upon the magistrate to exercise his jurisdiction, leaving him to the

exercise of that jurisdiction upon his own discretion; or whether the defendant's expression ought to be considered as addressed to any one who might happen to be in court and who should think fit to act upon it by taking the plaintiff into custody; or, in other words, whether the imprisonment ought to be referred to the exercise of authority upon the part of the magistrate or to the unauthorized act of some officer of the police court voluntarily interfering by ordering the plaintiff to go into the dock. It appears to us that the acts of the defendant throughout amounted to no more than calling on the magistrate to exercise his jurisdiction, and that the particular expression which alone can properly be argued to be evidence of an authority given by the defendant for the imprisonment of the plaintiff, was addressed to the magistrate and him only, and that no other person could properly act upon it; and we think that such an expression used by a party to a magistrate in the course of preferring a charge, cannot be considered as constituting the magistrate the agent of the suitor, or as calling upon him to act ministerially upon the authority of such suitor, any more than an individual who should move a Judge or Court for the commitment of a party for an alleged contempt can be considered as conferring a ministerial authority upon such Court or Judge, or as rendering him responsible for any imprisonment which might be consequent upon the motion. Therefore, even taking the precise words used by Johnson to be strictly accurate, still, regard being had to the place and occasion of their being used, they must be considered as merely invoking the exercise of the magistrate's authority. This view of the case appears to us to be consistent with the general principles of law, and with the decisions connected with this particular subject.

If an individual prefers a complaint to a magistrate, and procures a warrant to be granted upon which the accused is taken into custody, the complainant in such case is not liable in trespass for the imprisonment, and that, even although the magistrate had no jurisdiction. According to the case of *West v. Smallwood*, a party who shall make a direct application to a magistrate for a warrant, that a party may be taken into

custody, is deemed thereby only to make an appeal to the magistrate to exercise his jurisdiction, and the imprisonment is referred to the magistrate's authority so as to exempt the complainant from all liability in trespass; and what takes place in the presence of the magistrate ought to be referred to the exercise of his authority, as in *Barber v. Rollinson*. In that case, the plaintiff having been discharged from criminal custody by a magistrate, was leaving the police office, when the defendant said "I have another charge against him for forgery;" upon which the plaintiff was again taken and placed at the bar: and upon the trial, before Lord Lyndhurst, in an action of trespass, in respect of this second imprisonment, the plaintiff was nonsuited; and upon motion to set aside the nonsuit it was held, that the acts of the defendant were part of the proceedings before the magistrate, for which the defendant could not be held liable in trespass; that the taking could not be considered as the act of the defendant, who

had only put the law in motion for which he might be liable in case; and it appears to us in this case that the defendant never did more than call upon the magistrate to act, and that the plaintiff's being placed at the bar must be referred to the authority of the magistrate, and that the nonsuit in this case was right, considering the case only upon the evidence in chief given by Johnson. But the cross-examination of Johnson left the plaintiff's case upon the evidence of Gunn and Coles; and upon their statements it is quite clear that the defendant merely preferred his charge of embezzlement before the magistrate, which would not render him liable in trespass for the consequent imprisonment. The rule, therefore, for setting aside the nonsuit must be discharged.

This case was heard before my Lord Chief Justice, my Brothers Cresswell and Williams, and must be considered as their judgment.

*Rule discharged.*

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END OF TRINITY TERM, 1848.

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The case of *Fagan v. Harrison*, mentioned in last year's Volume, page 279 of the Common Pleas. in the list of cases to appear in this Volume, was inserted by mistake, as the case had not then been decided. *Brown v. Barrett*, also there mentioned, is reported in this volume as *Brown v. Mallett*. *Doe d. Bloomfield v. Eyre*, in the Exchequer Chamber upon writ of error from this Court, will appear in the Volume for 1849.

**REPORTS**

OF

**CASES ARGUED AND DETERMINED**

IN THE

**Court of Exchequer of Pleas,**

BY

**HENRY HORN, Esq., FRANCIS TOWERS STREETEN, Esq.**

AND

**DAVID POWER, Esq. BARRISTERS-AT-LAW ;**

AND IN THE

**Exchequer Chamber**

**UPON WRITS OF ERROR FROM THE EXCHEQUER OF PLEAS,**

BY

**DAVID POWER, Esq. AND EDWARD WISE, Esq.**

**BARRISTERS-AT-LAW.**

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**11 & 12 VICTORIÆ.**

<b>MICHAELMAS TERM . . . . .</b>	<b>1</b>
<b>HILARY TERM . . . . .</b>	<b>90</b>
<b>EASTER TERM . . . . .</b>	<b>196</b>
<b>TRINITY TERM . . . . .</b>	<b>246</b>



# CASES ARGUED AND DETERMINED

IN THE

## Court of Exchequer of Pleas.

MICHAELMAS TERM, 11 VICTORIÆ.

1847. } DOE d. STRICKLAND v. WOOD-  
Nov. 5. } WARD.

*Copyhold—Sale of reversionary Interest under Land-tax Redemption Act, 42 Geo. 3. c. 116; Effect of, where previous Grant invalid—Union of Tenements.*

*The last reversionary grant, by the rector and lord of the manor of Bredon, of certain copyhold premises, comprised in it, in one aggregate holding and at one aggregate undivided rent, three ancient tenements, originally held of the manor, under distinct grants at distinct rents. The same rector afterwards sold and conveyed the reversionary fee in those premises, under the powers in the Land Tax Redemption Act, to redeem a portion of the land tax on the living, and the sale was confirmed by the Land-tax Commissioners under that act. In ejectment by a subsequent rector, to recover the premises, held, that the title of the defendant, who claimed under the parliamentary sale and conveyance, could not be impeached, on the ground that the sale was the sale of a reversion expectant on a void grant.*

Ejectment on a demise, dated the 9th of April, A.D. 1847, for lands situate in the chapelry of Norton, in the parish of Bredon, in the county of Worcester.

At the trial, before Erle, J., at the last Summer Assizes for Worcestershire, it appeared that the lessor of the plaintiff was rec-

tor, and, as rector, lord of the manor of the rectory of Bredon. The lands in question were originally held of the manor by copyhold grants, the first on the court roll commencing in 1762, and were from time to time renewed until the year 1834, when they were, with other premises held of the manor, sold under the Land-tax Redemption Act, the 42 Geo. 3. c. 116, for the purpose of redeeming a portion of the land-tax charged on the living. The last reversionary grant of the lands in question was at a court baron, holden on the 2nd of September 1826, of the Rev. John Keysall, the then rector, and that grant comprised in it, in one aggregate holding, and at one aggregate undivided rent, three ancient tenements, originally held of the manor under distinct grants, at distinct rents. There were two other instances on the court rolls (in prior grants) of the union in one grant of copyhold tenements, formerly held of the manor by distinct grants. By indenture, dated the 29th of August 1834,—made between John Keysall, the said rector and lord of the manor of Bredon, the Land-Tax Commissioners, and Mary Ann Thackeray,—the said J. Keysall did, in consideration, &c., grant, bargain, sell, and convey, and the said Commissioners did thereby confirm unto the said M. A. Thackeray the reversionary fee in, &c. (the premises comprised in the grant of the 2nd of September 1826), to hold, &c. discharged of all land-tax, &c.



The learned Judge directed the jury to find for the defendant, and intimated his opinion that the court rolls afforded evidence of the existence of a special custom in the manor to unite in one grant tenements originally held under distinct grants and at distinct rents: but, assuming the grant to be invalid, his Lordship thought the defendant had an indefeasible title, under the sale in 1834, for the redemption of the land-tax, which had caused no injury to his successor, inasmuch as if the grant were void, the rector might, preparatory to the sale, have made a valid grant for three lives, and have pocketed the fine.

*J. Hodgson* now moved for a new trial, on the ground of misdirection.—The learned Judge was wrong in the view he took of this question at the trial. The opinion he expressed as to the evidence afforded by the court rolls of a special custom in the manor to unite tenements originally held under distinct grants, is at variance with the express decision of the Court of Queen's Bench in *Doe d. Rayer v. Strickland* (1).

[*PARKE, B.*—Assuming the grant of 1826 to be invalid, how do you get over the bargain and sale under the Land-tax Redemption Act? Do you mean to contend that it gives no title because the previous grant by the same lord was void?]

At the trial the Judge thought the defendant's title, under the deed of 1834, good, because the rector might, preparatory to the sale, have made a valid grant for three lives and pocketed the fine, and so that no injury had been done to his successor. But, if the rector failed to make a valid exercise of the power of sale given to him by the act, no consideration of what he might have done to remedy the defect can now impart validity to the by-gone sale.

[*ALDERSON, B.*—The 95th section of the act makes the Commissioners judges of the only material fact, viz. the value.]

[*PARKE, B.*—There is a judicial approbation of the sale; and unless you impugn it on the ground of fraud, it is valid.]

The statutory power which the rector had under the 42 Geo. 3. c. 116. s. 69. enabled him to sell the "reversion of copyhold

lands granted according to the custom of any manor for life or lives, &c.," but not to sell, as he has done, a reversion expectant on a grant not made according to the custom of the manor. And therefore, as the rector had no other power to alienate the fee, it follows that the attempted sale is void, from non-compliance with the terms of the act.

[*POLLOCK, C.B.*—You say there ought to have been three grants instead of one, and then the sale would have been good; but is the sale made under the approbation of the Commissioners to be set aside on that ground?]

[*ROLFE, B.*—Assuming that the grant was void, why should not the Commissioners leave it as it was? Is there any reason why they should have put the parties to the expense of three grants?]

There is no evidence that the Commissioners knew of the fact of the union of the tenements in the grant. The sale was, in truth, an illegal exercise of the power given by the act. A power, whether given by act of parliament or by will, should be strictly followed. In *Cockerell v. Cholmeley* (2), an estate comprising a manor and tenements, with the appurtenances, was devised to trustees, to the use of the eldest son of Sir H. E. for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders, with remainder to the first and other sons of his eldest son in tail male, &c., with a power to the trustees, at the request of the person who, for the time being, should be in possession of or entitled to the rents and profits of the said manor and tenements, with the appurtenances, by virtue of the limitations therein contained, by any deed or writing, to make sale and dispose of the same, or of any part or parts of the manor and tenements aforesaid, with the appurtenances, to any person, either together or in parcels; and to that end the trustees were also empowered, by any deed or deeds, writing or writings, to revoke, determine, or make void all and every or any of the use and uses, trusts, estates, powers, provisions, and limitations thereinbefore limited, created, provided, and declared, of and concerning the manor and tenements aforesaid, with the appurtenances, sold, to be sold,

(1) 2 Q.B. Rep. 792; s. c. 11 Law J. Rep. (N.S.) Q.B. 305.

(2) 10 B. & C. 564; s. c. 1 C. & F. 60.

disposed of, or exchanged; and by the same or any other deed or deeds, writing or writings, to limit and appoint the manor and tenements aforesaid, with the appurtenances, whereof the uses should be so revoked, unto the purchaser. The trustees sold the estate, exclusive of the timber growing upon it, for 13,400*l.*, and the tenant for life by the same deed sold the timber, wood, and underwood, for 2,448*l.* It was held, that there had not been a good and valid sale, according to the power, though there the tenant for life without impeachment of waste might, at law, have cut down all the timber trees and underwood.

[PARKE, B.—The defendant claims under a parliamentary title, and there is no pretence for imputing fraud.]

[POLLOCK, C.B.—I do not see how the case of *Cockerell v. Cholmeley* applies. The rector sold all his interest, and the commissioners approved, as the act requires, of the sale; and now it is proposed to set aside the sale, because the commissioners had not all the facts before them: but if they had been before them, what difference could they have made?]

This is a conveyance of an estate in reversion, when in truth it was an estate in possession.

POLLOCK, C.B.—I think there ought to be no rule. This is an action of ejectment, and it is a satisfaction to know that if our decision is wrong, the lessor of the plaintiff may bring another ejectment, and if the Judge at the trial should rule in the same way as in the present case, a bill of exceptions may be tendered which will bring the question before a superior court. It is unnecessary to go at any length into the grounds upon which our judgment proceeds, because they have been fully shewn in the course of the argument. It is said that the reversionary grant is void, because it united three tenements in one grant. That is a purely technical objection; and it may be that the commissioners on being told of the defect, if it be one, considered that it made no difference, and acted as though there had been three grants instead of one, and so approved of the sale. Why are we to say that that transaction is void, when all that we have to inquire into is, whether the substan-

tial and proper price was paid, and when it appears there was a bargain and sale, and the money was paid and no fraud is imputed?

PARKE, B.—I am of the same opinion. It is quite clear that my Brother Erle was right in the view he took of the case, and upon which he directed a verdict for the defendant. Whether he was right in the opinion he expressed as to the existence of a special custom of the manor to unite ancient tenements in one grant, and so that the grant of 1826 is valid, it is unnecessary to decide, because the defendant claims under a bargain and sale, and also under the Land-tax Redemption Act. It is objected that the prior rector did not receive an adequate consideration for the sale of the tenements, because he sold the reversion upon a grant of three lives, and received the price of the reversion only, when it was in fact an estate in possession. That is an objection to the conveyance of the reversion, and not to the inadequacy of the price; and if the defendant had derived his title under copy of court roll, it might have been void as against a succeeding lord of the manor. But then the act of parliament provides, that the decision of the Commissioners shall be conclusive as to the adequacy of the price; and the approbation of the commissioners, together with the conveyance by the tenant for life, is a good title, unless impeached by fraud. That being so, the defendant claims under the act of parliament, and his title must be taken to be valid, unless impeached by fraud, for which there is no pretence here.

ALDERSON, B.—I am of the same opinion. It is said that the grant of 1826 was void, and that may be so; but if there was a special custom in the manor for the lord to unite copyhold tenements, no doubt under such custom the grant would be good. That may have been so, and the question may have been before the Commissioners, who may have done what was perfectly right in law as well as in justice.

ROLFE, B.—I am of the same opinion. This decision does not interfere with the case of *Cockerell v. Cholmeley*, which proceeded on this ground, that if the conveyance was not in accordance with the power, it was no answer to say that it might have been done in some other form. Apply that principle here. If this case turned on

whether the sale of the reversion of three tenements in one grant was good, it would be no answer to say, that if the grantee's attention had been called to it at the time it might have been altered; that would have been analogous to the case of *Cockerell v. Cholmeley*; but the sale here is valid, because made under the act of parliament, and the sanction of the Commissioners is sufficient. It may be that the grant of 1826 was void, and that may have been known to the Commissioners, but it was a mere matter of form, or they would not have given their sanction. The parliamentary sanction to the sale makes a good title, and it is immaterial whether the Commissioners knew all the facts or not.

*Rule refused.*

1847. }  
Nov. 25. } THOMPSON v. LANGRIDGE.

*Cognovit—Appearance, Entry of, after Lapse of a Year—Reg. Gen. Hil. Term, 4 Will. 4. rr. 35. & 73—Term's Notice.*

*Where a cognovit, in the simple form, was given before appearance, and nothing further was done for several years, the plaintiff was held to be entitled to enter an appearance, and proceed on the cognovit, notwithstanding Reg. Gen. Hil. term, 4 Will. 4. r. 35, and without obtaining the leave of a Judge, or giving a term's notice.*

In this case the writ of summons was issued on the 29th of April 1840, and was served on the 6th of May. On the 9th of May, and before appearance, the defendant gave a cognovit in the simple form. Nothing further was done until the 10th of May 1847, when the plaintiff wrote to the defendant to say he should proceed on the cognovit; and, the next day, entered an appearance, and judgment having been signed, a *ca. sa.* issued on the 15th, and the defendant was arrested thereon. On summons before Platt, B., the defendant was, by order of the learned Judge, discharged out of custody. A rule, calling on the defendant to shew cause why that order should not be rescinded was obtained; and now, (Nov. 3.)

*Willes* shewed cause.—In order to support this rule, the other side must contend

that a plaintiff may enter an appearance on the 11th of May 1847, and proceed to judgment and execution upon a simple unconditional cognovit given by the defendant on the 9th of May 1840, a period of seven years and two days; and that without either giving a term's notice or obtaining the leave of a Judge; whereas in the case of a final judgment, after the lapse of a year and a day, a defendant cannot be arrested without a *sci. fa.* First, the plaintiff was not entitled to enter an appearance at all; for, by Reg. Gen. Hil. term, 4 Will. 4. r. 35, "A plaintiff shall be deemed out of court unless he declare within one year after the process is returnable." That rule derives authority from the statute 11 Geo. 4. & 1 Will. 4. c. 70. s. 11, and therefore, in this case, the cause was really out of court.

[PARKE, B.—Suppose there had been an interlocutory judgment by default, and then a cognovit?]

In that case a term's notice would have been necessary.

[PARKE, B.—Not after a cognovit.]

Here there had been no entry of appearance; and the case is within the rule of court. No doubt a cognovit implies an authority to the plaintiff to make up the record; but that must be done while there is a cause in court; here, the writ having been served on the 6th of May 1840, the cause was out of court on the 7th of May 1841. The case of *Richardson v. Daly* (1), cited on moving for this rule, is not applicable here. In that case the defendant gave a cognovit after the expiration of a writ of *capias* against him; and this Court held, that the plaintiff might enter an appearance and proceed to execution, on the ground that if the defendant chose voluntarily to come into court and give the cognovit he might do so. That is no authority for the entry of an appearance in a cause which is out of court. A cognovit given before declaration is good—*Webb v. Aspinall* (2); but you cannot proceed on a cognovit without entering an appearance.

[PARKE, B.—Then you argue that there is a difference between a cognovit given after declaration, and a cognovit given be-

(1) 4 Mee. & Wels. 384; s.c. 8 Law J. Rep. (s.c.) Exch. 13.

(2) 7 Taunt. 701.

fore declaration, the latter being to admit the truth of a declaration to be afterwards filed; and that you contend must be done within a year after the writ is returnable?]

Yes; and, secondly, it is submitted, that a cognovit is within Reg. Gen. Hil. term, 4 Will. 4. r. 73, by which "leave to enter up judgment on a warrant of attorney, above one and under ten years old, must be obtained by a motion in term, or by order of a Judge in vacation." *Webb v. Aspinall* so decides. It was there held that a cognovit was within the rule of Hil. term, 14 & 15 Car. 2, which related to the execution of warrants of attorney. Thirdly, the defendant was entitled to a term's notice, before the plaintiff could take any further proceeding.

*Bramwell* (*The Attorney General* with him), contra.—No declaration filed or delivered is necessary previously to signing judgment on a cognovit—*Morley v. Hall* (3). It pre-supposes a declaration.

[*Willes*.—*Roberts v. Spurr* (4) shews there must be an appearance entered, otherwise the judgment will be a nullity.]

[*PARKE, B.*—No doubt there must be an appearance; but a cognovit is supposed to be given by a person who is in court, and to authorize the plaintiff's attorney to do everything necessary to obtain judgment.]

The 35th rule of Reg. Gen. Hil. term, 4 Will. 4. was intended to apply only to cases where a declaration is actually filed or delivered. The words are "unless he declare;" and the meaning of the rule is, that where the plaintiff is to declare, *practically* he is to do so within a year. Here, the plaintiff was not bound to declare at all. Moreover, it is but a rule of practice, and may be explained or modified by others, and the practice of the Queen's Bench is in accordance with that pursued in this case. Then as to the second point, the 72nd rule mentions both warrants of attorney and cognovits, but the 73rd omits cognovits, and applies only to warrants of attorney, and the reason may be found in the different powers they give and the different circumstances under which they are given. The rule as to giving a term's notice is not applicable here; it applies

only to something to be done by the plaintiff as to which something is to be done by the defendant. It is applicable to hostile proceedings only, and does not apply where the proceedings have been delayed at the defendant's request.

*Cur. adv. vult.*

*POLLOCK, C.B.* now delivered the judgment of the Court (5).—In this case, which was argued on the second day of term, we are of opinion the rule ought to be made absolute. The question turns upon this, whether, where a cognovit is given before there is an appearance, and upon which nothing has been done for more than a year, it is open to the plaintiff to act upon the cognovit without a term's notice, and without any application to the Court or a Judge, on the part of the plaintiff, for leave to enforce the cognovit. Now, a cognovit certainly may be given before appearance, and it contains an implied authority to enter the appearance. It admits a cause of action stated upon the record in the form of a declaration, and though there be not one, it is an admission on the part of the defendant, which operates as if there was one. There is, therefore, an authority to enter an appearance. If there had been an appearance and a declaration, and then a cognovit, it seems to be clear that no term's notice would be necessary, and that a party would not be prevented by any lapse of time from entering up judgment on the cognovit. It appears to us, that the absence of a declaration in this case cannot be successfully relied upon, because the defendant admits, in fact, that there is a declaration; that there is a cause of action on the record; and that is an implied authority to the other side to enter an appearance and to proceed to judgment, exactly as if there was a declaration. Neither the rule of court, Hil. term, 4 Will. 4. r. 35, nor any statute, nor any analogy arising out of the case cited of *Webb v. Aspinall*, seems to us to apply. We think, therefore, the order made was not a correct one, and the rule for setting aside the order must be made absolute.

*Rule absolute.*

(5) *Pollock, C.B., Parke, B., Alderson, B. and Rolfe, B.*

(3) 2 DowL P.C. 494.

(4) 3 Ibid. 551.

1847. } SPINDLER AND JESSIE HIS WIFE  
Nov. 12. } v. GRELLETT.

*Promissory Note—When payable at particular Place—Presentment.*

*Declaration, alleging that the defendant made his promissory note, and thereby promised to pay to the plaintiff, by name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinburgh, the sum of, &c. Averment, that the plaintiff, when and since the said sum became due and payable, was always ready and willing to receive the said sum according to the tenour and effect of the said note, of which the defendant had notice, yet, &c. On general demurrer, held, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment for payment there.*

**Debt.** The declaration stated that the defendant, on the 25th of August, A.D. 1840, whilst the plaintiff Jessie was sole and unmarried, made his promissory note in writing, and then delivered the same unto the said Jessie, and thereby promised to pay to her, by name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinburgh, the sum of 200*l.*, by instalments of 15*l.* per quarter, to commence on the 1st of December then next, and so on until the said sum of 200*l.* should be paid. Averment, that whilst the said Jessie was sole and unmarried, divers, to wit, seven of the said instalments had become due and payable, and that the said Jessie, whilst she was sole and unmarried, was always ready to receive the said last-mentioned instalments, according to the tenour and effect of the said note, and that since the marriage of the plaintiffs (which took place on the 10th of October, A.D. 1842), and before the commencement of this suit, the residue of the said instalments, and of the said sum of 200*l.* in the said note specified, had become due and payable; and that the plaintiffs since that time have always been ready to receive the said residue, and the said sum of 200*l.*, according to the tenour and effect of the said note, of which said several premises the defendant, before the commencement of this suit, had notice, yet the plaintiff hath not paid, &c.

**General demurrer.**

One of the causes of demurrer was, that although the said promissory note is shewn to have been drawn payable at a particular place, it is not alleged to have been presented there for payment.

*Addison*, in support of the demurrer.—This declaration is bad for not averring a presentment of the note at 10, Duncan Street, Edinburgh, where it was payable. There can be no doubt, since the case of *Rowe v. Young* (1), that where a note or bill is drawn payable at a particular place, a presentment for payment at that place must be averred and proved. *Sanderson v. Bowes* (2) is a direct authority for that proposition; and the statute 1 & 2 Geo. 4. c. 78. cannot be relied on here, for it does not extend to promissory notes. *Emblin v. Dartnell* (3) is a case expressly in point, and decided since that statute.

[*ALDERSON, B.*—I suppose it will be said on the other side, that the words “at 10, Duncan Street,” are only part of the description of the payee, who is described by name and addition.]

Then it would have been of 10, Duncan Street, and not “at.” The rule is, that a pleading is to be taken most strongly against the party pleading it. A contrary maxim may be urged, viz. that where words are capable of receiving two interpretations, that is to be adopted which will give effect to the instrument declared on. But that rule must be received with some qualification; and, accordingly, in the case of *The King v. Stevens* (4), Lord Ellenborough said (5), “If the word ‘until’ occurred in a contract, and the context or subject-matter shewed that it was meant in an inclusive sense, there can be no doubt the Court, in furtherance of such intention, would so construe it.” In *Fleetwood v. Curle* (6) it was “agreed that words of an ambiguous sense shall receive the best sense.” Is not the obvious meaning and best sense of these words, that the note is made payable at a particular place?

(1) 2 Brod. & Bing. 165.

(2) 14 East, 500.

(3) 12 Mee. & Wels. 830; s. c. 13 Law J. Rep. (N.S.) Exch. 255.

(4) 5 East, 244.

(5) Ibid. 257.

(6) Hob. 267.

*Needham, contra.*—As to the point of construction, it is submitted that this is not a note payable at a particular place. If that had been the meaning of the words “at 10, Duncan Street, Edinburgh,” they would have been inserted in the declaration after the words “pay to her.” “At” is a term of mere description or addition; here it means of a certain name residing at, &c., being better known by place than name, especially in Scotland. Words are not, in a case of this kind, to be taken most strongly against the party pleading.

[*ALDERSON, B.*—If the word “at” means of, why not so state it? That would then be stating the instrument according to its legal effect, and there would be no variance.]

It might have been more certain to have done so; and though there is no ambiguity in the words used, possibly there may be some uncertainty; but that is ground of special demurrer only. But further, this case is not to be governed by the decisions upon bills of exchange; for a promissory note, whilst it continues in its original shape of a promise from one man to pay to another, bears no resemblance to a bill of exchange.

[*POLLOCK, C.B.*—Take the case of an agreement.]

A covenant to pay at a particular place may be stated as a covenant to pay generally. In general between payee and maker no demand need be averred; and when an instrument is not negotiable, the maker cannot refuse payment, though the payee be unable or refuse to produce it—*Wain v. Bailey* (7). That case shews, that where the note is not negotiable, no presentment for, or demand of, payment is necessary.

[*POLLOCK, C.B.*—All that *Wain v. Bailey* decided is, that where the instrument is not negotiable, the payee need not produce it. Is it not part of the contract here that the maker will pay at a particular place?]

A promise to pay at a particular place does not limit the general liability; the only effect is to enable the maker to relieve himself, by shewing that he was ready to pay then and there, and that the plaintiff was not there to receive.

(7) 10 Ad. & El. 616.

[*ROLFE, B.*—Your argument comes to this, that though the maker is at the place named, and ready to pay there, yet because he is not somewhere else to pay you, you may bring an action against him.]

Then if presentment be necessary, it sufficiently appears here on general demurrer; for the declaration avers a readiness to receive according to the tenour and effect of the note, of which the defendant had notice—*Huffam v. Ellis* (8).

[*POLLOCK, C.B.*—There is nothing here equivalent to a direct averment of presentment, on which presentment might be proved; there is no averment of demand.]

*Addison*, in reply.—The Court will not take judicial notice of the Scotch language; and the only question is, whether this note, by a reasonable construction, is not payable at a particular place: if the meaning is at all equivocal, the words are to be taken most strongly against the party pleading. *Dovaston v. Payne* (9), per Buller, J., is an authority for both propositions. He also cited *Thornton v. Adams* (10). If the proposition contended for, that no presentment or demand is necessary, is true, what a situation of danger and difficulty it would reduce the maker of the note to.

*POLLOCK, C.B.*—I am of opinion that our judgment should be for the defendant. With respect to the form of the note, the question is, what is the effect of it as stated in the declaration, which alleges that the defendant made his promissory note, and thereby promised to pay to the plaintiff, “by the name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinburgh, the sum of,” &c.? We must take it that that is the form of the note, and the question is, what is the legal effect of such a note? Is it necessary, on account of the ambiguity and uncertainty of the language, to seek for the meaning of the parties out of the note itself? or is it not rather a good conclusion of law, from the very form of the note, that it is payable at 10, Duncan Street? The act of 1 & 2 Geo. 4. c. 78. does not apply to promissory notes at all; which must still be presented for payment at the place (if any) at which they are payable. With

(8) 3 Taunt. 415.

(9) 2 H. Black. 531.

(10) 5 Mau. & Selw. 33.

respect to the distinction between notes and bills, the only distinction is, that the former are available only in the hands of the party to whom they are made payable, whereas the latter are payable to any *bonâ fide* holder. *Wain v. Bailey* fails to shew any such distinction as that contended for, that in negotiable instruments only, the place of payment is material. Where the instrument is between the parties themselves only, I should think it more likely upon principle that the law would require a presentment at the place named for payment. It is said that the averment that the plaintiff was ready to receive the said sum according to the tenour and effect of the note, of which the defendant had notice, sufficiently shews a presentment. I think that averment insufficient, especially to supply the want of an averment of a demand of payment. This, therefore, is a case in which the note is payable at a particular place; and as the declaration omits to aver either a presentment or demand, the defendant is entitled to judgment on general demurrer.

ALDERSON, B.—I am of the same opinion. We must construe this declaration according to the English language. If in truth, 10, Duncan Street, be a part of the description of the payee, the plaintiff should have substituted the word of for “at;” and there would have been no difficulty if it really means that: on the other hand, if it means, as we must understand it in this declaration, at then the plaintiff ought not to succeed on this declaration, as it contains no averment of presentment or demand.

ROLFE, B.—I am of the same opinion; and think the demurrer must succeed, as the declaration contains no such averment of presentment as the law requires in the case of a note payable at a specified place. It is said that is not the true construction of this note, and that the words “at 10, Duncan Street,” are descriptive only of the person of the payee; but we ought not to torture these words for the purpose of giving them such a meaning: and if not, then it leaves it quite plain that the note is payable at a particular place. That being so, then it is said that it is not necessary to aver a presentment, because the defendant is bound to apply to the payee herself wherever she may be. The case of *Wain v. Bailey* was, that the party was not dam-

nified by the non-delivery up of the note, and not that presentment was unnecessary. Then the third point is, that, assuming this to be a note payable at a particular place, there is that in the declaration which amounts to an averment of presentment. But that seems a very strange construction to put on the words “that the plaintiff was always ready and willing to receive according to the tenour of the note.” They cannot apply to a presentment, and never were intended to mean it. The want of this averment is fatal.

*Judgment for the defendant.*

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1847. }  
Nov. 9. } ROGERS AND OTHERS v.  
CHILTON.

*Pleading — Demurrer — Frivolous Demurrer.*

*To an action upon a bill for 25l., drawn by the defendant, indorsed by him to K, and by K. to the plaintiff, the defendant pleaded that K.'s indorsement was in blank, and that after the bill was indorsed and became payable, K. paid the plaintiff 25l. in satisfaction; that the plaintiff delivered the bill to K, who then and until and at the time of the commencement of the action hath been and still is the holder thereof. Replication, that at the commencement of the suit the plaintiff was the holder of the bill; without this, that at the time of the commencement of the suit K. was the holder. The defendant having demurred to the replication, a Judge set aside the demurrer as frivolous:—Held, on motion to set aside the Judge's order, that the replication was good, as it put in answer so much of the plea as was necessary to make K. the holder of the bill.*

This was an application to rescind an order of Platt, B. for setting aside the demurrers to the replications as frivolous.

The declaration stated that the defendant made his bill of exchange for 25l., and indorsed the same to T. R. Kemp, who indorsed it to the plaintiffs.

Plea—That the indorsement by T. R. Kemp was in blank, and after such indorsement and after the bill became payable, T. R. Kemp paid to the plaintiffs 25l. in full satisfaction; that the plaintiffs delivered

such bill to T. R. Kemp, who then and until and at and after the commencement of the action hath been and still is the holder of the said bill. The third plea in substance resembled the second.

The plaintiffs replied to the two pleas, that at the time of the commencement of the suit the plaintiffs were the holders of the bill; without this, that at the time of the commencement of the suit, the said T. R. Kemp was the holder *modo et formâ*.

To these replications the defendant demurred.

*Flood* now moved accordingly. — The order of the learned Judge cannot be supported, for the demurrers are good, and the replications bad. The latter admit that the bill has been paid, and is not in the hands of the plaintiffs; and if that be so, it is immaterial in whose hands it is. It is true, in the case of *Fraser v. Welsh* (1) the Court held the demurrer to a similar replication to be ill; but that case is distinguishable from the present, or at all events the Court will review it.

[PARKE, B.—The question is, whether the pleas would be good if the allegation of the delivery of the bill to Kemp were struck out.]

The plaintiffs' replications ought to have been, that Kemp re-delivered the bill to them for a valuable consideration, for it is admitted by the replications that the defendant gave the bill back to Kemp.

PARKE, B.—The question is, whether the point is so clear that the demurrer ought to be set aside as frivolous. The case does not resemble that of *Fraser v. Welsh*. The point is, what is involved in the traverse of Kemp being the holder of the bill? That traverse involves as much as was necessary to make him the holder. It traverses the delivery of the bill back to him. The replications are good, and the demurrer bad. I am disposed to think that the plaintiffs might have signed judgment on the whole record, as for want of a plea. One course would be to allow the defendant to set aside the order on the terms of paying costs, producing an affidavit of merits, adding the *similiter*, and taking short notice of trial.

(1) 8 Mee. & Wels. 629; a. c. 10 Law J. Rep. (N.S.) Exch. 378.

But under all the circumstances of the case, I think we ought to refuse the rule simply.

POLLOCK, C.B., ALDERSON, B., and ROLFE, B. concurred.

*Rule refused.*

1847. } THE ATTORNEY GENERAL v.  
Nov. 18. } BAILEY.

*Excise Information—Sweet Spirits of Nitre—"Spirits," Definition of—*6 Geo. 4. c. 80. ss. 101. and 133.—7 & 8 Geo. 4. c. 53. s. 32.—2 Will. 4. c. 16. s. 10.—6 & 7 Will. 4. c. 72.—5 Vict. c. 25.

*Sweet spirits of nitre are not "spirits" within the meaning of the stats.* 6 Geo. 4. c. 80. s. 101, 6 & 7 Will. 4. c. 72, and 5 Vict. c. 25.

*A party buying sweet spirits of nitre from one who is not a licensed distiller, and without a permit, and removing, and receiving them after their removal, knowing that no duty has been paid in respect of them, and that they have been illegally distilled, is not liable to be convicted under the stats.* 6 Geo. 4. c. 80. s. 133, 7 & 8 Geo. 4. c. 53. s. 32, and 2 Will. 4. c. 16. s. 10.

*The term "spirits" within the meaning of the 6 Geo. 4. c. 80. signifies an inflammable liquid, produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the generic appellation of spirits.*

This was an Excise information, containing several counts, at the suit of the Attorney General, against the defendant, for receiving a quantity of spirits from a person who was not a licensed distiller, &c.; for receiving spirits without a proper permit; for receiving spirits after they had been removed from the place where they ought to have been charged with duty, and before the duty had been charged; and for removing and concealing goods on which a duty was imposed, with intent to defraud Her Majesty of such duty. The defendant pleaded not guilty.

The case came on to be tried, before the Lord Chief Baron, at the sittings after Trinity term, 1846, when by consent a verdict was taken for the Crown, subject to the opinion of the Court upon the following—



## CASE.

The defendant is a wholesale druggist and manufacturing chemist, residing at Wolverhampton.

In the month of December 1842, one William Faulconbridge called upon the defendant, and offered him for sale, without any permit, some spirits of wine, 56 per cent. over proof, which had been illegally and privately distilled, and which had not paid or been charged with any duty. The defendant was aware at the time that the spirits so offered to him had been illicitly distilled, and had not paid or been charged with duty. He refused to buy any such spirits, but informed the said Faulconbridge that if he would make the spirits into spirits of nitre, he, the defendant, would buy 30*l.* worth a week of him. The said William Faulconbridge said he did not know how to make spirits of nitre, and the defendant then explained to him how to do so, and furnished him with certain ingredients, viz. oil of vitriol and ground saltpetre, and sold him a still for the purpose.

Within a short time afterwards, the said William Faulconbridge mixed the materials with which the defendant had provided him with a quantity of illicitly and privately distilled spirits, which had not paid duty, and distilled from them sweet spirits of nitre, and delivered the spirits of nitre so made, consisting of two gallons, to the defendant, who accepted and paid for it.

From that time down to the time of exhibiting the information, the defendant was in the habit of receiving and paying for, on numerous occasions, without a permit, from the said William Faulconbridge, in quantities of several gallons at a time, sweet spirits of nitre, which were made from spirits of wine and nitric acid (the nitric acid being substituted for the oil of vitriol and saltpetre used on the first occasion).

To make four and a half gallons of sweet spirits of nitre, six gallons of spirits, at 56 per cent. over proof, were used.

Sweet spirits of nitre is an article usually sold by chemists and druggists, and the spirits of nitre so purchased and received by the defendant from the said William Faulconbridge on the occasions aforesaid, were merchantable sweet spirits of nitre.

The ordinary article of trade called sweet spirits of nitre is made from spirits of wine,

on which a duty is paid of 11*s.* 9*d.* per gallon, and the ordinary cost price of sweet spirits of nitre so made is from 18*s.* to 25*s.* per gallon. The price paid by the defendant to Faulconbridge was 12*s.* 9*d.* per gallon.

The chemical analysis of sweet spirits of nitre is as follows:—80 per cent. uncombined spirits, and the rest hyponitrous ether. Hyponitrous ether is a chemical compound of hyponitrous acid and alcohol. According to some methods of making sweet spirits of nitre, hyponitrous ether is not separately produced, while according to other methods they are made by a direct mechanical admixture of hyponitrous ether with spirits, in the proportion of four pints of the latter to one of the former.

The spirits from which the sweet spirits of nitre above mentioned were on all occasions made had been privately and illegally distilled by Faulconbridge, who was not at any time a licensed dealer in or retailer of spirits, and no duty was ever paid or charged on any part of such spirits.

The defendant, William Bailey, was throughout and during the whole time of the above dealings and transactions with Faulconbridge fully aware that the spirits of which the sweet spirits of nitre above mentioned were on every occasion composed had been illegally distilled by the said William Faulconbridge, and had not paid or been charged with the duty, and that the said William Faulconbridge was not a person duly qualified and licensed by law to sell or distil spirits.

The defendant also supplied Faulconbridge on the above occasions with the ingredients, viz., in the first place with oil of vitriol and ground saltpetre, and afterwards with nitric acid, for mixing with the spirit from which the spirits of nitre were distilled, for which ingredients no charge was made by the defendant upon the said William Faulconbridge.

The pleadings were to form part of the case.

If the Court should be of opinion that on the above facts the defendant had rendered himself liable to any of the penalties sought to be recovered under any of the counts of the information, a verdict for the Crown was to be entered for one penalty on any such count. If the Court should be of a con-

trary opinion, a verdict was to be entered for the defendant.

*Sir J. Jervis (Attorney General)*, (April 30th), for the Crown, contended, that sweet spirits of nitre were to be deemed "spirits" within the meaning of the 6 Geo. 4. c. 80. ss. 92, 101. He cited and referred to 7 & 8 Geo. 4. c. 53. s. 32, *The Attorney General v. Green* (1), and *The Attorney General v. Houlgrave* (2). With respect to the illegal removal of the spirits, he cited and mentioned the schedule of 6 & 7 Will. 4. c. 72, 6 Geo. 4. c. 80. s. 92, and 2 Will. 4. c. 16. s. 10.

*Martin*, contra, cited *The Attorney General v. Green*, and *The Attorney General v. Bailey* (3).

[*POLLOCK, C.B.*—If the case of *The Attorney General v. Green* were to occur again, it might become the subject of some consideration.]

He also referred to 5 Vict. c. 25. s. 6. *The London Pharmacopœia*; 6 Geo. 4. c. 80. ss. 100, 101, 115, 133, 6 & 7 Will. 4. c. 72; 2 *Russ. on Crimes*, 109; *Stark. Crim. Plead.* 193.

*The Attorney General* replied.

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

*POLLOCK, C.B.*—This was an information against the defendant, for an infringement of the Excise laws, in having purchased and received from a man, named Faulconbridge, who was not a licensed distiller or rectifier, a large quantity of spirits, without a permit, and the duty on which had not been paid. There are several counts in the information; the subject-matter of the illicit dealing being in all of them described as a large quantity, to wit, twenty gallons of "spirits." It was proved at the trial that the defendant, who is a wholesale druggist and manufacturing chemist, had for some time been in the habit of purchasing from Faulconbridge large quantities of sweet spirits of nitre. It was also proved that the sweet spirits of nitre so sold were made by mixing nitric acid with spirits of wine, except on the first occasion, when oil of vitriol and saltpetre were used

instead of nitric acid. The spirits used by Faulconbridge, in making the sweet spirits of nitre, had all been illegally distilled by him, and no duty had been paid; *all which was known to the defendant*, who supplied Faulconbridge gratuitously with the nitric acid, which he mixed with the spirits of wine. The sweet spirits of nitre, so supplied by the defendant, were ordinary merchantable sweet spirits of nitre, such as were usually sold by chemists and druggists. The defendant was convicted on all the counts of the information; and there is no doubt but that the conviction is perfectly good if the sweet spirits of nitre supplied by Faulconbridge were "spirits" within the true intent and meaning of the 6 Geo. 4. c. 80. and two subsequent acts, on which the information was founded. The Attorney General, in support of the conviction, argued that the liquid seized was clearly "spirits" within the statutes, it having been proved at the trial, that every four and a half gallons of the sweet spirits of nitre in question contained six gallons of spirits, at 56 over proof; and, further, that the chemical analysis of the compound gives eighty parts of *uncombined spirits*, to twenty of hyponitrous ether; and he further argued, that by the very terms of the statute, 6 Geo. 4. c. 80. s. 101, such a mixture is defined to be spirits within the act. The language of the clause referred to is as follows: after previous enactments, as to what shall be deemed to be "*low wines*," and what to be "*feints*," it goes on to enact that all other *spirits* produced by re-distillation, and which shall not have had any flavour communicated thereto, and all liquors whatever which shall be mixed or mingled with any such *spirits*, shall be deemed and called *plain British spirits*; and that all other *spirits* produced by re-distillation, and which shall have had any flavour communicated thereto, and all liquors whatever which shall be mixed or mingled with any such *spirits*, shall be deemed a British compound, called *British brandy*. With respect to any argument to be deduced from this last-mentioned section, it must be observed, that there is not in truth any definition as to what is meant by the word "spirits." The section is not an interpretation clause, explaining the meaning of the word "spirits," but an enactment as to

(1) 4 Price, 224.

(2) 11 *Ibid.* 217.

(3) 16 *Law J. Rep. (N.S.) Exch.* 63.

what are to be deemed to constitute the different classes or denominations of "spirits." It assumes that "spirits" is a word of known import, and then proceeds to define the different classes of spirits; so that it does not enable us to determine the material point in this case, namely, what is the meaning of the word "spirits."

In the absence, therefore, of any statutable definition, we must assume that the word is used in the Excise acts in the sense in which it is ordinarily understood; and we do not think that in common parlance the word "spirits" would be considered as comprehending a liquid like *sweet spirits of nitre*, which is in itself a known article of commerce not ordinarily passing under the name of spirits. It is very true the case finds that "spirits" enter very largely into the composition of sweet spirits of nitre, but so they do into the article called sal volatile, and into most, if not into all, kinds of varnish, and so as to other fluids, which certainly no one in common parlance would speak of as "spirits." And we think that nothing can be taken to be "spirits" within the meaning of the 6 Geo. 4. c. 80, which does not come under the definition of *an inflammable liquid produced by distillation*, either pure or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the generic appellation of spirits. It will be observed, that in the 101st section, referred to by the Attorney General, all the liquids there enumerated come within the description of liquids in different stages of progress towards alcohol, either pure or mixed with some other fluid or matter, *supposed to render them more agreeable as a beverage*. The argument derived from 6 & 7 Will. 4. c. 72. and the 5 Vict. c. 25, is entitled to great weight, and is strongly confirmatory of our view of this case. The object of those statutes was to put England, Scotland, and Ireland on an equal footing in the exportation from one country to the other of articles which have paid a duty of Excise, the amount of which varies in the different countries. For this purpose the statutes allow a drawback, in the case of exportation, from the country where the duty is high, and impose a corresponding duty on exportation from the country where the duty is low. These statutes

are only material to the present case so far as they shew the legislature did not treat the subject-matter of the enactments in those statutes (and which in terms comprise sweet spirits of nitre), as being "spirits," but as being *mixtures, compounds, or preparations, into the manufacture of which spirits enter as the basis or principal ingredient or material thereof*. This certainly tends very forcibly to shew that we are right in holding that sweet spirits of nitre are not, in the opinion of the legislature, of themselves to be considered as "spirits." Another strong argument, in favour of our view of this case, is derived from the licensing acts. The 6 Geo. 4. c. 81. compels every retailer of "spirits" to take out a licence for which he is to pay a duty at certain specified rates, and he cannot get such a licence without also taking out a licence to sell beer, which he can only do, after obtaining a previous licence from a magistrate. If, therefore, sweet spirits of nitre be "spirits" within the true intent and meaning of the Excise acts, it can only be sold by a licensed dealer in beer and spirits, and the same observation will apply to sal volatile, spirit varnish, and many other articles of commerce, of which spirits are a principal component part. All these matters are notoriously sold, and indeed this case states that they are sold, not by licensed dealers in spirits, but by chemists, apothecaries, or others; and we consider this to be a strong confirmation of the view of the case which treats them as something distinct from spirits, however largely spirits may enter into their composition. The only reported case relied on by the Attorney General, was *The Attorney General v. Green*, but that case differs materially from the present. It was an information *in rem* for the condemnation of a large quantity of *liquor preparing for vinegar*, fraudulently deposited in an unentered place. The information was framed on the 43 Geo. 3. c. 69, which imposes a duty on every barrel of vinegar, *or liquor preparing for vinegar*, which shall be made for sale. The defendant was a blacking manufacturer, and the liquor was clearly a *preparation for vinegar*, mixed with lamp black and other ingredients used in making blacking; and it was proved that the liquid, though used merely for the manufacture of blacking, was really good

vinegar, when it had been left to stand and deposit the lamp black and other materials used with it. The real question in that case was, whether, in order to bring the liquor in question within the provisions of the statute, it was necessary to allege and prove that it was liquor preparing for vinegar, for sale as vinegar. The Court held that it was not, and that it was liable to seizure if it was liquor preparing for vinegar for sale, whether it was to be sold as vinegar or otherwise. It is obvious that this is not at all the present case. The analogous case would have been, if the proceedings had been taken against a purchaser of the blacking thus made, alleging that he had unlawfully in his possession vinegar which had not paid duty. The case is certainly no authority for holding that such a proceeding could have been supported. Inasmuch therefore as sweet spirits of nitre is itself a well-known article of commerce, not commonly known under the name of "spirits," and not adapted for ordinary use as an intoxicating beverage, we think it is not "spirits" within the meaning of that word, as used in the information, and consequently there must be

*Judgment for the defendant.*

1847. } ESDAILE, PUBLIC OFFICER, v.  
Nov. 17. } TRUSTWELL.

*Company—Scire Facias against Member of Banking Co-Partnership—Declaration—Duplicity and Uncertainty—7 Geo. 4. c. 46. s. 13.*

*Quære—Whether a declaration in sci. fa. on a judgment recovered against the public officer of a banking co-partnership is bad, which alleges that the defendant at the time of judgment recovered was and from thence hitherto hath been and still is a member of the said co-partnership.*

*Semble—That a writ in that form would be quashed on application to a Judge at chambers.*

[For the report of the above case, see 16 Law J. Rep. (N.S.) Exch. p. 316.]

1847. }  
Nov. 24. } WITHAM v. LYNCH.

*Judgment—Suitors' Fund; Annuity payable out of, by Order of Lord Chancellor, under 46 Geo. 3. c. 128.—Judge's Order charging the Annuity.*

*A Judge having made an order, under the 1 & 2 Vict. c. 110. and 3 & 4 Vict. c. 82, charging an annuity, payable out of the suitors' fund, by order of the Lord Chancellor, under the 46 Geo. 3. c. 128,—this Court, considering it doubtful whether the Judge's order might not be enforced, left the question of its validity open, and discharged a rule nisi to set aside the order.*

This was a rule obtained by *Sir Fitzroy Kelly*, on behalf of the Governor and Company of the Bank of England, calling on the plaintiff to shew cause why two orders of Platt, B., of the 6th and 16th of July last, should not be rescinded.

The following facts appeared on affidavits, on reading which the rule was drawn up. In the year 1738, the sums belonging to suitors in Chancery, paid in under decrees or orders of the Court, having accumulated to a very large sum of money, an act of parliament was passed, directing the same to be invested, for account of the parties interested therein and entitled thereto, in stock or annuities, to be purchased in the name of the Accountant General. That was accordingly done, and the several accounts opened under the act have since been popularly termed "The Suitors' Fund." At the date of the said order, that fund consisted of six several accounts of government or parliamentary annuities, standing in the books of the Governor and Company of the Bank of England, kept for the entry of the National Debt of Great Britain, in the name of the Accountant General of the High Court of Chancery, such several accounts having been opened, and the several amounts of stock carried to the credit of such accounts, under and by virtue of the following acts of parliament: 12 Geo. 2. c. 24; 4 Geo. 3. c. 32; 5 Geo. 3. c. 28; 8 & 9 Geo. 3. sess. 2. c. 19; 14 Geo. 3. c. 43; and 32 Geo. 3. c. 42. In addition to those accounts, another or seventh account was kept in the books of the Bank of England, in the name of the Accountant General of the Court

of Chancery, called "The Cash Balance Account," which is an account of cash paid in from time to time in the various suits in Chancery, on account of the suitors in Chancery, and to which account is also credited cash received by the Accountant General, for the dividends and interest accruing from time to time on the stocks and annuities so comprised in the said six several accounts above mentioned. From this account monies are paid under the orders of the Lord Chancellor. The defendant, who was one of the Masters of the Court of Chancery, became entitled to a retiring pension of 1,500*l.* per annum, under the 46 Geo. 3. c. 128, and under an order of the Lord Chancellor, dated the 31st of March 1847, made "In the matter of the Suitors of the High Court of Chancery." By that order, after reciting the 46 Geo. 3. c. 128; the 3 & 4 Will. 4. c. 84; and a certain order, petition, and deed of resignation of office by the defendant, Andrew Henry Lynch, the Lord Chancellor did order, "that out of the interest and dividends of the government or parliamentary securities, carried or to be carried to the account entitled 'Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,' and out of the interest and dividends of the government or parliamentary securities carried to the account entitled 'Account of securities purchased with surplus interest arising from securities carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,' there shall be paid, but subject to and without prejudice to the payment of all salaries and other sums of money, by any act or acts of parliament not repealed by the said act of the 3 & 4 Will. 4, directed or authorized to be paid thereout by the governor and company of the Bank of England, by virtue of an order or orders of this Court, to be made for that purpose, without any draft from the Accountant General of this court, the sum of 203*l.* 13*s.*, being the proportionate part of the annual sum of 2,500*l.*, payable to the said Andrew Henry Lynch, as one of the Masters in Ordinary of this court, and which accrued from the 25th of February last, the last quarterly day of payment thereof, to the said 25th of March inst., the

day of the resignation of the said Andrew Henry Lynch (both days inclusive); and his Lordship doth hereby, on the ground that the said Andrew Henry Lynch is afflicted with permanent infirmity, disabling him from the due execution of his office, further order, that out of the dividends and interest of the government or parliamentary securities, carried to the said account entitled 'Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,' and out of the interest and dividends of any government or parliamentary securities, after the passing of the said act, 46 Geo. 3, to be purchased and placed to the last-mentioned account, but subject to and without prejudice to the payment of all salaries and other sums of money, by the several acts of parliament, in the said act 46 Geo. 3. mentioned or referred to, directed or authorized to be paid thereout, there shall be paid by the Governor and Company of the Bank of England to the said Andrew Henry Lynch, an annuity or clear yearly sum of 1,500*l.*, by even and equal quarterly payments, on the 5th day of January, the 5th day of April, the 5th day of July, and the 10th day of October in every year, from the period of his resigning his said office, for and during the term of his natural life, free from parliamentary taxes, the first quarterly payment thereof to be made on the 5th day of July next, without any draft from the said Accountant General for that purpose; and his Lordship doth order, that there be paid in like manner, but subject as lastly hereinbefore mentioned, to the said Andrew Henry Lynch, on the 5th day of April next, the sum of 41*l.* 13*s.* 4*d.*, being the proportionate part of the said annuity or clear yearly sum of 1,500*l.*, which will have accrued from the said 25th day of March to the said 5th day of April next, without any draft from the said Accountant General for that purpose."

There was no appropriation of any part of the said stocks, funds, securities, or monies for the purpose of paying the said annual sum of 1,500*l.*; but the Bank of England are in the habit of paying salaries and pensions under the order of the Court of Chancery to a large amount out of the said funds. The two sums of 203*l.* 13*s.* and 41*l.* 13*s.* 4*d.* mentioned in the above

order were paid on the 11th of May 1847, by the Bank to the defendant's attorney duly authorized out of the general cash balance to the credit of the last-mentioned seventh account.

On the 6th of July the following order *nisi* of Platt, B., dated on that day, was served on the Governor and Company of the Bank of England:—" *Witham v. Lynch*. Upon reading the affidavit of the plaintiff, I do order that unless cause be shewn to the contrary, at my chambers, in Rolls Garden, Chancery Lane, on Tuesday next, at ten o'clock in the forenoon, the annuity of the sum of 1,500*l.* a-year, payable to the defendant as a superannuated Master of the Court of Chancery out of the suitors' fund, standing in the books of the Governor and Company of the Bank of England, in the name of the Accountant General of the Court of Chancery, stand charged with the payment to the plaintiff of the sum of 4,007*l.* 17*s.*, the amount of the judgment debt in this action, pursuant to the statutes in that case made and provided." On the 16th of July, an order absolute of the said Judge, dated on that day, was served on the Bank of England as follows:—" *Witham v. Lynch*. Upon hearing counsel on both sides, and upon reading the affidavits of the plaintiff, I do order that the annuity of the sum of 1,500*l.* a-year payable to the defendant, as a superannuated Master of the Court of Chancery out of the suitors' fund, standing in the books of the Governor and Company of the Bank of England, in the name of the Accountant General of the Court of Chancery, stand charged with the payment to the plaintiff of the sum of 4,007*l.* 17*s.*, the amount of the judgment debt in this action, pursuant to the statutes in that case made and provided." These orders were made under the 1 & 2 Vict. c. 110. ss. 14, 15, and the 3 & 4 Vict. c. 82. s. 1. (1).

(1) The 1 & 2 Vict. c. 110. s. 14. enacts, "That if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part

On the 12th of July, after service of the above order *nisi*, the quarter's pension, due on the 5th of July, was demanded at the Bank by and was paid to the authorized attorney of the defendant out of the money standing to the credit of the said seventh account. The plaintiff had since brought an action on the case against the Bank of England, to recover damages in respect of that payment.

thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

By sect. 15. the order of the Judge is to be an order *nisi* made *ex parte* in the first instance, and is to restrain the Bank of England from permitting a transfer until the order is made absolute or discharged.

The 3 & 4 Vict. c. 82. s. 1. enacts, "That the aforesaid provisions of the said act (the 1 & 2 Vict. c. 110. s. 14.) shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder or reversion, in, to, or out of any such stocks, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant General of the Court of Chancery, or the Accountant General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such Judge to make an order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, that no order of any Judge as to any stock, funds, annuities, or shares standing in the name of the Accountant General of the Court of Chancery, or the Accountant General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stock, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order."

*Martin and Peacock* now shewed cause against the above rule.—The learned Judge's orders are correct. The suitors' fund has been dealt with by the legislature as an existing property. Under the 46 Geo. 3. c. 128. s. 2. a certain sum is to be invested in public securities, and according to the powers conferred on him by that act of parliament, the Lord Chancellor has by his order created this annuity. Having made the order he has no power to interfere: it is an absolute annuity, always available; and there is no uncertainty in it any more than there would be in a charge on land. Under the Chancellor's order there is a primary obligation on the Bank of England to pay the money. The words "government stock" in the 1 & 2 Vict. c. 110. s. 14. mean government stock so called; and by the 3 & 4 Vict. c. 82. s. 1. the provisions of that section are extended to the interest of any judgment debtor whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and when standing in the name of the Accountant General of the Court of Chancery, they are chargeable in the same way as if the same had been standing in the name of a trustee of the judgment creditor. Here, the defendant had a clear vested estate in possession in the annual produce of the funds standing in the name of the Accountant General of the Court of Chancery; and therefore it was lawful for the learned Judge to charge it, and the orders made by him are correct.

[ALDERSON, B.—The last statute was passed because we thought the Lord Chancellor was not a trustee.]

If these orders are not within the acts of parliament, then they are invalid and of no effect at all, and it is unnecessary to set them aside.

[ALDERSON, B.—That is rather a dangerous argument, because it would be inconsistent with the dignity of this Court to make an order which cannot be enforced.]

[PARKE, B.—You mean to say that if the Court feel any doubt about it, the order should be allowed to stand.]

Yes; because the question may then be carried to the House of Lords. The order

is only to be enforced in the Court of Chancery where all the equities relating to the fund may be taken into consideration.

*Sir Fitzroy Kelly* and *Sir J. Bayley*, in support of the rule.—The form of the Lord Chancellor's order and the terms of the act of parliament, on which it is founded, plainly shew that this order is invalid and do not admit of any doubt on the point. The order directs the payment of an annuity out of certain stock or funds standing in the books of the Bank of England, and belonging to the suitors of the Court of Chancery; it is charged on the dividends and interest arising out of the suitors' fund. It is not stock standing in the name of the defendant, or in the name of any one in trust for him, but it is what the order calls it, an annuity, *i. e.* a pension to be paid out of the proceeds of a particular fund, which is the property of the suitors of the Court of Chancery, standing, under certain acts of parliament, in the Bank of England, in the name of the Accountant General of that court, but not in trust in any way for the defendant. The order recites and is framed in accordance with the terms of the 46 Geo. 3. c. 128. s. 2; and it is important to observe that neither by the order nor in practice is there any stock or dividends specifically appropriated so as to stand in the name of the defendant, or any one in trust for him. Indeed, the 6th section of that act shews clearly that the legislature did not intend to appropriate the suitors' money to their prejudice; and if it could so happen that the whole money could be claimed by its rightful owners, they would be entitled to it, and there would be no means of paying this annuity.

[ALDERSON, B.—Is not my Brother Platt's order the order of the Court acting by the Judge? Could it be enforced by attachment? and have we any jurisdiction over it?]

If the Bank of England took no notice of it, they would certainly be liable to an attachment. This is an order made by a Judge as a member of one of the superior courts.

[PARKE, B.—Acting on behalf of the Court as a member of the Court.]

Yes; and the 15th section of the 1 & 2 Vict. c. 110. provides that the Judge shall upon the application of the judgment cre-

ditor or "any person interested" have full power to discharge the order. So that there is no doubt the Bank of England may apply to rescind the orders. This question, however, does not depend wholly on principle. In the case of *Morris v. Manesty* (2), it was held that a Judge's order charging a pension granted by the East India Company was not authorized by the 1 & 2 Vict. c. 110, and the Court set aside an order nisi on the application of the East India Company.

[ALDERSON, B.—The question of jurisdiction could not have arisen there.]

It really is the same question; though here there is a final order.

[ALDERSON, B.—Then *Morris v. Manesty* overrules *Brown v. Bamford* (3).]

Not on the point that the Court has jurisdiction to set aside the final order if wrongly made. That case is a clear authority for saying that the Court has power to rescind this order. With respect to the power to make the orders, there is nothing in the 1 & 2 Vict. c. 110. or the 3 & 4 Vict. c. 82. which points to any pension or annuity. It is government stock alone standing in the name of the judgment debtor, or some one in trust for him, which is chargeable by the first act. Then the subsequent act makes a change only in this, that where stock is standing in the name of a party, which is paid into the Court of Chancery, to abide the event of a suit, for instance, and so stands in the name of the Accountant General of the Court, it may be charged; but here, there is no stock or dividend in the name of the defendant.

[PARKE, B.—You say this order charges a kind of fluctuating stock, and not any stock or dividend specifically appropriated.]

The order, in truth, charges by its language the annuity payable to the defendant out of the suitors' fund, and that is the allacy of the order.

[POLLOCK, C.B.—The last act uses the word "interest."]

Yes; that may be in reversion, but still must be in some specific stock.

[POLLOCK, C.B.—The question is, whether this is an interest in any government

stock, funds, annuities, or shares, or the dividends thereof standing in the name of the Accountant General.]

The orders should have specified what stock the Bank were to be restrained from transferring.

[ALDERSON, B.—The Court of Chancery may direct what it thinks proper, notwithstanding the order of the Judge.]

POLLOCK, C.B.—We are all of opinion that my Brother Platt's orders should not be set aside; not because we have come to any clear opinion on the point; but we think there is sufficient doubt raised in the case to place us in a situation to allow the orders to stand. If we were to set aside the order we should conclude the question; and to say nothing about the acts of parliament, our power to interfere with the order is much too doubtful for us now to set it aside. If the order is good, it may be that it will stand; if it is bad, it may be set aside. We leave the question of its validity open.

ALDERSON, B.—The question is too doubtful for us to act upon affirmatively either way.

ROLFE, B.—The plaintiff had better not force the Court to a decision upon the point.

*Rule discharged.*

1847. }  
Nov. 6. } SHAW v. KAY.

*Lease, Commencement and Execution of—Covenant to repair.*

*Where a lease is executed on a certain day, habendum from a previous day, the tenant who has entered between the two days is not liable on the covenant to repair for breaches committed during the interval.*

Covenant. The declaration alleged that the plaintiff, by an indenture of lease of the 9th of November 1842, demised a shop and dwelling-house to the defendant, subject to certain covenants to repair, and alleged as a breach that the defendant pulled down and destroyed a great part of the dwelling-house. The defendant pleaded *non est factum*, and traversed the breach in the declaration.

(2) 7 Q.B. Rep. 674; s.c. 14 Law J. Rep. (N.S.) 1 B. 285.

(3) 9 Mee. & Wels. 42; s.c. 11 Law J. Rep. (N.S.) 1 Ch. 53.



of Chancery, called "The Cash Balance Account," which is an account of cash paid in from time to time in the various suits in Chancery, on account of the suitors in Chancery, and to which account is also credited cash received by the Accountant General, for the dividends and interest accruing from time to time on the stocks and annuities so comprised in the said six several accounts above mentioned. From this account monies are paid under the orders of the Lord Chancellor. The defendant, who was one of the Masters of the Court of Chancery, became entitled to a retiring pension of 1,500*l.* per annum, under the 46 Geo. 3. c. 128, and under an order of the Lord Chancellor, dated the 31st of March 1847, made "In the matter of the Suitors of the High Court of Chancery." By that order, after reciting the 46 Geo. 3. c. 128; the 3 & 4 Will. 4. c. 84; and a certain order, petition, and deed of resignation of office by the defendant, Andrew Henry Lynch, the Lord Chancellor did order, "that out of the interest and dividends of the government or parliamentary securities, carried or to be carried to the account entitled 'Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,' and out of the interest and dividends of the government or parliamentary securities carried to the account entitled 'Account of securities purchased with surplus interest arising from securities carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,' there shall be paid, but subject to and without prejudice to the payment of all salaries and other sums of money, by any act or acts of parliament not repealed by the said act of the 3 & 4 Will. 4, directed or authorized to be paid thereout by the governor and company of the Bank of England, by virtue of an order or orders of this Court, to be made for that purpose, without any draft from the Accountant General of this court, the sum of 203*l.* 13*s.*, being the proportionate part of the annual sum of 2,500*l.*, payable to the said Andrew Henry Lynch, as one of the Masters in Ordinary of this court, and which accrued from the 25th of February last, the last quarterly day of payment thereof, to the said 25th of March inst., the

day of the resignation of the said Andrew Henry Lynch (both days inclusive); and his Lordship doth hereby, on the ground that the said Andrew Henry Lynch is afflicted with permanent infirmity, disabling him from the due execution of his office, further order, that out of the dividends and interest of the government or parliamentary securities, carried to the said account entitled 'Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,' and out of the interest and dividends of any government or parliamentary securities, after the passing of the said act, 46 Geo. 3, to be purchased and placed to the last-mentioned account, but subject to and without prejudice to the payment of all salaries and other sums of money, by the several acts of parliament, in the said act 46 Geo. 3. mentioned or referred to, directed or authorized to be paid thereout, there shall be paid by the Governor and Company of the Bank of England to the said Andrew Henry Lynch, an annuity or clear yearly sum of 1,500*l.*, by even and equal quarterly payments, on the 5th day of January, the 5th day of April, the 5th day of July, and the 10th day of October in every year, from the period of his resigning his said office, for and during the term of his natural life, free from parliamentary taxes, the first quarterly payment thereof to be made on the 5th day of July next, without any draft from the said Accountant General for that purpose; and his Lordship doth order, that there be paid in like manner, but subject as lastly hereinbefore mentioned, to the said Andrew Henry Lynch, on the 5th day of April next, the sum of 41*l.* 13*s.* 4*d.*, being the proportionate part of the said annuity or clear yearly sum of 1,500*l.*, which will have accrued from the said 25th day of March to the said 5th day of April next, without any draft from the said Accountant General for that purpose."

There was no appropriation of any part of the said stocks, funds, securities, or monies for the purpose of paying the said annual sum of 1,500*l.*; but the Bank of England are in the habit of paying salaries and pensions under the order of the Court of Chancery to a large amount out of the said funds. The two sums of 203*l.* 13*s.* and 41*l.* 13*s.* 4*d.* mentioned in the above

**Assumpsit.** The declaration stated, that the defendant was indebted to the plaintiff in 10*l.*, for the wages or salary of the plaintiff, then due and payable, as the hired servant of defendant, and on his retainer. Account stated.

**Plea—Non assumpsit.**

At the trial, before the under-sheriff of Bristol, in August last, it appeared that the defendant, having missed some money from his house, had discharged all his servants, and amongst others the plaintiff, who was his cook, and that the present action was brought to recover a month's wages, commencing on the day of discharge from the defendant's service. The plaintiff was nonsuited at the trial, on the ground that she could not, in this form of action, recover a month's wages for a period subsequently to her discharge, but that she ought to have declared specially.

A rule *nisi* was afterwards obtained by *M. Smith*, to set aside this nonsuit, against which—

*Greenwood* shewed cause.—The plaintiff cannot, under the common count for wages, recover in respect of the month during which she was not in the defendant's service.

[**PARKE, B.**—There are several authorities both ways, and the Court must therefore, on review of the whole, decide which class of cases is correct.]

*Archard v. Hornor* (1) is precisely in point. The facts of that case were similar to the present, and Lord Tenterden said, "On that count (the count for wages) you cannot recover for any more than the time you have actually served." That case, in effect, overrules *Gandell v. Pontigny* (2), where Lord Ellenborough ruled that where a servant is hired by the quarter and discharged without sufficient cause in the middle of it, he may recover a quarter's wages under a count in *indebitatus assumpsit*, for work and labour. There, however, the plaintiff made an offer to do the duties of his situation. In *Smith v. Hayward* (3), the inclination of the Court was, that an action like the present could not be maintained. The decision of the Court in *Snel-*

*ling v. Lord Huntingfield* (4) would have been different if the argument on the other side is correct; for the plaintiff could there have recovered on the common count for wages. The opinion of the reporters in that case (p. 26) is, that *Gandell v. Pontigny* cannot be supported.

[**PARKE, B.** referred to *Eardley v. Price* (5).]

In that case there was no determination of the contract. Besides the point was not much discussed, no cases having been cited. *Collins v. Price* (6) resembles it.

[**ALDERSON, B.**—Suppose the plaintiff had received her wages in full, and had then been turned away, could she have recovered?]

She could not. Suppose after she had made a bargain for a year's service, and before she had served at all she had been told that she would not be wanted, and had gone away at the same moment, could she have recovered a month's wages in this form of action, as for past services? The rule on this subject is laid down in *Hartley v. Harman* (7).

[**PARKE, B.**—The difficulty in the case is that the plaintiff has not *served* for a year.]

*Beeston v. Collyer* (8) is in point.

[**PARKE, B.**—The servant is entitled to something, not on account of services performed, but on a distinct contract. Under all the circumstances, there may be a debt, but not a debt for work and labour.]

He referred to *Haigh v. Paris* (9).

*M. Smith*, *contra*.—The nonsuit was wrong, and must be set aside. The question is, what is the contract? The plaintiff contends that the contract is, that the master shall pay so much additional for the services of the servant, if he dismisses him improperly.

[**PARKE, B.**—No doubt the master in this case is to pay a month's wages; but they are not to be paid for services, but for turning the servant away without cause.

(4) 1 Cr. M. & R. 20; a. c. 4 Law J. Rep. (n.s.) Exch. 232.

(5) 2 New Rep. 338.

(6) 5 Bing. 132; a. c. 6 Law J. Rep. C.P. 244.

(7) 11 Ad. & El. 798; a. c. 9 Law J. Rep. (n.s.) Q.B. 179.

(8) 4 Bing. 309; a. c. 5 Law J. Rep. C.P. 180.

(9) 16 Mee. & Wels. 144; a. c. 16 Law J. Rep. (n.s.) Exch. 37.

(1) 3 Car. & Pay. 349.

(2) 4 Campb. 375.

(3) 7 Ad. & El. 544; a. c. 7 Law J. Rep. (n.s.) Q.B. 3.

The contract is, that the master will give a month's notice, or in lieu thereof a month's wages. The month's wages are not therefore due for bygone services, but by reason of the master not having performed his contract.]

In *Eardley v. Price*, Chambre, J. says, "The contract in this case being no longer executory at the time when the demand arose, the objection founded upon the stipulation being matter of special contract does not apply."

[PARKE, B.—The judgment in that case proceeds upon a refinement. The good sense of the point is to be found in the case of *Smith v. Hayward*, which has been adhered to by the Court of Queen's Bench. In this case there is not even an entering of the service by tendering service. What the defendant is called upon to pay for in this form of action is actual service.]

This is a conditional contract, and the present action may be maintained as in the case of goods furnished on sale or return. *Smith v. Kingsford* (10) is also in point.

POLLOCK, C.B.—I think this rule must be discharged. This is the case of a special contract, and the wages cannot be recovered on the count for work and labour. Mr. Smith uses the case of *Eardley v. Smith*, as shewing that the condition was, that the master should pay for bygone services; and his argument is, in effect, this, that if a man has made a bargain he ought to fulfil it, and the Court may substitute one contract for another, provided the practical conclusion is the same. But, although justice ought to be enforced, there are certain modes of proceeding, certain technical rules and forms of action which must be adhered to. If we were to take any other course, it would be impossible to say where the Courts could stop. A servant claims a month's wages for having been turned away without warning; but the master is at liberty, if he pleases, to pay him a month's wages, in lieu of keeping him. The right, however, to recover those wages is not the same as a right to recover wages for services actually performed; and one contract cannot be substituted for an-

other. I regret in this case that the plaintiff is deprived of what is actually due to her; but there is a mode of enforcing her claim, namely, by a special action, and in the present case we have no alternative. The case is governed by *Archard v. Hornor*, which, from the time of its being decided to the present, has been constantly recognized; we acted upon it in this court in the case of *Broxham v. Wagstaffe* (11).

PARKE, B.—I concur in opinion with the Lord Chief Baron. The case of *Archard v. Hornor* is full of good sense, and has been confirmed by the Court of Queen's Bench as well as by this Court. Nor has it been broken in upon by the case of *Smith v. Kingsford*, which proceeded upon a different ground. The true contract in these cases is, that a master may turn away a servant by giving him a month's wages or a month's warning; but it is a refinement to say that the month's wages claimed by the servant for a period during which she has not served, are to be considered as additional wages for bygone services. *Eardley v. Price* broke in upon the rule on this point, with the view, it would seem, of doing justice in the particular case. But that was afterwards set right in *Archard v. Hornor*.

ALDERSON, B.—I am of the same opinion. The meaning of the rule of law on the subject is, that if a party is turned away on the instant, without just cause, he is entitled to compensation.

ROLFE, B. concurred.

*Rule discharged.*

1847. }  
Nov. 25. } ANONYMOUS.

*Attorney, Striking off the Rolls—Evidence of Identity—Time of Application.*

*A rule to strike an attorney off the rolls for misconduct having been applied for on the production of a similar rule granted by the Common Pleas against the same party, the Court refused it, there being no evidence of the identity of the parties.*

*A rule of this kind ought not to be moved for on the last day of term, but in sufficient*

(10) 3 Scott, 279; s. c. 5 Law J. Rep. (N.S.) C.P. 271.

(11) 5 Jurist, 845.

*time to enable the party to shew cause against it within the term.*

Ball moved, on the last day of term, to strike an attorney off the rolls of this Court for misconduct.—The application is made on the production of a similar rule against the same person, lately granted in the Court of Common Pleas. The party against whom the motion is made is also an attorney of this court. The course to be pursued in such a case is not laid down with any certainty in the books of practice.

[ALDERSON, B.—We must have some evidence of the identity of the party.]

POLLOCK, C.B.—We cannot take it for granted that the attorney in this case is the same person against whom a rule has been granted by the Court of Common Pleas. Besides, this is the last day of term, and a proceeding of this kind ought not to hang over the head of a party during the whole vacation. The motion ought to have been made in time to enable him to answer it, and perhaps to clear himself within the term.

ALDERSON, B. and ROLFE, B. concurred.

*Ball took nothing.*

1847. } OLLIVE AND ANOTHER v.  
Nov. 18. } BOOKER.

*Ship and Shipping—Charter-party—  
Time of Sailing—Condition Precedent.*

*In an action on a charter-party made between the plaintiffs and the defendant, the declaration alleged, as a breach, that the defendant did not ship a full cargo of linseed according to the terms of the charter-party. The defendant pleaded, setting forth the charter-party, which stated that it was mutually agreed between the plaintiffs, as original charterers of the vessel called the Dove, A, 1, "now at sea, having sailed three weeks ago," and the defendant, that the said ship should sail to Marseilles, and there load a full cargo of linseed, and should then proceed to one safe port in the United Kingdom, and deliver the same on being paid freight. Averment, that upon the making of the said charter-party time was an essential part of the contract, and that the probable situation of the vessel, with*

*reference to the date of her sailing, was also a material and necessary part of the contract; that at the making of the charter-party, the vessel had not sailed three weeks before, but, on the contrary, had sailed at a materially and unreasonably later time, to wit, one week later, which plaintiffs, at the time of the making of the charter-party knew, wherefore the defendant declined to load any cargo. Replication de injuriâ. A verdict having been found for the defendant on this issue,—Held, on motion for judgment non obstante veredicto, that the fact of the vessel having sailed three weeks was a condition precedent to the defendant's liability to load, and that the defendant was entitled to judgment.*

*Semble, per Parke, B., that the averment of the plaintiffs' knowledge was an immaterial averment.*

Assumpsit on a charter-party. The declaration stated, that under and by virtue of a certain charter-party of affreightment, it was agreed by the plaintiffs, therein described as the charterers of the good ship or vessel called the *Dove*, A 1, of the measurement of 149 tons or thereabouts, therein alleged then to be at sea, having sailed three weeks before, and the defendant, therein described as of London, merchant, that the said ship being tight, staunch, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Marseilles (after having delivered her cargo at Genoa for the ship's account), or so near there as she might safely get, and then load from the factors of the defendant a full cargo of linseed or other goods, which the defendant bound himself to ship, not exceeding, &c., and being so loaded should therewith proceed to one safe port in the United Kingdom, calling at Cork or Falmouth for orders, and deliver the same on being paid freight, at and after the rate, &c., the act of God, restraints of princes, &c. always excepted; that the freight was to be paid on unloading and right delivery of the cargo, one-third in cash, and the remainder by an approved bill on London, at nine months' date. Thirty working days were to be allowed, Sundays excepted, the defendant (if the ship was not sooner despatched) for loading the said ship at Marseilles, and unloading at the return port.

The declaration, after stating other terms

*scribers' agreement or the parliamentary contract at all. The scheme having proved abortive he brought an action against one of the managing committee for money had and received:—Held, that he had placed himself in the same position as if he had signed the parliamentary contract, and was not entitled to recover.*

Indebitatus assumpsit, for money had and received, and on an account stated.

Plea—Non assumpsit.

The cause was tried before Pollock, C.B., at the Middlesex sittings, after last term, when it appeared the action was brought to recover a deposit of 2*l.* 2*s.* per share on 500 shares in the "Hull and Lincoln Direct Railway Company," provisionally registered. The defendant was one of the managing committee, and the deposit had been paid under the following circumstances. The day after the parliamentary deposit at the Bank of England, and the lodging of the subscribers' agreement and parliamentary contract at the Private Bill Office, the plaintiff, at the company's office, signed an application for shares, containing the usual undertaking to sign the subscribers' agreement and parliamentary contract, when required. There was no letter of allotment, but there was a minute in the company's books that 500 shares were to be allotted to the plaintiff on payment of the deposit. The plaintiff paid the deposit, and a day or two afterwards received scrip certificates for the shares, giving the usual receipt for them. The plaintiff never signed the subscribers' agreement or the parliamentary contract, but the form of the scrip was "The subscribers' agreement and parliamentary contract having been signed by the person to whom the certificate is issued for the number of shares mentioned therein, and a deposit of 2*l.* 2*s.* per share having been paid thereon, the shares have been registered in the company's books." The undertaking failed, and the affairs of the company were wound up. The concern was a *bona fide* one, and no fraud was imputed. The Chief Baron told the jury that if the plaintiff took the scrip, professing that he had signed the parliamentary contract, he must be taken to have acquiesced in the terms of the contract; and, the jury being of opinion that the plaintiff had entered into the same con-

tract as though he had signed the parliamentary agreement, the defendant had a verdict.

W. H. Watson (*Dowdeswell* with him) now moved for a rule to shew cause why the verdict should not be set aside, and a new trial had.—The facts in this case, viz., the application for shares, the entry in the company's books that shares were to be allotted, and the delivery of scrip certificates amount to nothing, and the scheme having proved abortive, the case is within *Walstab v. Spottiswoode* (1); and the plaintiff was entitled to recover.

[ROLFE, B.—Did not the plaintiff put himself in the same position as if he had signed the deed?]

Scrip certificates are a mere token, saleable in the market, and were no evidence of any contract.

[ALDERSON, B.—On what terms then does he sign the receipt for the scrip?]

[POLLOCK, C.B.—The jury say that he did contract, and in the same way as if he had signed the deed.]

There was no evidence of any contract.

[PARKE, B.—The effect is that the plaintiff puts himself in the same position as regards the defendant as if he had signed the deed.]

[ALDERSON, B.—There is no magic in the words *parliamentary contract*.]

*Per Curiam*—We think it quite clear there ought to be no rule.

*Rule refused.*

1847. }  
Nov. 25. } SHARLAND v. LOARING.

*Costs*—*Statutes 4 & 5 Anne, c. 16. ss. 4. and 5. and 3 & 4 Vict. c. 24.—Divisible Causes of Action.*

*To an action for trespasses in three closes, A, B, and C, in one count, the defendant pleaded a public way over all three, and other pleas of justification; the plaintiff traversed all the pleas except so much of the plea of public way as related to close C, as to which he new assigned trespasses *extra viam*. The jury found for the defendant on the plea of public way over closes A. and B.*

(1) 15 Mee. & Wels. 501; *r. c.* 15 Law J. Rep. (n.s.) Exch. 193.

had not sailed as in the said charter-party set forth, to wit, upon, &c., and wholly neglected and refused to load any cargo on board her, to wit, upon, &c., as he lawfully might for the cause aforesaid. Verification.

At the trial, before Pollock, C.B., at the London Sittings, after Hilary term last, the jury found a verdict for the defendant on the eighth, ninth, and eleventh issues, leave being reserved to the plaintiffs to move to enter a verdict for them on the two latter issues.

*Crowder*, for the plaintiffs, having obtained a rule *nisi*, accordingly, on the ground that the facts proved did not support those issues, and also for judgment on the eighth plea, *non obstante veredicto*,—

*Watson and Greenwood* shewed cause.—First, there was ample evidence to sustain the verdict on the ninth and eleventh issues (1). The main question, however, arises upon the eighth plea, and it is this, whether the statement in the charter-party and in the plea, that the vessel was “now at sea, having sailed three weeks ago,” is a condition precedent to the defendant's liability to load the vessel, or merely a representation. If it is a condition precedent, then as the condition had not been complied with, the eighth plea, which has been found for the defendant, is good, and affords an answer to the action. *Glaholm v. Hays* (2) is precisely in point. There it was agreed by a charter-party that the vessel should proceed to Trieste, and load a cargo of wheat, &c., and should then proceed to a port in the United Kingdom: “the vessel to sail from England on or before the 4th of February then next.” It was held, that the sailing of the vessel was a condition precedent to the owner's right to sue the merchant for not providing a cargo at Trieste. So where in a charter-party, no time of sailing is mentioned, it is an implied condition that the vessel shall sail within a reasonable time; and if she does not arrive within a reasonable time the charterers may refuse to load her—*M'Andrew v. Adams* (3). In cases like the present the delay of a week may be most important; and here the jury,

by their verdict, have found it to be so. It cannot be contended that if this vessel were not, in the terms of the charter-party, “tight, staunch and strong, and every way fitted for the voyage,” the merchants would be bound to load her. The case of *Hart v. Windsor* (4) throws some light on this point.—(They were then stopped by the Court.)

*Crowder and Bovill*, contra.—The statement as to the time of sailing is not a condition precedent, but merely a representation, for which, if false, an action would lie. The plea states, that the plaintiffs knew that the ship had sailed a week later than the stipulated time: that shews that the defendant did not require anything more than a representation, which, if false, should have the effect of vitiating the charter-party. It never was the intention of the parties to this contract, that the instrument should be void if the vessel did not sail exactly within the time specified. The case would have been different if the plaintiffs had used the word “warranted.” *Glaholm v. Hays* is distinguishable, because there the position in the charter-party of the clause as to sailing shews that it was meant to be a condition precedent. Besides, there the stipulation was for a future act; whereas here it refers to a past event. In the present case the language of the charter-party is more like a statement agreed upon by both parties than a condition precedent. They cited and referred to *Dunlop v. Waugh* (5), and the case of *Jeudwine v. Slade* (6), and *Stavers v. Curling* (7). They then contended that the rule ought to be made absolute for entering a verdict on the ninth and eleventh issues.

PARKE, B.—This rule must be absolute for entering a verdict on the ninth and eleventh issues, and discharged as to the eighth. The eighth plea, which raises an important question, is proved, except so far as relates to the averment that the plaintiffs knew that the vessel had sailed; and as to the importance of that allegation, the plaintiffs may, if they please, take the opinion of a

(1) This part of the case having turned upon the facts, the argument is omitted.

(2) 2 Man. & Gr. 257; s. c. 10 Law J. Rep. (n.s.) C.P. 98.

(3) 1 Bing. N.C. 29; s. c. 3 Law J. Rep. (n.s.) C.P. 236.

(4) 12 Mee. & Wels. 68; s. c. 13 Law J. Rep. (n.s.) Exch. 129.

(5) Peake, N.P.C. 123.

(6) 2 Esp. 572.

(7) 3 Bing. N.C. 355; s. c. 6 Law J. Rep. (n.s.) C.P. 41.

Denman's Act was framed with the same object as the stat. of Eliz., which it recites, viz., to avoid trifling and frivolous suits; and by that act, if a plaintiff brings what by the verdict of a jury for him with less damages than 40s., is shewn to be a frivolous action, he is not to recover in respect of such verdict any costs whatever.

[ALDERSON, B.—The words of the stat. of Eliz. are remarkable, viz., that where the debt or damages to be recovered shall not amount to 40s., the Judge shall not award for costs to the party plaintiff *any greater or more costs than the damages recovered.*]

Lord Denman's Act does not contemplate a division of causes of action, for the purposes of costs; and where a plaintiff recovers less than 40s., and the Judge does not certify, the action is frivolous, and the plaintiff is to have no costs at all—*Marriott v. Stanley* (2). It ought, like all statutes which deprive a plaintiff of costs, to be construed generally and liberally, and not to be limited—*Irvine v. Reddish* (3). The statute 4 & 5 Anne, c. 16. ss. 4, 5, does not apply here. That statute only applies where there is a plea found for the defendant, which would entitle him to the general costs of the cause—*Richmond v. Johnson* (4); here the plaintiff would, but for Lord Denman's Act, be entitled to the *postea*. The case of *Newton v. Rowe* (5) is in point. That was an action of libel to which the defendant pleaded the general issue, and several special pleas; and the plaintiff had a verdict with one farthing damages; and there was no certificate under Lord Denman's Act; and it was held that the plaintiff was not entitled to any costs, either on the general issue or the special issues.

[ROLFE, B.—There the plaintiff recovered on all the issues.]

Yes, the statute of Anne did not apply; nor does it in this case, because there is no plea here found for the defendant, which, independently of Lord Denman's Act, would give him the general costs. The 7th rule of Hilary term, 4 Will. 4, does not apply here; it is subservient to the statute of

Anne—*Simpson v. Hardiss* (6), *Robinson v. Messenger* (7), *Fry v. Monckton* (8); and the 3 & 4 Vict. c. 24. is subsequent to it.

*Montague Smith*, in support of the rule.—There are three distinct causes of action here, to which there are distinct lines of pleading, and on two of those causes of action the defendant has substantially succeeded, and the plaintiff has succeeded on the third, as to which it is admitted that the verdict being under 40s., and there being no certificate under Lord Denman's Act, he is entitled to no costs. The plaintiff, however, is entitled to the costs of those issues found for him which are applicable to the causes of action on which the defendant has succeeded. This case is distinguishable from *Newton v. Rowe*, where there was but one cause of action, and all the issues on the record were found for the plaintiff. The present plaintiff seeks to have these costs, not in respect of "such verdict," that is, the verdict for less than 40s., but in respect of a verdict on different matters, and under the statute of Anne, contending that there are two causes of action, to which the defendant has pleaded several useless pleas, which have been found for the plaintiff, while the fact of the defendant having succeeded on those causes of action prevents their being of necessity frivolous under the 3 & 4 Vict. c. 24. In *Howard v. Cheshire* all the issues were found for the plaintiff. The effect of the statute of 4 & 5 Anne was to allow the plaintiff costs where the defendant pleaded several pleas and succeeded on one only—*Spencer v. Hamerton* (9), where, in an action of libel, the defendant having succeeded on the general issue, which went to the whole cause of action, the plaintiff was allowed the costs of several special pleas found for him. The result of the argument on the other side is, that the plaintiff is in a much worse position than if he had *lost* the verdict on the new assignment.

*Cur. adv. vult.*

(2) 9 Dowl. P.C. 59; s.c. 10 Law J. Rep. (N.S.) C.P. 50.

(3) 5 B. & Ald. 796.

(4) 7 East, 583.

(5) 1 C.B. 187; s.c. 14 Law J. Rep. (N.S.) C.P. 132.

(6) 2 Mee. & Wels. 84; s.c. 6 Law J. Rep. (N.S.) Exch. 16.

(7) 8 Ad. & El. 609; s.c. 7 Law J. Rep. (N.S.) Q.B. 208.

(8) 9 Dowl. P.C. 967.

(9) 4 Ad. & El. 413; s.c. 5 Law J. Rep. (N.S.) K.B. 114.

1847. }  
Nov. 11. } FRYER v. ANDREWS.

*Pleading—Order to plead several Matters—Irregularity—Signing Judgment.*

To a declaration, containing three counts, the defendant, who had appeared by attorney, obtained a rule generally to plead coverture and the Statute of Limitations, and, accordingly, pleaded those pleas to the whole declaration. The pleas were set aside by a Judge at chambers, on the ground that a defendant could not appear by attorney and plead coverture. The defendant then, without obtaining a fresh rule to plead, pleaded to the first two counts, coverture, and to the whole declaration, the Statute of Limitations, whereupon the plaintiff signed judgment:—Held, that the judgment was irregular, for as the rule to plead had not been set aside, the defendant was at liberty to plead the pleas in question, and was not bound by the terms of the rule to plead them to the whole of the declaration.

This was an action on two promissory notes, and the declaration contained two counts on the notes, and a third count on an account stated. The defendant, who was a married woman, appeared by attorney, and having obtained a rule in general terms to plead coverture and the Statute of Limitations, pleaded those pleas to the whole declaration. A summons was afterwards obtained, and an order made thereon for setting aside these pleas, on the ground that a married woman could not appear by attorney, and the defendant had two days' time to plead *de novo*. The defendant thereupon, without entering a fresh appearance, or obtaining a fresh rule to plead, pleaded the Statute of Limitations to the whole declaration, and coverture to the first and second counts. The plaintiff, under these circumstances, having signed judgment as for want of a plea, Platt, B. made an order to set it aside, with costs to be paid by the plaintiff.

Unthank moved for a rule, calling upon the defendant to shew cause why the order of Platt, B., setting aside the judgment signed by the plaintiff, should not be rescinded, or why a rule to plead several matters should not be set aside. It is submitted that the judgment was regular,

and that the order setting it aside must be rescinded. First, the rule to plead several matters directed the plaintiff to plead the pleas in question to the whole declaration, whereas she has confined one of her pleas to the first two counts.

[PARKE, B.—The rule does not specify to which counts the pleas are to be pleaded; it is a permission to the defendant to plead the pleas in any manner she may think fit.]

Secondly, when the Judge set aside the pleas, he in fact set aside the rule to plead; the defendant, therefore, could not plead the same pleas again without a fresh rule to plead.

[PARKE, B.—The first rule is a sufficient sanction for the pleas as they were last pleaded; it does not tie the defendant down to plead them in any particular form. The pleas were warranted by the order, and my Brother Platt was right in setting aside the judgment, as it ought not to have been signed.]

POLLOCK, C.B.—If the defendant in the first instance made a bad use of the rule to plead, there is no reason why she should not afterwards make a good use of it. There will be no rule.

PARKE, B.—The pleas were set aside on a collateral ground, that the defendant ought not to appear by attorney and plead coverture. The judgment signed was irregular, for the defendant was right in availing herself of the pleas ultimately pleaded by her.

ALDERSON, B. and ROLFE, B. concurred.

*Rule refused.*

1847. }  
Nov. 24. } CAINE v. HORSFALL.

*Ship and Shipping—Supercargo—Commission—"Net Proceeds."*

The following letter was addressed to a captain and supercargo by his employers:—  
"Your commissions are 6l. per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., 4l. per ton from the gross sales of the oil when taken from the quay, and 4l. 15s. when warehoused:—Held, upon the construction of this letter, (Parke, B. and Rolfe, B. dubitantibus,) that the commissions were payable



*only upon the proceeds which came to hand, after deducting bad debts upon the sales.*

Debt, for work and labour, care, diligence, journeys, and attendances, as the factor and agent of the defendants, and for commission in respect thereof, for money paid, for interest, and on an account stated. The defendant pleaded *nunquam indebitatus*, acceptance in satisfaction and discharge, and set-off. The particulars of demand shewed that the action was brought to recover 2,275*l.* 12*s.* 4*d.* for commission on several cargoes of palm oil. The particulars of set-off shewed various items and cash payments to an amount exceeding the sum claimed.

At the trial, before Rolfe, B., at the Lancashire Spring Assizes, 1847, it appeared that the plaintiff had for many years been in the employ of the defendants, as master and supercargo; and the matter in dispute between the parties was, whether, upon the following document, the plaintiff, as captain on an African voyage, was entitled to a commission of 6*l.* per cent. on the proceeds of his homeward cargo of palm oil, on the amount of sales, without any deduction in respect of bad debts, arising out of the failure of parties, to whom portions of the oil had been sold.

"Liverpool, February 3, 1845.

"Captain Charles Caine,

"Your commissions are 6*l.* per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., 4*l.* per ton, from the gross sales of the oil when taken from the quay, and 4*l.* 15*s.* when warehoused. No commissions allowed in watered oil. We are, &c.,

"Charles Horsfall & Son."

There was evidence that, in ordinary mercantile language, "net proceeds" meant exclusive of bad debts.

The learned Judge was of opinion that the defendants should be allowed to deduct losses, sustained by reason of bad debts, on certain sales of portions of the cargo, before the plaintiff was entitled to his commission; and his Lordship nonsuited the plaintiff, with leave to enter a verdict for 370*l.*, if the Court should think his construction of the instrument wrong. A rule having been obtained accordingly,

*W. H. Watson and Forsyth* now shewed

cause.—The object of this commission on the homeward cargo, beyond the regular wages, is to ensure the energy and skill of the captain as supercargo in a hazardous employment, and the proceeds of the adventure are as it were divided between the parties in certain proportions, so that a loss to the property, by bad debts or otherwise, incurred without the default of either party, ought not to fall on one only. The true meaning of the document is, that the plaintiff is to have a commission of 6*l.* per cent. on the sum actually received; it means on the net proceeds when ascertained, or on the money which actually comes into the defendants' hands. It cannot mean that the 6*l.* per cent. is to be calculated on the value of the cargo, because the sales must be made, and the charges thereof taken into account. Moreover, there might be a total destruction of the cargo by fire, and in that case the plaintiff would clearly be subject to the loss of his commission. A bad debt cannot be said to be part of the proceeds of the cargo.

[PARKE, B.—Take the letter altogether, and what do you say to it?]

It strengthens the defendants' view of the meaning of the words "net proceeds," inasmuch as it shews that *all* charges are to be deducted; the charges of 4*l.* per ton, when taken from the quay, and 4*l.* 15*s.* when warehoused, being specified merely on account of their being of a fluctuating nature. That is a limitation on a peculiar and uncertain class of charges. Cases might arise in which it would be impossible to carry out the view contended for on the other side. Suppose, for instance, the case of a fraudulent purchase of a portion of the cargo, the owner might maintain trover, and revest himself with the goods, and then there might be a subsequent sale, for a less sum, the price having fallen in the mean time; on which sale would the commission be payable? Or suppose the goods landed, and then injured or destroyed by fire before sale. It does not mean that the 6*l.* per cent. shall be paid on a nominal contract of sale, but on the net proceeds, or sum realized. The words "after deducting," &c. is a mere statement of deduction of particular charges. The expression "net proceeds" has the same meaning as "net profits," used in *Storey vs Partnership*, p. 62. The plaintiff trusts to

the care and prudence of his employer in making the sales; and he could not be liable to loss, though in some cases he might not get much profit.

*Martin and Cowling*, in support of the rule.—The whole letter, which is a letter of instructions, must be read together; and it is then plain that “net proceeds” there means not on an account current, but the amount of gross sales, less the 4*l.* or 4*l.* 15*s.* per ton. The captain, who acts as supercargo, has discharged his duty by expending his labour and skill in procuring and bringing home a cargo; and is it reasonable to suppose that the intention could be that he should be deprived of his compensation for it, by bad debts incurred by sales over which he had not the least controul?

[*PARKE, B.*—The 4*l.* per ton only includes dock charges; you would be making the owner pay commission on brokerage.]

It means 6*l.* per cent. on amount of the sales, deducting the charges of the sale at the time. The letter shews that the African charges are to be deducted from the gross sales, and then the 6*l.* per cent. is to be calculated on the residue.

*POLLOCK, C.B.*—I am of opinion that this rule should be discharged.—I have always understood that in construing an act of parliament, or a deed, or a contract, we ought to read the words in their ordinary sense, and not to alter their general signification unless it is quite clear that they are used in a different sense. This document is an agreement for a commission of 6*l.* per cent. on the *net proceeds* of a homeward cargo, after deducting the usual charges, &c. viz. a specified sum per ton from the gross sales thereof when taken from the quay and when warehoused. The question is, what is the meaning of that? I do not entertain any doubt that it means that the 6*l.* per cent. is to be payable on the sum actually received after making all deductions, and not on what is nominally received as the amount of the sales, without taking into consideration deficiencies arising from losses by bad debts or otherwise. It is contended that the proper construction of this contract is, that the commission is payable on the amount of sales, after deducting the specified sum per ton only, and that the words “net proceeds” are explained and

controuled by those subsequent words; so that it is proposed to read it thus: “Your commissions are 6*l.* per cent. on the net proceeds of your homeward cargo,” *that is to say*, “after deducting the usual charges,” &c. But why should we so read it?—and if not, the words “net proceeds” must be understood here to mean what they ordinarily mean in mercantile language. The correct way of reading the letter is as if it began thus: “After deducting the usual charges, &c. then your commission is 6*l.* per cent. on the net proceeds.” There would be little difficulty then if you only give the words “net proceeds” their ordinary and proper meaning. So that I think this is a contract to pay commission on the net proceeds, with a stipulation for a deduction of 4*l.* per ton in respect of certain particular charges. As to this being a hard bargain for the plaintiff, that cannot make any difference in the construction of the letter; but I do not see the hardship. It is said that the plaintiff gets nothing for his labour; nor ought he unless the owner receives some remuneration for the outlay of his capital. He is pretty certain to get his commission on some part of the cargo. It is said he has no controul over the sales, but the owner has so large an interest in taking care that the sales are properly made that the captain’s risk in that particular is but small. There is a necessity for trust on both sides. I own I think the case very clear, and that the rule should be discharged.

*PARKE, B.*—I concur in opinion that this rule should be discharged. In the course of the argument I entertained some doubt (and I cannot say that it is entirely removed) on the only view of this question in which it is open to doubt; but the best course seems to be to adopt the construction put on this letter at the trial, which is, certainly, not an unreasonable one. It is said the captain has no controul over the sales, and that it is a hardship on him, after his labour in procuring a cargo, to be at the mercy of the owner; but the answer is, that the captain trusts the owner of the cargo to get the best price for it; and as ninety-four parts belong to the owner and the captain has but six, that seems reasonable enough. The expression “net proceeds” means the sum which comes into the defendants’ pocket; and the short question is,

whom the said shares should be allotted by a committee of management of the said proposed company. That before and at the time of the defendant's application for shares, and the making of his said promise as hereinafter mentioned, the plaintiffs formed and were the committee of management of the said proposed company. That before the making of the promise by the defendant as hereinafter mentioned, to wit, on the 8th of October A.D. 1845, the defendant applied to the plaintiffs, then forming and being such committee of management as aforesaid, and requested them to allot him, the defendant, fifty of the said shares in the said proposed company, and then undertook to accept the same, or any less number that might be allotted to him; and thereupon heretofore, to wit, on the 25th of November 1845, the plaintiffs, at the request of the defendant, allotted to him thirty-five of the said shares in the said company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him as aforesaid, making in the whole a large sum of money, to wit, the sum of 73*l.* 10*s.*, should be paid by him the defendant, on or before the 9th of December A.D. 1845, to the account of the said company, to one of certain bankers then appointed and agreed upon in that behalf, to wit, the London and County Joint-Stock Bank, Lombard Street, and Brighton, and at their several country branches, and Messrs. Hall, West, & Borrer, Union Bank, Brighton, of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on the day and year last aforesaid, promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his the defendant's part, and although the plaintiffs were always ready and willing to perform and fulfil the said terms in all things on their part, and although the said 9th day of December elapsed after the said promise of the said defendant, and before the commencement of this suit, of all which premises the defendant hath always had notice; yet the de-

fendant, disregarding his said promise, did not, nor would on or before the said 9th of December, pay, nor hath he since paid, to any or either of the said bankers, or at any of their banks, either in London or elsewhere, or to any other person, to the account of the said company, the said deposit of 2*l.* 2*s.* per share; but hath wholly neglected so to do. By means of which said premises the plaintiffs have been and are greatly injured and damaged," &c.

Special demurrer.

The defendant's points as marked for argument were: first, that the declaration is bad both in form and substance, and shews no sufficient cause of action; secondly, that the matters therein stated are not sufficient from which to imply the promise alleged; thirdly, that the only consideration stated for the promise declared on is, the allotment to the defendant of shares in a company which the plaintiffs and others once upon a time before the making of the promise had agreed with each other to endeavour to form, but which said agreement and the formation of the said company and all endeavours to form the same may (consistently with the said declaration) have been given up and abandoned long before the said allotment or promise, and that such consideration is insufficient to sustain the said promise; fourthly, that the declaration is wanting in certainty in not stating whether the formation of the company commenced before or after the coming into operation of the stat. 7 & 8 Vict. c. 110; fifthly, that if the formation of the company commenced before the coming into operation of the 7 & 8 Vict. c. 110. all the several parties to the agreement for its formation, and not the plaintiffs alone, ought to have sued in this action, and if the formation commenced after the said act came into operation, then the declaration ought to have shewn that the plaintiffs were according to the act entitled to allot shares and receive deposits, and that the deposits sued for are such as the act authorizes; sixthly, that the declaration ought to have shewn with certainty that the defendant accepted the allotment; seventhly, that the declaration ought to have stated with certainty the terms which the plaintiffs are alleged to have promised to fulfil, and been ready and willing to fulfil.

of 1*l.* 13*s.* 1*d.* for," &c.; that Laffeatty held the bill upon the terms that the said debt should be set off against the said sum so due from the defendant to Laffeatty upon the bill; that Laffeatty, in order to deprive the defendant of his right of set-off in respect of the said sum of 1*l.* 13*s.* 1*d.*, and in fraud of the defendant, and in collusion with the plaintiffs, and contrary to the said terms, indorsed the bill to the plaintiffs; and that the plaintiffs were suing in this action only as agents of Laffeatty, according to the said fraud and collusion. Verification.

The plaintiffs thereupon signed judgment, on the ground that the plea was not issuable, and a rule having been obtained to set aside this judgment,—

*Petersdorff* shewed cause.—The judgment was properly signed, for the plea is not issuable. In the first part, it professes to answer a part only of the plaintiffs' demand; and in the latter part, to be a good answer to the whole declaration. *Parratt v. Goddard* (1) decides that pleas pleaded in form to the whole declaration, but applicable to one count only, are not issuable pleas. The plea is also bad on another ground. The plaintiffs could not safely go to trial upon this plea.—He referred to *Thomson v. Redman* (2).

*Hawkins*, in support of the rule.—The plea answers the whole of the declaration, and is an issuable plea. The defendant would not be entitled, in an action against him by an innocent indorsee, to set off the debt due to him from Laffeatty the drawer —*Burrough v. Moss* (3). The plea states that the bill was fraudulently indorsed over, in order to deprive the defendant of his right of set-off. The case would have been different if there had been no fraud, and the bill had been transferred to the plaintiffs in the ordinary course of business.

[*ALDERSON, B.*—The set-off may perhaps be good as to 1*l.* 13*s.* 1*d.* The plea, however, is not issuable; it does not enable the plaintiffs to go to trial upon the merits. I do not say what the result would have been if the effect of the plea had been to get rid of the set-off to the whole amount.]

The plea is founded on *Watkins v. Bensusan* (4). That was an action by an indorsee against the acceptor of a bill, and the plea was that before the drawer indorsed it he owed the defendant a sum of money exceeding the amount of the bill; that after the bill became due, and in order to deprive the defendant of his right of set-off in respect of the debt, he fraudulently indorsed the bill to enable the plaintiffs to sue the defendant on the bill, and without any consideration for the indorsement. This was held to be an issuable plea.

[*ALDERSON, B.*—The plea here states that the plaintiffs are fraudulently suing for the whole sum secured by the bill, whereas, in fact, they are entitled to part only. The defendant had better plead the plea as to 1*l.* 13*s.* 1*d.*, and bring the remainder into court. The plea is not pleaded to issue.]

The defendant has an affidavit of merits.

*Per Curiam.*—The rule will be discharged unless the defendant bring the balance into court within seven days, and consent to a change of venue. If he comply with these terms, the rule will be absolute for setting aside the judgment.

Rule accordingly (5).

1847. }  
Nov. 3. } GARWOOD v. EDE.

*Railway Company—Provisional Committee-man, Liability of, for Deposits on Shares—Subscribers' Agreement—Money had and received.*

*A railway company, provisionally registered, required a deposit of 2*l.* 12*s.* 6*d.* on each share allotted. The plaintiff had twenty shares allotted to him, on which he paid the required deposit and received scrip certificates for the shares. He signed the subscribers' agreement, which gave the provisional committee power to carry on the undertaking, or any part of it, or to abandon the whole,*

(4) 9 Mee. & Wels. 422; s. c. 11 Law J. Rep. (n.s.) Exch. 378.

(5) See *Goodall v. Ray*, 4 Dowl. P.C. 76; *Cripps v. Davis*, 12 Mee. & Wels. 159; s. c. 13 Law J. Rep. (n.s.) Exch. 217; and *Whitehead v. Walker*, 10 Mee. & Wels. 696; s. c. 12 Law J. Rep. (n.s.) Exch. 28.

(1) 9 Mee. & Wels. 458; s. c. 11 Law J. Rep. (n.s.) Exch. 217.

(2) 11 Ibid. 487; s. c. 12 Law J. Rep. (n.s.) Exch. 310.

(3) 10 B. & C. 558; s. c. 8 Law J. Rep. K.B. 287.

*only upon the proceeds which came to hand, after deducting bad debts upon the sales.*

Debt, for work and labour, care, diligence, journeys, and attendances, as the factor and agent of the defendants, and for commission in respect thereof, for money paid, for interest, and on an account stated. The defendant pleaded *nunquam indebitatus*, acceptance in satisfaction and discharge, and set-off. The particulars of demand shewed that the action was brought to recover 2,275*l.* 12*s.* 4*d.* for commission on several cargoes of palm oil. The particulars of set-off shewed various items and cash payments to an amount exceeding the sum claimed.

At the trial, before Rolfe, B., at the Lancashire Spring Assizes, 1847, it appeared that the plaintiff had for many years been in the employ of the defendants, as master and supercargo; and the matter in dispute between the parties was, whether, upon the following document, the plaintiff, as captain on an African voyage, was entitled to a commission of 6*l.* per cent. on the proceeds of his homeward cargo of palm oil, on the amount of sales, without any deduction in respect of bad debts, arising out of the failure of parties, to whom portions of the oil had been sold.

“Liverpool, February 3, 1845.

“Captain Charles Caine,

“Your commissions are 6*l.* per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., 4*l.* per ton, from the gross sales of the oil when taken from the quay, and 4*l.* 15*s.* when warehoused. No commissions allowed in watered oil. We are, &c.,

“Charles Horsfall & Son.”

There was evidence that, in ordinary mercantile language, “net proceeds” meant exclusive of bad debts.

The learned Judge was of opinion that the defendants should be allowed to deduct losses, sustained by reason of bad debts, on certain sales of portions of the cargo, before the plaintiff was entitled to his commission; and his Lordship nonsuited the plaintiff, with leave to enter a verdict for 370*l.*, if the Court should think his construction of the instrument wrong. A rule having been obtained accordingly,

*W. H. Watson and Forsyth* now shewed

cause.—The object of this commission on the homeward cargo, beyond the regular wages, is to ensure the energy and skill of the captain as supercargo in a hazardous employment, and the proceeds of the adventure are as it were divided between the parties in certain proportions, so that a loss to the property, by bad debts or otherwise, incurred without the default of either party, ought not to fall on one only. The true meaning of the document is, that the plaintiff is to have a commission of 6*l.* per cent. on the sum actually received; it means on the net proceeds when ascertained, or on the money which actually comes into the defendants' hands. It cannot mean that the 6*l.* per cent. is to be calculated on the value of the cargo, because the sales must be made, and the charges thereof taken into account. Moreover, there might be a total destruction of the cargo by fire, and in that case the plaintiff would clearly be subject to the loss of his commission. A bad debt cannot be said to be part of the proceeds of the cargo.

[PARKE, B.—Take the letter altogether, and what do you say to it?]

It strengthens the defendants' view of the meaning of the words “net proceeds,” inasmuch as it shews that *all* charges are to be deducted; the charges of 4*l.* per ton, when taken from the quay, and 4*l.* 15*s.* when warehoused, being specified merely on account of their being of a fluctuating nature. That is a limitation on a peculiar and uncertain class of charges. Cases might arise in which it would be impossible to carry out the view contended for on the other side. Suppose, for instance, the case of a fraudulent purchase of a portion of the cargo, the owner might maintain trover, and revest himself with the goods, and then there might be a subsequent sale, for a less sum, the price having fallen in the mean time; on which sale would the commission be payable? Or suppose the goods landed, and then injured or destroyed by fire before sale. It does not mean that the 6*l.* per cent. shall be paid on a nominal contract of sale, but on the net proceeds, or sum realized. The words “after deducting,” &c. is a mere statement of deduction of particular charges. The expression “net proceeds” has the same meaning as “net profits,” used in *Storey on Partnership*, p. 62. The plaintiff trusts to

The Lord Chief Baron was of opinion that under the terms of the subscribers' agreement the action could not be maintained, and nonsuited the plaintiff, with leave to him to move to enter a verdict.

*Knowles* now moved accordingly.—It is manifest that the deposit of 2*l.* 12*s.* 6*d.* per share consisted of 2*s.* 6*d.* per share, being 10*s.* per 100*l.* on each 25*l.* share deposited in pursuance of the 23rd clause of the 7 & 8 Vict. c. 110. for the general purposes of the undertaking, and the residue, 2*l.* 10*s.* per share, being the 10*l.* per cent. required to be deposited by the standing orders of parliament. Now, the 23rd clause defines and limits the powers of the directors. Under it they can only receive on the shares at the rate of 10*s.* in every 100*l.* for the general purposes of the concern, and the further deposit of 10*l.* per cent. is for a specific purpose only, and cannot be legally appropriated to any other purpose. The terms of the subscribers' agreement, therefore, must be understood as applying only to that portion of the plaintiff's demand which consists of the deposit of 10*s.* per 100*l.*, viz. 2*l.* 10*s.* of the 52*l.* 10*s.* deposited, and as respects that sum, it may be that the plaintiff ought not to recover. The deed, however, does not create a partnership, and the remaining 50*l.*, or 10*l.* per cent. deposit required by the standing orders, not having been used as under the act of parliament it only could be used, and the scheme being at an end, is money received by the defendant to the plaintiff's use, and recoverable in this action—*Nockels v. Crosbie* (1), and *Walstab v. Spottiswoode* (2).

[*POLLOCK, C.B.*—In *Walstab v. Spottiswoode* the purpose for which the money was paid had failed, and the plaintiff never was jointly interested with the defendant in anything. Here the plaintiff had obtained his scrip on paying the deposit money, and had entered by deed into a new contract, whereby he became associated with the defendant in a common adventure.]

[*ALDERSON, B.*—Why may not any set of persons agree to dispose of their own money as they please? There is nothing in the act of parliament to prevent that.]

(1) 3 B. & C. 814.

(2) 15 Mees. & Wels. 501; a. c. 15 Law J. Rep. (N.S.) Exch. 193.

[*PARKE, B.*—Suppose the agreement had been that in the event of its being unnecessary to pay the 10*l.* per cent. in under the standing orders, the directors should be at liberty to pay any other expenses out of it: that would have been perfectly legal.]

This deed does not use words sufficient for that purpose.

[*PARKE, B.*—It amounts very nearly to that, because it empowers the directors to go on with the undertaking, or any part of it, and to employ the money which may come to their hands in paying and satisfying all costs or liabilities which they sustained in relation to the undertaking. So that the effect of the agreement is, that if the undertaking went on the money was to be deposited under the standing orders; if it did not go on, there was to be this disposition of it.]

The 1 & 2 Vict. c. 110. s. 23. limits the amount of such disposition of the money deposited to that part of it which consists of the 10*s.* in every 100*l.*; and the subscribers never intended to give any right to the directors to expend in preliminary steps any part of the deposit of 10*l.* per cent.

*Per Curiam.*—The plaintiff has by this deed disposed of his own money, and there never was a time when it was money in the defendant's hands to the plaintiff's use. The nonsuit was therefore right.

*Rule refused.*

1847. }  
Nov. 8. } CLEMENT v. TODD.

*Railway Company—Provisional Committee-man, Liability of, for Deposits—Abortive Scheme.*

*The plaintiff signed a letter of application for shares in a railway company, provisionally registered, therein undertaking to sign the subscribers' agreement and parliamentary contract, when required. He never received any letter of allotment, but having paid the deposit on 500 shares, he received scrip certificates for them which in form were:—"The subscribers' agreement and parliamentary contract having been signed by the person to whom the certificate is issued." In fact he never signed the sub-*

plaintiffs alone; and that all ought to have sued jointly. The declaration, however, appears to me to shew a consideration in respect of which the plaintiffs may have a sufficient interest to sue the defendant. I think that on the face of the contract, as stated here, there is a sufficient consideration to support the promise alleged, if any such were made by the defendant.

Other objections (of form only) are made; and Mr. Maynard has urged upon our consideration that the declaration shews that there were certain terms to be performed by the plaintiffs, without shewing what those terms were; and on this ground he contends that the declaration is defective. Now as to the effect of a declaration, which merely refers to certain terms, as forming part of the consideration for the contract declared on, whether or not it would be open to such an objection on special demurrer, I give no opinion. I doubt whether it would not come within the rule long established, and recognized in the case of *Cryps v. Baynton* (14), which was an action upon a promise by the defendant to pay for necessities provided to a third person, and the declaration which averred generally that necessities were provided, was objected to, for not shewing what necessities were provided; and it was held good without such special shewing, for the avoiding of multiplicities of reckonings. It is, however, unnecessary to consider this case in that view, because I think that there are terms fully stated in this declaration, which are sufficient to support the promise. The allegation is, that the shares "were allotted to the defendant upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*l.* 2*s.*, upon each and every of the said shares so allotted to him, as aforesaid, making in the whole," &c., "should be paid by him, the defendant, on or before the 9th of December 1845, to the account of the said company, to one of certain bankers, then appointed and agreed upon in that behalf, to wit," &c.; and it adds, "of all which premises the defendant had notice; and, thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on &c., promised the defendant

to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his, the defendant's, part." Now it is said that there may be more terms, but I think such an objection cannot be taken advantage of on special demurrer, though it may be otherwise available. For instance, on the plea of non assumpsit, if, at the trial, it appeared there were more terms, there would be a variance between the plaintiffs' proof and their declaration; and the defendant would succeed upon that. If these terms require anything to be done, either expressly or by implication, the plaintiffs, no doubt, were bound to do what they promised; but, if those terms do not express anything as requisite to be done, then the reference to them, in this declaration, is surplusage. The plaintiffs promise to do all that on their parts was to be done; but they were not bound to ascertain and allege the extent of their obligation, either express or implied. There certainly was an implied promise to some extent, if only to keep their accounts at particular bankers, or, if they changed their bankers, to give the defendant notice; and if there was any implied promise, we cannot treat this as surplusage. I think none of the objections, either of substance or form, are well founded, and that the plaintiffs are entitled to judgment upon this demurrer.

ALDERSON, B.—I am of the same opinion. As to the question of illegality, I think that on the face of this declaration we must presume the transaction to have been legal. It may be that it was illegal, if the company were not registered; but though the company were not registered, the transaction may have been legal, because it is consistent with the allegations of this declaration that the company was formed before the 1st of November 1844. If the facts were not so, the defendant should have shewn that by plea, which he has not done. Then, with respect to *Woolmer v. Toby*, it does not govern the present case; because, in *Woolmer v. Toby*, the proof did not correspond with the allegation in the declaration. There the consideration for the contract was stated to be with A, B, and C, whereas the proof was, that it was with D, E, and F. The statement here is, that the defendant's promise was made with the managing commit-

and for the plaintiff on not guilty to the new assignment, with a farthing damages: the other pleas were all found for the plaintiff. There was no certificate under the 3 & 4 Vict. c. 24:—Held, that the trespasses in the three closes were divisible causes of action; and that the plaintiff was entitled under the 4 & 5 Anne, c. 16. ss. 4. and 5. to the costs of the issues found for him as to closes A. and B, on which he had failed; but that under the 3 & 4 Vict. c. 24. he was entitled to no costs in respect to close C, on which he had succeeded, but had recovered less than 40s. damages. So that the effect of the 3 & 4 Vict. c. 24. combined with the 4 & 5 Anne, c. 16. ss. 4. and 5. as construed by decided cases is, that the plaintiff is in a better condition by bringing an action in which he fails altogether, than by bringing a frivolous one in which he succeeds. The defendant when he succeeds is punished by the one statute if he improperly plead pleas which he cannot support, and the plaintiff when he succeeds is punished by the other statute if he brings a frivolous action.

**Trespass.** First count for breaking and entering certain closes of the plaintiff, situate in the parish of Ilminster, in the county of Somerset, that is to say, a certain close being part of a certain field called "Six Acres," &c., a certain other close called "Five Acres," and a certain other close called "Northovers," and there, &c. Second count for breaking and entering a certain other close in the said parish of Ilminster, to wit, a certain close, (describing it by abutments,) and there, &c. The defendant pleaded, first, not guilty to the whole declaration, and to the first count he pleaded secondly, that the several closes in the said first count mentioned were not nor was either of them, or any part thereof, at &c., the closes of the plaintiff, *modo et formâ*. Thirdly, a public footway over the said closes in which, &c., in the said first count mentioned, justifying the said trespasses under a user of the said way, and concluding with a verification. Fourthly, a footway by user for twenty years, as of right and without interruption by the defendant and others, as occupiers of Eames's Mill Farm, in the said parish of Ilminster, justifying the said trespasses thereunder, and con-

cluding with a verification. Fifthly, a like plea by user for forty years.

**Replications**—As to the first and second pleas, issue joined. As to so much of the third plea as relates to two of the closes in the first count mentioned, to wit, the said close being parcel of the field called "Six Acres," and the said close called "Five Acres," a denial of the public footway, *modo et formâ*, &c.: and as to so much of the said third plea as relates to the close in the first count mentioned, called "Northovers," a new assignment of trespasses *extra viam*. As to the fourth and fifth pleas, a denial of the user for twenty and forty years respectively, *modo et formâ*. Not guilty was pleaded to the new assignment, and issues having been joined, the cause was tried, before Williams, J., at the Somersetshire Summer Assizes, 1847, when a verdict was found on the plea of not guilty, for the plaintiff, on the first count, and for the defendant on the second count. On the second plea, the verdict was for the plaintiff. On the third plea, as to "Six Acres" and "Five Acres," the verdict was for the defendant. On the new assignment of trespasses *extra viam* as to "Northovers," the verdict was for the plaintiff, with one farthing damages. The issues on the fourth and fifth pleas were found for the plaintiff. There was no certificate under 3 & 4 Vict. c. 24. The Master having on taxation refused to tax the plaintiff any costs, a rule was obtained, calling on the defendant to shew cause why the Master should not review his taxation.

**Taprell** (Nov. 22) shewed cause.—The Master was right in not taxing the plaintiff the costs of the issues found for him. The question turns on the construction of Lord Denman's Act, 3 & 4 Vict. c. 24. The words in the statute 4 & 5 Anne, c. 16. s. 5, are only that costs shall be given at the discretion of the Court; and under the statute 43 Eliz. c. 6, the rule of practice was, that if there was a certificate under that statute, the plaintiff should not have the costs of any plea pleaded with leave of the Court, although the issue thereon was found for him, and the Judge had not certified that the defendant had a probable cause for so pleading—*Hovard v. Cheshire* (1). Lord

(1) Sayer, 260.



Denman's Act was framed with the same object as the stat. of Eliz., which it recites, viz., to avoid trifling and frivolous suits; and by that act, if a plaintiff brings what by the verdict of a jury for him with less damages than 40s., is shewn to be a frivolous action, he is not to recover in respect of such verdict any costs whatever.

[ALDERSON, B.—The words of the stat. of Eliz. are remarkable, viz., that where the debt or damages to be recovered shall not amount to 40s., the Judge shall not award for costs to the party plaintiff *any greater or more costs than the damages recovered.*]

Lord Denman's Act does not contemplate a division of causes of action, for the purposes of costs; and where a plaintiff recovers less than 40s., and the Judge does not certify, the action is frivolous, and the plaintiff is to have no costs at all—*Marriott v. Stanley* (2). It ought, like all statutes which deprive a plaintiff of costs, to be construed generally and liberally, and not to be limited—*Irwine v. Reddish* (3). The statute 4 & 5 Anne, c. 16. ss. 4, 5, does not apply here. That statute only applies where there is a plea found for the defendant, which would entitle him to the general costs of the cause—*Richmond v. Johnson* (4); here the plaintiff would, but for Lord Denman's Act, be entitled to the *postea*. The case of *Newton v. Rowe* (5) is in point. That was an action of libel to which the defendant pleaded the general issue, and several special pleas; and the plaintiff had a verdict with one farthing damages; and there was no certificate under Lord Denman's Act; and it was held that the plaintiff was not entitled to any costs, either on the general issue or the special issues.

[ROLFE, B.—There the plaintiff recovered on all the issues.]

Yes, the statute of Anne did not apply; nor does it in this case, because there is no plea here found for the defendant, which, independently of Lord Denman's Act, would give him the general costs. The 7th rule of Hilary term, 4 Will. 4, does not apply here; it is subservient to the statute of

Anne—*Simpson v. Hardiss* (6), *Robinson v. Messenger* (7), *Fry v. Monckton* (8); and the 3 & 4 Vict. c. 24. is subsequent to it.

*Montague Smith*, in support of the rule.—There are three distinct causes of action here, to which there are distinct lines of pleading, and on two of those causes of action the defendant has substantially succeeded, and the plaintiff has succeeded on the third, as to which it is admitted that the verdict being under 40s., and there being no certificate under Lord Denman's Act, he is entitled to no costs. The plaintiff, however, is entitled to the costs of those issues found for him which are applicable to the causes of action on which the defendant has succeeded. This case is distinguishable from *Newton v. Rowe*, where there was but one cause of action, and all the issues on the record were found for the plaintiff. The present plaintiff seeks to have these costs, not in respect of "such verdict," that is, the verdict for less than 40s., but in respect of a verdict on different matters, and under the statute of Anne, contending that there are two causes of action, to which the defendant has pleaded several useless pleas, which have been found for the plaintiff, while the fact of the defendant having succeeded on those causes of action prevents their being of necessity frivolous under the 3 & 4 Vict. c. 24. In *Howard v. Cheshire* all the issues were found for the plaintiff. The effect of the statute of 4 & 5 Anne was to allow the plaintiff costs where the defendant pleaded several pleas and succeeded on one only—*Spencer v. Hamerton* (9), where, in an action of libel, the defendant having succeeded on the general issue, which went to the whole cause of action, the plaintiff was allowed the costs of several special pleas found for him. The result of the argument on the other side is, that the plaintiff is in a much worse position than if he had lost the verdict on the new assignment.

*Curr. adv. vult.*

(2) 9 Dowl. P.C. 59; s.c. 10 Law J. Rep. (N.S.) C.P. 50.

(3) 5 B. & Ald. 796.

(4) 7 East, 583.

(5) 1 C.B. 187; s.c. 14 Law J. Rep. (N.S.) C.P. 132.

(6) 2 Mee. & Wels. 34; s.c. 6 Law J. Rep. (N.S.) Exch. 16.

(7) 8 Ad. & El. 609; s.c. 7 Law J. Rep. (N.S.) Q.B. 208.

(8) 9 Dowl. P.C. 967.

(9) 4 Ad. & El. 413; s.c. 5 Law J. Rep. (N.S.) K.B. 114.

The judgment of the Court (10) was now delivered by—

**POLLOCK, C.B.**—In this case the plaintiff brought an action for several trespasses, in three different closes, Six Acres, Five Acres, and Northovers, in one count. In the second count, in another close. Not guilty was pleaded to all; secondly, not the plaintiff's closes; thirdly, a public way over the three closes in the first count. Fourthly and fifthly, a private way over the three closes, by prescription, twenty years' user, and forty years' user. These four latter pleas were to the first count alone. The replications took issue on the first and second pleas and traversed all the others, except that of public way, so far as related to Northovers, as to which the plaintiff newly assigned trespasses *extra viam*, which was denied by the rejoinder.

On not guilty the verdict was for the plaintiff on the first count; for the defendant on the second. On the second plea for the plaintiff. On the third, as to Six Acres and Five Acres, for the defendant. On the new assignment for the plaintiff, with one farthing damages. And the issues on the fourth and fifth pleas were found for the plaintiff.

The Master refused to tax the plaintiff any costs, and a rule *nisi* was obtained to review the taxation.

Upon this record it appears that the plaintiff has altogether failed, and the defendant has succeeded with respect to the causes of action in two closes; but that he has pleaded as to those causes of action four several unnecessary pleas, on which the plaintiff had a verdict. With respect to the cause of action for trespasses in the third close, the plaintiff has brought an action, in respect of which he has obtained only one farthing damages, and so far, therefore, as relates to that cause of action, the effect of Lord Denman's Act is to deprive the plaintiff of all costs. This result is a punishment for having brought a frivolous action for that cause; and there is no doubt that if the plaintiff had sued for that cause of action alone, and there had been special pleadings all found for him, he would have lost all the costs of all the issues, as was

properly decided in the case of *Newton v. Rowe*. In such a case the statute 4 Anne, c. 16. does not apply, for no one plea to the cause of action is found for the defendant. In such case it may be that there is an inconvenience (as suggested in this case) as contrasted with the case of a verdict for the defendant upon the plea of not guilty, and for the plaintiff on the justifications. But in the case where the defendant so succeeds, the matter in dispute may have really been of serious amount to the plaintiff; whereas when the plaintiff succeeds, it is, by the verdict of the jury, ascertained to be so frivolous that the legislature has thought no action at all should have been brought in respect of it. "Other hardships," as my Brother Maule, in *Newton v. Rowe*, properly observed, "might possibly be suggested, but no doubt the legislature has thought that all these are outweighed by the advantages to result from the discouragement of petty litigation." We concur entirely in that decision, and if there had here been a set of special pleas to the new assignment, all found for the plaintiff, the plaintiff could still have had no costs whatever in respect thereof.

But here there is a divisible cause of action, in respect of the trespasses in two of the three closes in the first count. We have held such a cause of action to be divisible in ejectment—*Doe d. Bowman v. Lewis* (11), as it had been previously held to be divisible in other cases, as in *Cox v. Thomason* (12), and other authorities on this point. The plaintiff, therefore, with respect to these causes of action, is not in the position of a person bringing a frivolous action, but in that of a person who has brought an action, it may be, for a real grievance, but in which he has failed. If this action had been brought for that cause alone, it is clear that, under the statute of 4 Anne, c. 16, the plaintiff would have been entitled to the costs of those issues found for him, there being also issues found for the defendant, giving the general costs of the cause to him; for that statute applies to cases where *one or more issues* are found for the defendant—*Richmond v. Johnson*.

(11) 13 Mee. & Wels. 241; s. c. 14 Law J. Rep. (N.S.) Exch. 198.

(12) 2 Cr. & Jer. 498; s. c. 1 Law J. Rep. (N.S.) Exch. 187.

(10) Pollock, C.B., Parke, B., Alderson, B., and Rolfe, B.

Being of opinion that the causes of action are divisible, we think that this case is to be treated as if it were a separate action for the trespasses in two closes, and consequently, that the plaintiff is entitled to have the costs of the issues found for him, as to those closes, taxed; but he is entitled to no costs in respect of the third close. The consequence is that the plaintiff is in a better condition by bringing an action, in which he fails altogether, than by bringing a frivolous one, in which he succeeds. But this, we think, is the true result of Lord Denman's Act, combined with the cases, as establishing the proper construction of the statute of Anne.

It is, however, to be observed, that the defendant, when he succeeds, is punished by the one statute for improperly pleading pleas which he cannot support; and the plaintiff, when he succeeds, is punished by the other statute for bringing a frivolous suit. The rule, therefore, must be absolute for the Master to review his taxation.

ALDERSON, B. added,—It comes to this; the legislature punishes a defendant who, being in the right, has improperly pleaded, while, on the other hand, it punishes a plaintiff, where, being in the right, he uses that right for frivolous and vexatious purposes.

*Rule absolute.*

1847. }  
Nov. 6. } JONES v. ROBINSON.

*Assumpsit—Consideration—Right to sue.*

*Assumpsit.* The declaration alleged that in consideration that the plaintiff and W. D. would sell and assign to the defendant their copartnership business the defendant promised the plaintiff to pay him all the money he had advanced in respect of the co-partnership, and for which the co-partnership was accountable to the plaintiff. The declaration then averred performance by the plaintiff and W. D., and that the plaintiff, at the time of the promise, had advanced a sum of money in respect of the co-partnership, for which the co-partnership was, at the time of the promise, accountable to him, alleging, as a breach, the non-payment of

that sum by the defendant:—*Held, that the declaration disclosed a sufficient consideration to entitle the plaintiff to sue alone.*

*Assumpsit.* The declaration stated that one W. Dalton and the plaintiff carried on the business of ironmongers in co-partnership; that in consideration that he, the plaintiff, and the said W. Dalton would sell and assign to the defendant the said co-partnership business and the stock in trade, and would become trustees for the defendant in respect of all debts and rights due or belonging to them, the plaintiff and the said W. Dalton, as such co-partners, by assigning to the defendant all their beneficial interest in the said debts and rights, and would put the defendant in possession of the said business and stock in trade, he, the defendant, promised the plaintiff to pay him all the money that he, the plaintiff, had advanced in respect of the co-partnership, and for which, at the time of the promise, the co-partnership was accountable to the plaintiff; and also promised the plaintiff and W. Dalton that he, the defendant, would discharge all the debts due from the plaintiff and W. Dalton, as such co-partners, and all liabilities to which they were subject as such co-partners; that the plaintiff and W. Dalton in a reasonable time did sell and assign to the defendant the said co-partnership business and the stock in trade, then being of the value of 500*l.*, and became trustees for the defendant in respect of all debts and rights due or belonging to them, the said plaintiff and the said W. Dalton, by their assigning to the defendant all their beneficial interest in the said debts and rights, and put the defendant into possession of the said business and stock in trade; that he, the plaintiff, had, at the time of the promise, advanced in respect of the co-partnership, money amounting to 112*l.* 1*s.* 11*d.*, for which money the said co-partnership was at the time of the promise accountable to the plaintiff. Breach, non-payment of the last-mentioned sum. The declaration also contained the common counts.

The cause having been tried, and the plaintiff having obtained a verdict on the first count,—

*Martin* moved to arrest the judgment.—The plaintiff is not entitled to sue alone in this case. Dalton ought to have joined

with him, it being a rule that all the persons from whom the consideration moves ought to be the parties to bring the action. The contract belongs to the persons from whom the consideration moves, and it is immaterial to whom the promise is made.

[PARKE, B.—The consideration in this case is, the separate interest of the plaintiff in the partnership fund; he has a larger interest in it than his partner.]

This question was argued at great length in *Lord Bentinck v. Connop* (1), where the point is stated, although the argument is not given in the report. Either party might have released this contract.

[PARKE, B. referred to *Price v. Easton* (2), and *Crow v. Rogers* (3).]

POLLOCK, C.B.—There will be no rule, as no authority has been cited in support of the defendant's argument.

PARKE, B.—There is a consideration in this case, namely, the joint interest of the plaintiff and Dalton in the partnership fund. That is a sufficient consideration to support the defendant's promise to pay.

ALDERSON, B. and ROLFE, B. concurred.

*Rule refused.*

1847. } DUKE, KNT., AND OTHERS v.  
Nov. 12. } FORBES.

*Railway—Pleading—Contract—Allotment of Shares—Statute 7 & 8 Vict. c. 110.*

*Declaration in assumpsit, that on a certain day, to wit, on &c. the plaintiffs had agreed together with divers, to wit, 200 other persons, to establish a joint-stock company for making a railway, which required the authority of parliament, the capital, to wit, &c. to be divided into shares of 20l. each, and a deposit of 2l. 2s. per share to be paid by the persons to whom they should be allotted by a committee of management; that the plaintiffs were the committee of management; that the plaintiffs, to wit, on &c., at the request of the defendant, allotted him thirty-*

*five shares in the proposed company, upon certain terms then agreed upon between them, that is to say, that the deposit on each share should be paid by the defendant on a certain day, to certain bankers then agreed upon; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, had promised the defendant to perform the said terms on their part, the defendant promised the plaintiffs to perform the said terms on his part. Averment of the plaintiffs' readiness and willingness; and, breach, the non-payment by the defendant of the deposit:—Held, on general demurrer, that the declaration disclosed a contract between the plaintiffs and the defendant, on which they might sue him without joining the other members of the company. Also, that the declaration was good, though it did not allege that the company was provisionally registered pursuant to the 7 & 8 Vict. c. 110, or that it was formed previously to the date of that act.*

*And held, on special demurrer, that the declaration was not bad for not alleging that the company was continuing when the shares were allotted to the defendant; nor for not shewing with sufficient certainty that the defendant accepted the allotment; nor for not shewing with certainty what the terms to be performed by the plaintiffs were.*

*Assumpsit.* The declaration stated that heretofore and before the making of the promise by the defendant hereinafter mentioned, to wit, on the 20th of August A.D. 1845, the plaintiffs had agreed together, with divers, to wit, 200 other persons, to endeavour to form and establish a certain joint-stock company or partnership undertaking, for the making, constructing, and working a certain railway, to be called "The Dorking, Brighton, and Arundel Atmospheric Railway," and to endeavour to obtain an act of parliament for that purpose, the said railway not being capable of being constructed without the authority of parliament; and the capital of which said proposed company or partnership undertaking was to consist of a certain sum of money, to wit, 1,000,000l. sterling, to be divided into 50,000 shares of 20l. each, and upon which a deposit of 2l. 2s. for each and every share was to be paid by such persons respectively as should apply for, and to

(1) 5 Q.B. Rep. 693; s.c. 13 Law J. Rep. (N.S.) Q.B. 125.

(2) 4 B. & Ad. 433; s.c. 2 Law J. Rep. (N.S.) K.B. 51.

(3) 1 Stra. 592.

whom the said shares should be allotted by a committee of management of the said proposed company. That before and at the time of the defendant's application for shares, and the making of his said promise as hereinafter mentioned, the plaintiffs formed and were the committee of management of the said proposed company. That before the making of the promise by the defendant as hereinafter mentioned, to wit, on the 8th of October A.D. 1845, the defendant applied to the plaintiffs, then forming and being such committee of management as aforesaid, and requested them to allot him, the defendant, fifty of the said shares in the said proposed company, and then undertook to accept the same, or any less number that might be allotted to him; and thereupon heretofore, to wit, on the 25th of November 1845, the plaintiffs, at the request of the defendant, allotted to him thirty-five of the said shares in the said company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him as aforesaid, making in the whole a large sum of money, to wit, the sum of 73*l.* 10*s.*, should be paid by him the defendant, on or before the 9th of December A.D. 1845, to the account of the said company, to one of certain bankers then appointed and agreed upon in that behalf, to wit, the London and County Joint-Stock Bank, Lombard Street, and Brighton, and at their several country branches, and Messrs. Hall, West, & Borrer, Union Bank, Brighton, of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on the day and year last aforesaid, promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his the defendant's part, and although the plaintiffs were always ready and willing to perform and fulfil the said terms in all things on their part, and although the said 9th day of December elapsed after the said promise of the said defendant, and before the commencement of this suit, of all which premises the defendant hath always had notice; yet the de-

fendant, disregarding his said promise, did not, nor would on or before the said 9th of December, pay, nor hath he since paid, to any or either of the said bankers, or at any of their banks, either in London or elsewhere, or to any other person, to the account of the said company, the said deposit of 2*l.* 2*s.* per share; but hath wholly neglected so to do. By means of which said premises the plaintiffs have been and are greatly injured and damaged," &c.

#### Special demurrer.

The defendant's points as marked for argument were: first, that the declaration is bad both in form and substance, and shews no sufficient cause of action; secondly, that the matters therein stated are not sufficient from which to imply the promise alleged; thirdly, that the only consideration stated for the promise declared on is, the allotment to the defendant of shares in a company which the plaintiffs and others once upon a time before the making of the promise had agreed with each other to endeavour to form, but which said agreement and the formation of the said company and all endeavours to form the same may (consistently with the said declaration) have been given up and abandoned long before the said allotment or promise, and that such consideration is insufficient to sustain the said promise; fourthly, that the declaration is wanting in certainty in not stating whether the formation of the company commenced before or after the coming into operation of the stat. 7 & 8 Vict. c. 110; fifthly, that if the formation of the company commenced before the coming into operation of the 7 & 8 Vict. c. 110. all the several parties to the agreement for its formation, and not the plaintiffs alone, ought to have sued in this action, and if the formation commenced after the said act came into operation, then the declaration ought to have shewn that the plaintiffs were according to the act entitled to allot shares and receive deposits, and that the deposits sued for are such as the act authorizes; sixthly, that the declaration ought to have shewn with certainty that the defendant accepted the allotment; seventhly, that the declaration ought to have stated with certainty the terms which the plaintiffs are alleged to have promised to fulfil, and been ready and willing to fulfil.

*Butt*, (*Maynard* with him) in support of the demurrer (Trinity term, June 9).—The first objection to the declaration is, that it does not state that the company were provisionally registered under the 7 & 8 Vict. c. 110. ss. 4, 23, and 24. Provisional registration is necessary before the company can make any contract for allotting shares, and that fact ought to have been averred in the declaration.

[*Pollock*, C.B.—The defendant ought to have pleaded that the company had not been registered.]

The 1st, 2nd, 4th, and 23rd sections apply to this part of the argument.

[*Pollock*, C.B.—The defendant admits that he and the plaintiffs made a contract. In such a case is the plaintiff to aver that the contract is legal, or is the defendant to plead the illegality?]

The question is, whether the compliance with the requisites of the act of parliament is not a condition precedent to the plaintiffs' right to sue. The defendant submits that it is, and that the plaintiffs are not entitled to sue, unless they shew, on the face of the declaration, that they are within the act of parliament. Secondly, it does not appear, from the declaration, that any contract was made with the plaintiffs alone. It was made with all the parties who were engaged in the undertaking. In *Woolmer v. Toby* (1), the defendant was sued as an allottee of shares by the managing committee of a railway company, and the Court made absolute a rule for entering a nonsuit on the ground that the contract had been made by the defendant with the provisional committee. Here it is not alleged that the deposits were to be paid to the plaintiffs; but it is stated, that they were not paid to certain parties on account of the company. There is no express contract with the plaintiffs, and if there is any implied contract it is with the company. Thirdly, the consideration for the defendant's promise appears to be the allotment of shares in a proposed railway company, and it is consistent with the declaration that the project may have been abandoned before the allotment took place. Fourthly, the declaration does not contain any averment that the defendant accepted the allotment of shares. Fifthly, the decla-

ration is defective in another particular; it states that, "in consideration of the premises, and that the plaintiffs, at the request of the defendant, promised the defendant to fulfil the said terms on their part." Now, the "premises" are, that the 200 persons were endeavouring to form a company for making a railway: that the plaintiffs were the committee of management of the company, being a mere delegated body of those persons to whom the shares belonged. Again, the "terms" that the plaintiffs are alleged to have been bound to fulfil, are not stated with so much certainty that any promise on the part of the defendant to fulfil the terms on his part can be implied.

*J. Brown* (*Martin* with him) in support of the declaration (Michaelmas term, Nov. 12).—The first objection made on the other side is, that the declaration does not shew that the company had been provisionally registered, and so that the act 7 & 8 Vict. c. 110. not having been complied with, the company could not legally allot shares, and therefore the contract declared on was not shewn to be legal, and the declaration was bad on that ground. The answers to that objection are, first, that the 7 & 8 Vict. c. 110, which did not come into operation until the 1st of November 1844, applies only to companies formed after that day; and as the dates in this declaration are laid under *videlicet*s, for all that appears on the face of it this company may have been formed prior to the 1st of November 1844. Secondly, an illegality of this kind must not be presumed, but should be pleaded and proved by the party relying upon it—*Daintree v. Hutchinson* (2), where it was held, that the objection that a coursing match was illegal under the 16 Car. 2. c. 7, could not be taken advantage of unless specially pleaded. It is contended here that the registration was a condition precedent to the right to make this contract; but the contract is good at common law, and the true principle is that where a statute makes certain circumstances necessary to the validity of an act which in itself is valid at common law, that does not alter the manner of pleading in use before the statute—*Bac. Abr. tit. 'Statute,'* (L, 3). And in *Stephen on Pleading*, 3rd edit. p. 375, the rule is thus laid

(1) 16 Law J. Rep. (N.S.) Q.B. 225.

(2) 10 Mee. & Wels. 85; s. c. 11 Law J. Rep. (N.S.) Exch. 397.

down, "Where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act; as in the case of a will of lands, it must be alleged to have been made in writing; but where an act makes writing necessary to a matter where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the Statute of Frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence." No person can act as a broker within the city of London unless he is duly licensed pursuant to 6 Anne, c. 16; but in an action by a broker to recover commission, the fact of his being licensed is never averred—*Cope v. Rowlands* (3). So in the case of a contract to perform at a theatre, which would be illegal unless the theatre were licensed; it is unnecessary to state the licence in the declaration—*Astley v. Weldon* (4).

(He was then stopped by the Court on that point.)

Then, secondly, it is objected that the declaration is framed upon a promise implied, if any can be implied, from facts which shew that the promise was made to all the members of the company, and not to the plaintiffs alone, and that all should have joined in suing, for which *Woolmer v. Toby* was cited. But on the declaration in that case, it did not appear that there was any provisional or managing committee, and the case turned on the sufficiency of the evidence, and not on any point of pleading. The case of *Jones v. Robinson* (5), which was decided in this court a few days ago, seems to shew, that although the consideration for a contract moves from several, one of them may declare on the contract, and allege the promise to be made to himself alone.

With respect to the formal objections, the first is, that it is consistent with this declaration that the projected establishment of the company might have been abandoned before the allotment of shares to the defendant. But the Court will not presume that, for it is a rule well established and

recognized in the recent case, in this court, of *Price v. Price* (6), "that things are to be presumed to continue in the same state till the contrary appears" (7). There is nothing in the second formal objection, that it does not appear with certainty that the defendant accepted the allotment of shares, because the declaration expressly avers that the allotment was made at the defendant's request. The last objection is, that, inasmuch as the declaration avers the implied promise to be "in consideration of the premises, and that the plaintiffs at the request of the defendant, promised the defendant to perform and fulfil the said terms on their part," it ought to have stated what the terms to be performed by the plaintiff were. But it does not appear that there were any terms to be performed by the plaintiff other than those stated in the declaration; and the allegation implying that there were may be rejected as surplusage,—*utile per inutile non vitiatur*. The rule is thus stated in 1 *Chitty on Pleading*, 6th edit., p. 295: "When part of an entire consideration, or one of several considerations, stated in a declaration, is merely *frivolous* and void, without being illegal, and *the residue is good*, and extends to the whole of the promise, the void part will not vitiate the declaration, but may be rejected as surplusage; and the promise will be referred to, and supported by that part of the consideration which is legally sufficient."

*Maynard*, in reply.—First, as to the point of illegality, it may be conceded that where a declaration states a consideration which may be legal under one state of facts, and illegal under another state of facts, the illegality must be pleaded; but where an implied contract is stated which can only be legal in one state of facts, it is different, and the declaration should aver all that is necessary to shew its legality. As to the case cited of *Daintree v. Hutchinson* it goes too far, because the declaration there shews the contract to be illegal, and it is sufficient if the illegality appears on any part of the record. In the case of an insurance on a ship, where, under the 19 Geo. 2. c. 37, it is necessary to the legality of the contract

(3) 2 Mee. & Wels. 149; a. c. 6 Law J. Rep. (N.S.) Exch. 63.

(4) 2 Bus. & Pul. 346.

(5) *Ante*, p. 36.

(6) 16 Mee. & Wels. 233; a. c. 16 Law J. Rep. (N.S.) Exch. 99.

(7) At p. 242 of Mee. & Wels. and p. 102 of Law J. Rep.

that the insurer shall have an interest in the subject-matter, it is usual to aver an interest. In *Cousins v. Nantes* (8) it was held, that a policy in the common form was a policy on interest, and that the declaration must aver in whom the interest vested. That case and *Craufurd v. Hunter* (9), are expressly in point. Executing contracts for the sale of stock not being in possession, are illegal under 7 Geo. 2. c. 8; and, accordingly, all the precedents contain an averment of possession in the party selling. The principle is laid down in *Com. Dig. 'Pleader,'* (C, 76), where it is said, "The plaintiff, in his declaration, ought to aver every fact, without being informed of which the Court cannot judge whether the plaintiff has cause of action. . . . So in all cases where any circumstances are required by the purview of an act to make it good, they ought to be averred; as, where the statute 1 R. 3, 1, makes a feoffment, &c. by *cestuis que use* of full age, sane, and at large, &c. good, he who pleads a feoffment by *cestuis que use* ought to aver that he was sane, of full age, and at large." Then as to the right of the plaintiffs to sue alone, the consideration moves from all the members of the company, and not from the plaintiffs alone. The interest is in the entire body, and the action is improperly brought by a section of it. In truth, *Woolmer v. Toby* governs this case, for the only difference is, that, in this case, the circumstances which there came out in evidence are stated on the record. On this point he cited *Bowen v. Morris* (10). But, further, the letter of allotment would contain the terms that the defendant should be entitled to scrip certificates, upon signing the parliamentary contract, and there is nothing to shew, but the reverse rather, that the company was continuing; and, lastly, the consideration for the promise is insufficiently stated. There must upon this declaration, have been some terms to be performed by the plaintiff; but it does not appear what they were; and, on special demurrer, this is a good objection. The rule of pleading is, that all the consideration must be stated.

[POLLOCK, C.B.—I very much doubt whether it is always necessary to set out

(8) 3 Taunt. 513.

(9) 8 Term Rep. 13.

(10) 2 Taunt. 374.

the whole of the consideration. The whole consideration may be the whole agreement.]

*Beach v. White* (11) is an authority for saying that the whole of the consideration for the contract sued upon must be set out. In *Figes v. Cutler* (12) Lord Tenterden held that an action cannot be maintained for the breach of an agreement for not entering into partnership with the plaintiff, without its being shewn what the terms were on which the parties had agreed to become partners. That case was recognized in *M'Neil v. Reid* (13).

POLLOCK, C.B.—I am of opinion our judgment should be for the plaintiffs. Two objections are made to this declaration in matters of substance. The first of those objections is, that the declaration does not shew that the company was provisionally registered as required by the 7 & 8 Vict. c. 110; and it is said, that without such registration a company of this nature has, by the operation of that act, no power to allot shares. That may be so; but the answer is, that the 7 & 8 Vict. c. 110. is not retrospective, and applies only to companies formed after the 1st of November 1844, and for anything that is averred or appears to the contrary, this company may have been formed before that time. But it is said, if that be so, that the declaration should have shewn that the company existed prior to the passing of the 7 & 8 Vict. c. 110; otherwise the company do not shew they were acting legally, or had any power to allot shares, without which, it is argued, they are not entitled to maintain the action. I think the authorities cited by Mr. Brown are sufficient to shew that this argument is not well founded. A party suing is not bound to anticipate matters of that kind, and the objection, if it really exists, (and assuming it to be good) should come by way of answer, and cannot be taken advantage of on demurrer to the declaration. The second objection in point of substance, is, that the consideration for the implied promise moves from all those who were associated together to form the company, and not from the

(11) 12 Ad. & El. 668; s.c. 10 Law J. Rep. (N.S.) Q.B. 4.

(12) 3 Stark. N.P.C. 139.

(13) 9 Bing. 68; s.c. 1 Law J. Rep. (N.S.) C.P. 162.



whom the said shares should be allotted by a committee of management of the said proposed company. That before and at the time of the defendant's application for shares, and the making of his said promise as hereinafter mentioned, the plaintiffs formed and were the committee of management of the said proposed company. That before the making of the promise by the defendant as hereinafter mentioned, to wit, on the 8th of October A.D. 1845, the defendant applied to the plaintiffs, then forming and being such committee of management as aforesaid, and requested them to allot him, the defendant, fifty of the said shares in the said proposed company, and then undertook to accept the same, or any less number that might be allotted to him; and thereupon heretofore, to wit, on the 25th of November 1845, the plaintiffs, at the request of the defendant, allotted to him thirty-five of the said shares in the said company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him as aforesaid, making in the whole a large sum of money, to wit, the sum of 73*l.* 10*s.*, should be paid by him the defendant, on or before the 9th of December A.D. 1845, to the account of the said company, to one of certain bankers then appointed and agreed upon in that behalf, to wit, the London and County Joint-Stock Bank, Lombard Street, and Brighton, and at their several country branches, and Messrs. Hall, West, & Borrer, Union Bank, Brighton, of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on the day and year last aforesaid, promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his the defendant's part, and although the plaintiffs were always ready and willing to perform and fulfil the said terms in all things on their part, and although the said 9th day of December elapsed after the said promise of the said defendant, and before the commencement of this suit, of all which premises the defendant hath always had notice; yet the de-

fendant, disregarding his said promise, did not, nor would on or before the said 9th of December, pay, nor hath he since paid, to any or either of the said bankers, or at any of their banks, either in London or elsewhere, or to any other person, to the account of the said company, the said deposit of 2*l.* 2*s.* per share; but hath wholly neglected so to do. By means of which said premises the plaintiffs have been and are greatly injured and damaged," &c.

Special demurrer.

The defendant's points as marked for argument were: first, that the declaration is bad both in form and substance, and shews no sufficient cause of action; secondly, that the matters therein stated are not sufficient from which to imply the promise alleged; thirdly, that the only consideration stated for the promise declared on is, the allotment to the defendant of shares in a company which the plaintiffs and others once upon a time before the making of the promise had agreed with each other to endeavour to form, but which said agreement and the formation of the said company and all endeavours to form the same may (consistently with the said declaration) have been given up and abandoned long before the said allotment or promise, and that such consideration is insufficient to sustain the said promise; fourthly, that the declaration is wanting in certainty in not stating whether the formation of the company commenced before or after the coming into operation of the stat. 7 & 8 Vict. c. 110; fifthly, that if the formation of the company commenced before the coming into operation of the 7 & 8 Vict. c. 110. all the several parties to the agreement for its formation, and not the plaintiffs alone, ought to have sued in this action, and if the formation commenced after the said act came into operation, then the declaration ought to have shewn that the plaintiffs were according to the act entitled to allot shares and receive deposits, and that the deposits sued for are such as the act authorizes; sixthly, that the declaration ought to have shewn with certainty that the defendant accepted the allotment; seventhly, that the declaration ought to have stated with certainty the terms which the plaintiffs are alleged to have promised to fulfil, and been ready and willing to fulfil.

tee, and the contract, as it appears on the declaration, is a contract made with the present plaintiffs. That is sufficient on demurrer, though it may turn out, as in *Woolmer v. Toby*, that the contract sued on was made with the plaintiffs and others jointly. I am also of opinion that the formal objections made to this declaration cannot be supported. If the allegation had been that, in consideration of the premises, and of the plaintiffs' undertaking to perform what was to be performed on their part, the defendant undertook and promised on his part, I should have taken time to consider whether the omission to specify the terms to be performed by the plaintiffs would not be a good objection on special demurrer. The allegation, however, is "in consideration of the premises, and that the plaintiffs at the request of the defendant promised the defendant to perform and fulfil the *said* terms on their part;" and that refers to the previous statements in the declaration, which are sufficient to shew certain express or implied terms, and which must be taken to be embodied in the allegation of the promise.

ROLFE, B.—I am of the same opinion. With respect to the objection that the contract in this declaration should have been treated as a contract with all the members of the company, and not as a contract with its managing committee: it may be, in fact, a contract with the company; but there is nothing illegal in a contract between the managing committee of such a company as this, and an allottee, to enure to the benefit of the company. The declaration does not shew that the committee of management forms part of the company, but only that the plaintiffs had agreed with other persons to form a company, of which they were to be part, and were to allot shares in it. It then alleges that they entered into a contract with the defendant to allot him shares, that they performed all they had undertaken to perform, and that he had not performed what he had undertaken to perform. I think if the facts be as stated, they are enough to sustain the action. As to the question of illegality, it is said, the contract does not appear to be legal on account of the statute 7 & 8 Vict. c. 110. But it is a contract which is good at common law, and illegal only if made after the passing of a particular act of

parliament, and if certain requisitions in that act are not complied with. We cannot presume those facts; if they exist they ought to come from the other side. The only point I had any doubt about was, that the declaration shewed there were certain terms to be performed by the plaintiff, and did not shew what they were. That is an objection taken on special demurrer; but the truth is, that the declaration shews there are no terms except those previously averred in it; and, therefore, the words implying other terms, are surplusage, as in the case of *Ring v. Roxburgh* (15). There a declaration stated, that in consideration of work and labour, &c., and certain diseases, the defendant promised, &c.; and Bayley, B. said, that though the allegation of the defendant being indebted for certain diseases was nonsense and surplusage, yet as there were other good considerations in the declaration sufficient to support the promise, it was good. I think, in this declaration, there is a consideration stated sufficient to support the promise, viz., the consideration of having done what was done, and the subsequent allegation of readiness to perform other terms may be rejected.

*Judgment for the plaintiffs.*

1847. }  
June 4. } HALL v. LACK.

*Annuity Deed — Consideration — What sufficient Memorial under 53 Geo. 3. c. 141. — Statement of Pre-existing Debt.*

*Where, in the memorial required by the 55 Geo. 3. c. 141, under column "Consideration, and how paid," the statement was 5,000*l.* made up of five several sums of 300*l.*, 200*l.*, 2,000*l.*, 1,500*l.*, and 1,000*l.*, previously lent and advanced by C. H. to or for the use of J. L. and E. J. L., and owing to C. H. on security of five several bills of exchange, drawn by E. J. L. upon, and accepted by, J. L., and indorsed by E. J. L., the said consideration being paid and satisfied by the cancellation of the said bills and a release, &c. :—Held, a fair statement, and one with as much detail as the nature of the transaction permitted.*

(15) 2 Cr. & Jer. 418; s. c. 1 Law J. Rep. (N.S.) Exch. 168.

this action, before and at the time of the commencement of this action was and still is justly and truly indebted to the deponent and to Edward Pontifex, his, deponent's, partner in trade, in 100*l.* for work done, and materials for the same provided, and goods manufactured and made, by the deponent and his said partner, for said Sergius de Maltzoff, and at his request."

*Martin* shewed cause.—The affidavit is sufficient. The goods in question, having been ordered by an individual for a particular purpose, cannot be expected to produce the same price if they were to be re-sold. The case differs from that of the affidavit to hold to bail for goods sold.

*Hoggins*, contra, was not called on.

*PARKE, B.*—The affidavit is indefinite. *Non constat* that any property in the goods passed to the defendant; the defendant may not have accepted the goods. The contract may be executory. The case cannot be put more strongly in favour of the plaintiffs, than by comparing it to the case of goods bargained and sold, without alleging that they are delivered, and an affidavit stating that a party is indebted to another for goods sold cannot be supported (1). The rule for discharging the defendant out of custody must be made absolute. The *capias* is to stand as a justification to the sheriff.

*POLLOCK, C.B., ALDERSON, B., and ROLFE, B.* concurring,—

*Rule absolute.*

1847. }  
Nov. 25. } *SUKER AND ANOTHER v. NEAL.*

*Alteration of Record.*

*A declaration on a bill of exchange stated it to be payable at three months, and contained counts for goods sold and delivered and on an account stated. The bill, as produced at the trial, was made payable at two months, and on the record being referred to, appeared payable in like manner at two months, but the word "two," in the record, had been written on an erasure.*

*The plaintiffs having obtained a verdict, the Court set aside the record and all sub-*

*sequent proceedings, refusing leave to the plaintiffs to retain their verdict on the account stated.*

This was a rule calling upon the plaintiffs to shew cause why the record and all subsequent proceedings should not be set aside for irregularity, with costs.

The declaration stated, that the plaintiffs were the drawers, and the defendant the acceptor of a bill of exchange, payable *three months after date*, for the sum of 38*l.* 11*s.* There were also counts for goods sold and delivered and on an account stated.

The pleas were, first, that the defendant did not accept the bill; secondly, to the residue of the declaration, "never indebted."

The issue delivered was in conformity with the declaration and pleas.

At the trial, before *Wilde, C.J.*, at the last Bristol Summer Assizes, the plaintiffs, in support of their case, put in evidence a bill of exchange, drawn by them and accepted by the defendant, payable at *two months after date*, for the sum of 38*l.* 11*s.*

*Ball*, for the defendant, objected that this was not the bill declared on. On reference to the record it appeared that the word "two" had been written on an erasure. The learned Chief Justice said he could only try the issues as they appeared on the record, and accordingly a verdict was returned for the plaintiffs for the amount of the bill and the interest.

*Ball* having obtained a rule *nisi* to set aside the record, &c.,

*Hoggins* shewed cause.—The record has been altered by the plaintiffs' agent at Bristol without their authority; but the plaintiffs may still retain the verdict upon the account stated, abandoning the count upon the bill of exchange.

[*ALDERSON, B.*—Can you hold a verdict on a record that has been improperly altered? We cannot be sure that the defendant may not have had a good defence on the account stated.]

*Ball*, contra, was not called on.

*Per Curiam* (1).—The rule must be *Absolute* (2).

(1) *Pollock, C.B., Alderson, B., and Rolfe, B.*

(1) See *Hopkins v. Vaughan*, 12 East, 398, 1 *Ascar v. Morioseph*, 1 Bing. 357; s. c. 2 Law J. Rep. C.P. 14.

(2) See *Jones v. Tatham*, 8 Taunt. 634; *Drummond v. Burt*, 1 Moo. & Rob. 136; and *Doe v. Cotterill v. Wylde*, 2 B. & Ald. 472.

Bills for 300 <i>l.</i> , dated 22nd July 1841, at 3 months.	
200 <i>l.</i> , 22nd July 1841, at 3 months.	
2,000 <i>l.</i> , 29th July 1841, at 3 months.	
1,500 <i>l.</i> , 3rd Aug. 1841, at 2 months.	
1,000 <i>l.</i> , 18th Aug. 1841, at 2 months.	

Immediately on the giving of the bill for 2,000*l.*, in the said indenture mentioned, the said Robert Phillott held the said sum of 2,000*l.* as the agent of and in trust for the said defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof, except that as to 100*l.*, part of the said sum of 2,000*l.*, the said Robert Phillott held that sum for himself and H. M. Elderton, with the consent and by the authority of the defendant and the said E. J. Lack, as discount, which he, the said Robert Phillott, represented to the defendant and the said E. J. Lack, he, the said Robert Phillott, and the said Henry M. Elderton, paid for the loan of the said sum of 2,000*l.* on the said bill, but no part of this discount was ever received by the plaintiff. This was the first advance made by the plaintiff to the defendant and the said E. J. Lack. In like way, on the giving of the bill for 1,500*l.*, in the said indenture mentioned, the said Robert Phillott held the sum of 700*l.* as the agent of and in trust for the said defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof. As to the sum of 300*l.*, and as to 1,000*l.*, part of the secondly-mentioned sum of 2,000*l.*, the said Robert Phillott received and held these sums respectively for the said defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof, immediately he, the said Robert Phillott, received those portions of the proceeds of the said stock, which was some days after he first held the said bill for 1,500*l.* on account of the plaintiff. And the said Robert Phillott received and held the remainder of the said secondly-mentioned sum of 2,000*l.*, as the agent of and in trust for the defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof immediately on the receipt of the said bill for 1,000*l.*, subject as to each of the four

last-mentioned bills to a like holding of a part for discount, as in the case of the first-mentioned bill.

The last-mentioned sum of 1,892*l.* 19*s.* 1*d.* was received by R. Phillott on the said 1st day of September, and 242*l.* 19*s.* 1*d.*, part thereof, was then lent by him, as the agent of the plaintiff, to the defendant and the said E. J. Lack, and the residue, 1,150*l.*, was held by him on account of the plaintiff until January, A.D. 1842, when the same was lent by him, as the agent of the plaintiff, to the defendant and the said E. J. Lack. The said R. Phillott was duly authorized by the defendant and the said E. J. Lack, to procure and hold the said sums of 2,000*l.*, 700*l.*, 300*l.* and 2,000*l.* on account of the defendant and the said E. J. Lack, and the same were loans from the plaintiff to the defendant and the said E. J. Lack, at the several times the said R. Phillott held the same respectively on account of the defendant and the said E. J. Lack as aforesaid. Although the said R. Phillott held the same on account of the defendant and the said E. J. Lack, he did not pay the full amount thereof to them, or apply it for their benefit, but held considerable portions thereof as aforesaid, and he and the said Henry M. Elderton untruly represented to the defendant and the said E. J. Lack, that they, the said R. Phillott and H. M. Elderton, had been obliged to pay the sums so held for discount of the said several bills.

The said several bills were received by the said R. Phillott from the defendant and the said E. J. Lack on or about their respective dates. The bill for 2,000*l.* was given specifically for the said first-mentioned sum of 2,000*l.*, so lent as aforesaid, and held by the said R. Phillott, as the agent of the plaintiff, from the time of its date. The bill for 1,500*l.* was given and held by R. Phillott partly for advances made, partly in expectation of advances to be made, and which were made as aforesaid; and the bills for 300*l.* and 200*l.* were set apart, and held by R. Phillott, as the agent for the plaintiff, from the 17th of August. And the bill for 1,000*l.* was made and given to and held by him, as the agent of the plaintiff, to make up the amount of 5,000*l.*, which the plaintiff was to lend and advance, and did lend and advance as aforesaid.

In the month of December 1842, the plaintiff so being the holder of the said bill of exchange, the said defendant and the said E. J. Lack and H. M. Elderton proposed to the plaintiff to execute the said indenture, on his the plaintiff's cancelling or destroying the said bills and executing the release of the said defendant, the said E. J. Lack, and H. M. Elderton, in the said deed contained. The plaintiff, being unable to procure any other or better security for the money so obtained by the sale of his stock, acceded to the said proposal, and the said deed was accordingly executed by the several parties thereto, and the said bills of exchange were given up and cancelled, as in the said recital of the said deed mentioned. At that time the defendant and the said E. J. Lack were indebted to the plaintiff in 6,392*l.* 19*s.* 1*d.* for money lent by him to them, 5,000*l.* of which was secured by the said five bills of exchange as aforesaid. The said Elderton and Phillott did, as above stated, obtain from the plaintiff a larger sum than 5,000*l.*; but they have not, up to the present time, rendered an account to the defendant of the expenditure thereof, and it is admitted by the plaintiff that no such account can be rendered to make up the sum of 5,000*l.*, unless the receipt by Elderton and Phillott, or one of them, is to be considered as a receipt by the defendant. The question for the opinion of the Court was, whether the plaintiff was entitled to retain the verdict on the second issue: if so, whether the judgment ought to be arrested. If not so entitled to retain the verdict, then whether he was entitled to judgment notwithstanding a verdict for the defendant on such issue.

*Willes* (with whom was *Peacock*), for the plaintiff.—First, the issue ought to be for the plaintiff. The substance of the matter is to be looked at. The facts found by the case amount to the issue being found for the plaintiff. The money left the plaintiff's hands, and reached those of persons authorized by the defendant and E. J. Lack to receive it. It is found by the case, that Phillott received it as agent for the Lacks. Secondly, here, there was no pecuniary consideration, and in such case no inrolment is requisite. In *Blake v. Attersoll* (1), where

a son-in-law agreed with the executors of the father to cancel a marriage settlement, under which he was a creditor in 10,000*l.*, and in consideration thereof to receive 5,000*l.* and an annuity of 125*l.*, it was held that such annuity need not be inrolled. The Annuity Act only applies to annuities granted for pecuniary consideration. The cases on this subject are collected in *Chitty's Statutes*, p. 27. The word "pecuniary," which appears in the 53 Geo. 3. c. 141, is omitted in the previous Annuity Act of 17 Geo. 3. c. 26.

*Watson* (with whom was *Corrie*).—The memorial states that five specific sums had been lent, and that five bills of similar amounts were held as security for those sums. This was not so in fact. Under the 53 Geo. 3. c. 141, the Court has no discretion as to setting aside an annuity deed, when the memorial does not truly state the consideration. The statement in the memorial must be precise, and must state the fact—*Ex parte Lewis* (2). In *Drake v. Rogers* (3) it was held, that where part of the consideration consisted of a draft, payable at a banker's, it was necessary to state in the memorial at what time such draft was payable. *Horwood v. Underhill* (4), decided on the 17 Geo. 3. c. 26, is in point. In *Kirkman v. Price* (5) it was held that the memorial must set forth precisely the manner in which the consideration money was paid.

[*ALDERSON, B.*—That is under the old act, where the word "pecuniary" is left out.]

*Morris v. Wall* (6). If it be set forth in the memorial that the consideration was so much in money paid, when the real consideration was part in money and part is the giving up of a former annuity, the Court will set aside the security—*Washburn v. Birch* (7). Annuities are not regarded with favour. In the 17 Geo. 3. c. 26. the practice of raising money by annuity is called "pernicious," and the case of the bills is

(2) 2 Ad. & El. 135.

(3) 2 Brod. & Bing. 19.

(4) 3 Mau. & Selw. 32.

(5) 1 H. Bl. 309.

(6) 1 Bos. & Pul. 208.

(7) 5 Term Rep. 472.

(1) 2 B. & C. 275; s. c. 2 Law J. Rep. K.B. 193.

worse than that of raising money—*Erle v. Brown* (8).

*Willes*, in reply.—No fraud is suggested by the other side. The five bills mentioned in the memorial were given to secure amounts equivalent to what was on the face of them.

[*ROLFE, B.*—The Annuity Act intends that you should state the exact transaction.]

Bygone transactions are not within the Annuity Act. But if they are, they need not be stated in the memorial with the strictness contended for. In *Symmons v. Mortimer* (9) it was held, that where 1,200*l.* had been paid for the grant of an annuity, and the securities to prevent their being registered had been renewed from twenty days to twenty days, and then 600*l.* had been paid for the grant of a further annuity; and the securities renewed in like manner, and sometimes after a longer period than twenty days, and afterwards had been registered, a memorial of the annuity stating the consideration to be 1,800*l.* was valid. So, in *Kelfe v. Ambrose* (10), it was held, that money lent and paid at different times for the education and advancement of the defendant is a good consideration for an annuity, and is sufficiently expressed in the memorial as "money lent and advanced, and also paid, laid out and expended to and for the maintenance, education, and advancement in the world of the defendant." *Ex parte Lewis* was a case under the old act.

*Cur. adv. vult.*

The judgment of the Court was now, in Michaelmas term, 1847, delivered by—

*ROLFE, B.*—This case was argued last Trinity term, by Mr. Willes, for the plaintiff, and Mr. Watson, for the defendant. It was in action of covenant, brought to recover the arrears of an annuity, claimed to be due from the defendant to the plaintiff, under the terms of an annuity deed, dated the 21st of December 1842. By that deed, after reciting that the plaintiff had at various times advanced and lent to the defendant and his son Edward John Lack, among other monies, five several sums of 300*l.*, 200*l.*, 2,000*l.*, 1,500*l.*, and 1,000*l.*, as a security

for the re-payment of which the plaintiff held five several bills of exchange for the same sums of 300*l.*, 200*l.*, 2,000*l.*, 1,500*l.*, and 1,000*l.*, bearing date on various days, mentioned in the deed, in the months of July and August 1841; and further reciting, that all interest on these sums had been duly paid up to the 29th of September 1842, and that the defendant and his said son had some time since agreed with the plaintiff for the sale to him of an annuity of 804*l.*, in consideration of the sums so due on the said five bills of exchange, such consideration to be satisfied by the cancellation of the bills and a release from the same, to be executed by the plaintiff; and further reciting, that in pursuance of that agreement, the first bill had been that day delivered up by the plaintiff to the defendant and his son, and had been cancelled, it is witnessed, that the plaintiff, pursuant to the said agreement, released the defendant and his son from the said bills, and all claim in respect thereof. And it was further witnessed, that in consideration of the said sums so released and discharged, by cancellation of the said bills, the defendant and his son did grant to the plaintiff an annuity of 804*l.*, payable quarterly on the days therein mentioned; and the defendant covenanted for due payment of the annuity on the specified days. There are a great many other provisions in the deed, but they do not appear to us material to the present case. The declaration, after setting out the deed *verbatim*, and alleging performance of all its stipulations on the part of the plaintiff, alleges various breaches of the covenants entered into by the defendant, and particularly of the covenant for payment of the annuity, to the plaintiff's damage of 4,000*l.*

There were several pleas, but the questions before us turn entirely on the second, the plaintiff having succeeded on all the others. By that second plea, the defendant pleads, that the deed in question was made after the passing of the Annuity Act, 53 Geo. 3. c. 146, and alleges that the annuity was granted for a pecuniary consideration, and that no memorial was inrolled according to the provisions of the statute, whereby the indenture is null and void.

To this the plaintiff replied, that a memorial was duly inrolled according to the statute, which memorial was and is as fol-

(8) 10 Ad. & El. 412; s.c. 8 Law J. Rep. (N.S.) p. 276.

(9) 5 Term Rep. 139.

(10) 7 Ibid. 551.

lows,—and then sets out the memorial verbatim. The language under the column "Consideration, and how paid," being to the effect following: "5,000*l.* made up of five several sums of 300*l.*, 200*l.*, 2,000*l.*, 1,500*l.*, and 1,000*l.* previously lent and advanced by C. R. Hall, to or for the use of John Lack and E. J. Lack, and owing to C. R. Hall, on security of five several bills of exchange, drawn by E. J. Lack upon and accepted by J. Lack, and indorsed by E. J. Lack, the said consideration being paid or satisfied by the cancellation of the same bills; and a release by C. R. Hall of J. Lack and E. J. Lack, from the sum secured thereby and interest.

The replication then goes on to aver that the said memorial did duly contain and truly set forth (*inter alia*) the pecuniary consideration for granting the said annuity.

The defendant, by his rejoinder, says, that the memorial did not truly set forth how the pecuniary consideration was paid, because the plaintiff did not previously to the grant of the said annuity, lend or advance to or for the use of the defendant and J. Lack the said sums of 300*l.*, 200*l.*, 2,000*l.*, 1,500*l.*, and 1,000*l.*; of this he puts himself upon the country,—thus traversing the averments in the replication that the memorial did truly set forth the pecuniary consideration for the grant of the annuity.

The plaintiff joined issue on the traverse so taken by the defendant; and on the trial of that issue a verdict was, by consent, taken for the plaintiff, subject to the opinion of this Court as to whether the facts warranted such a finding. It appeared by the case that in the year 1840 the plaintiff being about to leave England, and being entitled to certain 3*l.* per cent. annuities, standing in his name, gave a power of attorney to Robert Phillott, enabling him to sell out the same, with directions to place the proceeds out at interest, on good securities. Phillott made various sales of the stock in the months of July and August 1841, the whole net proceeds of such sales amounting to 6,392*l.*, and in those same months made advances by way of loan to the defendant and to Edward John Lack out of the said net proceeds, to the extent of 5,000*l.*, save that he claimed to deduct, and actually did deduct, several sums

amounting to 250*l.*, which he falsely represented that he had been obliged to pay by way of discount, in order to obtain the said loans. The plaintiff was entirely ignorant of the deductions, the whole of the sums retained having been appropriated by Phillott to his own purposes. At or about the time of these advances, Phillott took, by way of security for the money advanced, five several bills of exchange as follows, that is to say, one for 300*l.*, one for 200*l.*, one for 2,000*l.*, one for 1,500*l.*, and the other for 1,000*l.* All the bills were drawn by E. J. Lack, payable to his own order. They were all drawn upon and accepted by the defendant, and were indorsed by E. J. Lack, and were handed over to Phillott, as agent for the plaintiff, by way of security for the advances. The bills were dated on different days between the 22nd of July and the 18th of August 1841: the dates of the bills did not exactly correspond with the date of the advances, nor were the advances made in the exact sums for which the bills were given, but sums to the amount of 5,000*l.* (subject to the deductions before adverted to) were advanced nearly about the times when the bills were given, for which sums the bills were intended to be securities.

In the month of December 1842, the plaintiff agreed with the defendant to accept the annuity granted by the deed set out in the declaration, in satisfaction of the five bills of exchange and the 5,000*l.* thereby secured. The bills were accordingly cancelled and the deed was executed, and a memorial was enrolled, as stated in the pleadings. On these facts, Mr. Watson, for the defendant, argued, either that a verdict ought to be entered for him on the issue as to the memorial, or if the verdict should be entered for the plaintiff, then that the defendant was entitled to arrest the judgment.

The argument for entering the verdict for the defendant rested on these grounds. The sums advanced and covered, or intended to be covered, by the five bills, did not, it was said, really amount to 5,000*l.*, but only to that sum less 250*l.*; the memorial, therefore, stating the amount to be 5,000*l.* was contended to be untrue, and so that the averment that the memorial did truly set forth the pecuniary consideration was not made out. It was further contended, that

no such precise sums as those for which the several bills were given ever were advanced, and on this ground also it was contended that the memorial was untrue, for that it ought to have stated the exact amount of each advance, and so that even supposing the aggregate of all the advances to be correct, still that the statement was insufficient. We are of opinion that neither of these objections can prevail. The money, it must be recollected, was all advanced to the Lacks without any reference to the purchase of an annuity, and merely by way of loan.

The first thing, therefore, to be done in order to arrive at a just conclusion as to the rights of the parties, is to look at the question apart from any consideration of the annuity, and merely as a transaction of lending and borrowing; and when it is so considered, there can be no doubt but the defendant was liable on the bills to the full amount. The exact days on which the different advances were made were wholly immaterial, and it was certainly competent to the parties to treat the 5,000*l.* as having been advanced in sums and at dates corresponding with the five bills. So also it was lawful for the defendant to treat the 250*l.* retained by Phillott as having been advanced to him. If the plaintiff had sued the defendant on the bills it would have been no answer to the plaintiff, as to any part of the demand, to shew that Phillott had retained a part of the money. Even treating it as clear that Phillott was the agent of the plaintiff, and not of the defendant, still it did not lie in the mouth of the defendant to say that the plaintiff did not advance the whole of the 5,000*l.* He did, in fact, advance the whole of that sum. What was kept back by Phillott was retained by him for his own use in fraud of the other parties, and without the privity of the plaintiff. And the defendant, by accepting the bills of the full amount of 5,000*l.*, must be taken to have agreed to treat the whole sum as received by him by so accepting the bills. He enabled Phillott to discharge himself as against the plaintiff. He afterwards paid to the plaintiff interest regularly on the whole 5,000*l.*, treating the whole as having come to his hands; and having done so, he cannot afterwards turn round and say that a part of the sum for which he accepted the bills, and on which he regularly had paid interest, was

not really received by him, but was intercepted in its progress by the agent.

For these reasons, we think it clear, that at the time when the annuity was granted the plaintiff had an undoubted claim on the defendant for the 5,000*l.* due on the five bills; and this being so, it follows that the consideration is described in the memorial with strict accuracy. Indeed, it would have been incorrect to have stated that the advance of 5,000*l.*, or any part of it, formed the consideration, or any part of the consideration, for the annuity. The whole of the 5,000*l.* was a debt justly due before the annuity was thought of, and the consideration for the grant of the annuity is correctly described, not as the advance of the 5,000*l.*, but as the release of the previously existing debt, and the cancellation of the bills by which it was secured. This case, therefore, closely resembles that of *Kelfe v. Ambrosae*, referred to by Mr. Willes, where, under the original Annuity Act, 17 Geo. 3. c. 26, which requires the consideration to be correctly stated in the body of the deed, it was held, that the statement of a pre-existing debt due from the grantor to the grantee was a sufficient compliance with the act, without shewing how the debt had arisen. The principle acted on in that case as to the statement of the consideration in the body of the deed, under 17 Geo. 3. c. 26. s. 3, is equally applicable to the statement of the consideration in the memorial under the more recent act, 53 Geo. 3. c. 141. Indeed, to hold that it is necessary in the case of existing by-gone debts to state when and how each sum constituting the debt was advanced, would obviously in many cases be equivalent to holding that an annuity cannot be granted in consideration of such debts. It might often be quite impossible, more especially in the case of cross accounts, to state when and how all the items of which the debt is made up arose. The statute does not require any such statement. All that it requires is, that the memorial should state the pecuniary consideration, and how paid; and in the present case this has been done with perfect fairness and with as much detail as the nature of the transaction permitted. The consequence will be, that the verdict on the issue raised by the replication to the second plea must be entered for the plaintiff.

It is hardly necessary to say that our



In the month of December 1842, the plaintiff so being the holder of the said bill of exchange, the said defendant and the said E. J. Lack and H. M. Elderton proposed to the plaintiff to execute the said indenture, on his the plaintiff's cancelling or destroying the said bills and executing the release of the said defendant, the said E. J. Lack, and H. M. Elderton, in the said deed contained. The plaintiff, being unable to procure any other or better security for the money so obtained by the sale of his stock, acceded to the said proposal, and the said deed was accordingly executed by the several parties thereto, and the said bills of exchange were given up and cancelled, as in the said recital of the said deed mentioned. At that time the defendant and the said E. J. Lack were indebted to the plaintiff in 6,392*l.* 19*s.* 1*d.* for money lent by him to them, 5,000*l.* of which was secured by the said five bills of exchange as aforesaid. The said Elderton and Phillott did, as above stated, obtain from the plaintiff a larger sum than 5,000*l.*; but they have not, up to the present time, rendered an account to the defendant of the expenditure thereof, and it is admitted by the plaintiff that no such account can be rendered to make up the sum of 5,000*l.*, unless the receipt by Elderton and Phillott, or one of them, is to be considered as a receipt by the defendant. The question for the opinion of the Court was, whether the plaintiff was entitled to retain the verdict on the second issue: if so, whether the judgment ought to be arrested. If not so entitled to retain the verdict, then whether he was entitled to judgment notwithstanding a verdict for the defendant on such issue.

*Willes* (with whom was *Peacock*), for the plaintiff.—First, the issue ought to be for the plaintiff. The substance of the matter is to be looked at. The facts found by the case amount to the issue being found for the plaintiff. The money left the plaintiff's hands, and reached those of persons authorized by the defendant and E. J. Lack to receive it. It is found by the case, that Phillott received it as agent for the Lacks. Secondly, here, there was no pecuniary consideration, and in such case no enrolment is requisite. In *Blake v. Attersoll* (1), where

a son-in-law agreed with the executor of the father to cancel a marriage settlement, under which he was a creditor in 10,000*l.*, and in consideration thereof to receive 5,000*l.* and an annuity of 125*l.*, it was held that such annuity need not be enrolled. The Annuity Act only applies to annuities granted for pecuniary consideration. The cases on this subject are collected in *Chitty's Statutes*, p. 27. The word "pecuniary," which appears in the 53 Geo. 3. c. 141, is omitted in the previous Annuity Act of 17 Geo. 3. c. 26.

*Watson* (with whom was *Corrie*).—The memorial states that five specific sums had been lent, and that five bills of similar amounts were held as security for those sums. This was not so in fact. Under the 53 Geo. 3. c. 141, the Court has no discretion as to setting aside an annuity deed, when the memorial does not truly state the consideration. The statement in the memorial must be precise, and must state the fact—*Ex parte Lewis* (2). In *Drake v. Rogers* (3) it was held, that where part of the consideration consisted of a draft, payable at a banker's, it was necessary to state in the memorial at what time such draft was payable. *Horwood v. Underhill* (4), decided on the 17 Geo. 3. c. 26, is in point. In *Kirkman v. Price* (5) it was held that the memorial must set forth precisely the manner in which the consideration money was paid.

[*ALDERSON, B.*—That is under the old act, where the word "pecuniary" is left out.]

*Morris v. Wall* (6). If it be set forth in the memorial that the consideration was so much in money paid, when the real consideration was part in money and part in the giving up of a former annuity, the Court will set aside the security—*Washburn v. Birch* (7). Annuities are not regarded with favour. In the 17 Geo. 3. c. 26. the practice of raising money by annuity is called "pernicious," and the case of the bills is

(2) 2 Ad. & El. 135.

(3) 2 Brod. & Bing. 19.

(4) 3 Mau. & Selw. 82.

(5) 1 H. Bl. 309.

(6) 1 Bos. & Pul. 208.

(7) 5 Term Rep. 472.

(1) 2 B. & C. 275; s. c. 2 Law J. Rep. K.B. 193.

expenses would be the consequence of a delay in the delivery of the goods.

PARKE, B.—There is no ground for a rule. The defendants are responsible for all the reasonable consequences arising from their breach of contract. Whether the expense of the clerk's going and remaining three days at Bedford was a reasonable consequence of the defendants' breach of contract was a question for the jury. If he went down unnecessarily, or stayed there too long, the defendants ought not to be compelled to pay that expense. The truth is, the jury have given too large damages, but as the damages are less than 20*l.*, we cannot grant a new trial on the ground of the verdict being against the evidence. There is no misdirection.

ALDERSON, B.—I am of the same opinion. Whether the expenses of the clerk and of sending the goods to St. Neot's were reasonable, was a question for the jury. The law was rightly laid down by the Judge. The jury have given too much by way of damages, and if the amount that they have given were sufficient to warrant a new trial, we should be willing to grant a rule.

ROLFE, B. concurred.

POLLOCK, C.B.—The jury were wrong in giving too large an amount of damages, but we cannot set the verdict aside. The real question is, whether it was incumbent on the Judge to decide as a matter of law, whether certain expenses were reasonable. I think it was not. The notice to the carriers of the consequences of an unreasonable delay in the delivery of the goods makes no other difference than this, that if they have notice of that fact and then take them they may be liable for some expenses for which they would not otherwise be liable. But whether a particular class of expenses is reasonable or not will depend upon the subject-matter, upon the nature of the goods, upon the usage of trade, upon what a reasonable man would do under the particular circumstances, and other matters of that kind. It would therefore be for the jury to say what were reasonable expenses. I regret that we cannot interfere in this case.

*Rule refused.*

1847. }  
Nov. 9. } DOE d. ROBERTS v. WILLIAMS.

*Devise—Estate in Fee.*

*A testator devised as follows:—"I give, devise, and bequeath all my real and personal estate, monies, securities for money, and all other my real and personal estate, of what nature or kind soever, and wheresoever the same may be, which I am now possessed of, or which at any time hereafter I may be possessed of, or entitled unto, subject to the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will, unto my dear wife, to and for her sole and separate use and benefit":—Held, that, under the above words, the devisees took an estate in fee in the lands of the testator.*

This was an action of ejectment, to recover possession of a tenement and land, called Penybonge, in the parish of Llandwrog, in the county of Carnarvon.

At the trial, before Maule J., at the last Carnarvonshire Summer Assizes, the following facts appeared:—The lessor of the plaintiff claimed the property as heir-at-law of Thomas Roberts, who died in 1833, having made his will in these terms: "I give, devise, and bequeath all my real and personal estate, monies, securities for money, and all other my real and personal estate of what nature or kind soever, and wheresoever the same may be, which I am now possessed of, or which at any time hereafter I may be possessed of, or entitled unto, subject to the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will, unto my dear wife Catherine, to and for her sole and separate use and benefit." The defendant claimed, under the will of the testator's wife, Catherine Roberts, who died in 1842. On the part of the plaintiff, it was contended that, under the terms of the will of T. Roberts, the wife of the testator took no more than an estate for life in the premises in question. The learned Judge was of opinion that the testator's wife took an estate in fee, and directed the jury to find a verdict for the defendant, reserving leave to the lessor of the plaintiff to move to enter a verdict for him.

Townsend now moved accordingly.—The

wife of the testator took only an estate for life in the premises in question. It is not given to her and her heirs. In *Moor v. Denn* (1) the devise was "all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever or wheresoever; and also all my goods, &c., after payment of my just debts and funeral expenses, I give and devise the same unto my wife Sissily Carr," and it was held that the wife took only an estate for life. That was a decision of the House of Lords, and proceeded on the ground that the premises were devised, and subject to a charge.

[PARKE, B.—The lessor of the plaintiff is to cut down the will. It does not direct that the *devisee* is to pay the debts. The only question then is, whether the devise to the "sole and separate use and benefit" of the wife reduces the estate to an estate for life.]

The rule on this subject is stated by Grose, J., in *Goodtitle v. Maddern* (2): "The rule has been long established, that if the executor be bound to pay the debts by the terms of the devise, he must take a fee in the lands devised to him, in respect of which such obligation is thrown upon him; but if he be only to pay them out of the produce of the land devised to him, or only to take the land *after* payment of debts, then, without words of inheritance, the fee will not pass." And the language of Lawrence, J. is to the same effect. He referred to *Saunderson v. Dobson* (3).

*Per Curiam* (4).—We are all of opinion that the wife of the testator took an estate in fee in the premises in question; and, therefore, there will be no rule.

*Rule refused.*

1847. }  
Nov. 20. } ORGILL v. BELL.

*Writ of Trial—Judge's Order to set aside Verdict—Irregularity.*

*The plaintiff having obtained a verdict in a writ of trial, a Judge at chambers, instead*

(1) 2 Bos. & Pul. 247.

(2) 4 East, 500.

(3) 16 Law J. Rep. (n.s.) Exch. 249.

(4) Pollock, C.B., Parke, B., Alderson, B. and Rolfe, B.

*of staying the execution of the writ, made an order on the 6th of July 1846, for setting aside the verdict, on the ground of the irregularity of the notice of trial:—Held, that this was not a nullity, but an irregularity; and that an application to rescind the order made on the last day of Trinity term 1847 was too late.*

This was a rule calling upon the defendant to shew cause why an order of Platt, B. should not be rescinded. A writ of trial having issued, directing the cause to be tried before the sheriff, the plaintiff gave notice of trial for a time when the Court did not sit, except for the purpose of trying, by adjournment, causes previously undisposed of. The defendant's attorney attended at the court on the day in question, and protested against the trial taking place on the ground of the insufficiency of the notice, but the trial proceeded, and the plaintiff had a verdict.

On the 6th of July 1846, Platt, B. made an order, directing that the *verdict* and all subsequent proceedings should be set aside.

In Michaelmas term, 1846, the defendant obtained a rule for judgment as in case of a nonsuit; and on the last day of Trinity term, 1847, the plaintiff obtained the present rule.

*C. C. Jones, Serj.* shewed cause.—The ground on which this rule was obtained is, that in the case of a writ of trial a Judge at chambers has no power to set aside a *verdict*, his authority being confined to staying execution on the writ. The course, however, taken by the Judge was, at the most, a mere irregularity, and has been waived by the plaintiff's delay in coming to this Court.

[PARKE, B.—If this was a case of an improper exercise of jurisdiction on the part of the Judge, the plaintiff ought to have come promptly to complain of it. The effect of his lying by is, that the verdict stands.]

*Crouch, contra.*—The Judge had no power to set aside the *verdict*; his power under the 3 & 4 Will. 4. c. 42. s. 18. was limited to staying the judgment or the execution upon the writ. The proceeding therefore was not a mere irregularity, but an absolute nullity, and is not cured by the lapse of time. *Roberts v. Spurr* (1) shews

(1) 3 Dowl. P.C. 551.

that an interlocutory judgment signed without an appearance entered is a nullity, and cannot be waived.

[PARKE, B.—The defendant has acted in a manner on the Judge's order by moving for judgment as in case of a nonsuit.]

[ALDERSON, B.—The act 3 & 4 Will. 4. c. 42, that enables writs of trial to be executed before the sheriff, had reference to immediate execution; but then, under the statute that power may be taken away by the Judge. But if the Judge does not take it away, execution proceeds, and the effect is the same as in the case of a verdict at Nisi Prius. What then would be the consequence of a single Judge setting aside a verdict at Nisi Prius? If his act would be a mere nullity you are right: if it is an irregularity you are wrong.]

It is submitted that the act of the Judge was a nullity.

POLLOCK, C.B.—This rule must be discharged. The service of the order of July 1846 being an impediment to the plaintiff's proceeding, he ought to have applied in Michaelmas term to set aside the order. Instead of this, he waits until an application is made for judgment as in case of a nonsuit. And he even then omits to apply to this Court to set aside the order until Trinity term in this year. That was too late, for the order of the Judge was not a nullity, but a mere irregularity.

ALDERSON, B.—The act of the Judge in setting aside the verdict was a mere irregularity, and if pointed out at the time would have been set right; and under the circumstances we should not have rigidly scrutinized the time for making the application. The practice in such a case is to apply to the Court promptly to set the order aside. Here, the order was erroneous, but the application to rescind it ought to have been made in Michaelmas term, 1846. The general rule must prevail, as the motion was not made in reasonable time. There must be an end of litigation. The general maxim applies to this case, *quod fieri non debet factum valet*.

ROFFE, B. concurred (2).

*Rule discharged.*

(2) Parke, B. had left the court during the argument.

1847. } PEGLER AND ANOTHER v.  
Nov. 22. } HISLOP.

*Arrest—Statute 1 & 2 Vict. c. 110. s. 3.*

*Upon appeal against a Judge's order to hold a defendant to bail under 1 & 2 Vict. c. 110. s. 3, affidavits in denial of the plaintiff's cause of action are admissible, but the Court will not interfere unless it be clear that there is no cause of action.*

*Where upon a Judge's order and writ of capias the defendant gave bail to the sheriff, and on appeal against the order it appeared that the defendant had no intention of leaving England for two months, but that the plaintiff would not be able to get judgment in that time, the Court, considering the arrest premature, cancelled the bail bond, but directed the order and capias to stand.*

In this case, Williams, J., on the 25th of October 1847, made an order for the arrest of the defendant, under the 1 & 2 Vict. c. 110. s. 3, upon an affidavit of one of the plaintiffs, which stated that the defendant was justly and truly indebted to the plaintiffs in 650*l.*, for goods sold and delivered by the plaintiffs to the defendant in the early part of the present year, in the kingdom of Spain, where the defendant then resided; that he had received information from a clerk of certain brokers to a Portuguese steamer called the *Falcon*, that the defendant was about to leave England for Portugal on board that steamer as soon as certain repairs to her machinery were completed; and that he believed the defendant would leave England unless forthwith apprehended. A *capias* accordingly issued, on which the defendant was held to bail.

*Pashley* thereupon moved for and obtained a rule, calling on the plaintiff to shew cause why the above order should not be rescinded and all subsequent proceedings thereon be set aside; and why the bail bond given to the sheriff should not be delivered up to be cancelled. He produced an affidavit of the defendant denying the debt, and stating that he was master and supercargo of the *Falcon*, which sailed regularly between Portugal and England, usually arriving in England every month, and remaining about ten days; that he did not intend to discontinue his business and occupation, as such master and supercargo; that the *Fal-*

closed at night by the defendant or his servants, (the defendant keeping the key thereof).

The gateway into the yard is entirely covered over by a portion of the house, No. 115, in High Street aforesaid, which house stands in the straight and direct line of, and abuts and fronts upon that street to the west of, and over the said gates and gateway, and is duly rated in and by the said rate, and the house adjoining to No. 115, on the east of the said gates and gateway is numbered No. 114, in the High Street, and such last-mentioned house also stands in the straight and direct line of and abuts and fronts upon the High Street, and is also duly rated in and by the said rate. The said gates and gateway are not distinguished by any number at all.

[From a plan which formed part of the case, it appeared the buildings on the one side of the yard abutted on Commercial Street, and those on the other side abutted on Castle Street.]

That part of the footpath of the said street which is opposite to and between the said gates and the general carriageway of the said High Street, is not laid down with flag stones, but with ordinary carriageway pavement, as is usual in similar cases in the metropolis, where a party is entitled to an entrance across the footway, and the carts and other carriages, and the horses and cattle of the defendant, in passing through the said gateway to or from the said yard, houses, &c., have at all times during his occupation and possession as aforesaid, necessarily traversed and passed over, and do necessarily traverse and pass over a large portion of the said street so paved and repaired by such commissioners, and the pavement thereof.

No part of the said yard has ever been paved, repaired, raised, sunk, or altered by the said commissioners, nor have they within the said yard at any time exercised any of the powers conferred upon them by the said acts or either of them, and none of the said houses or other buildings round the said yard ever fronted or were differently placed with respect to or more open to the High Street than they are now.

[The case then stated the making of a rate on the 22nd of November 1844, of one shilling in the pound of the yearly rent or

yearly value of such houses, shops, warehouses, cellars, vaults, or other tenements respectively, (so far as the same can be known,) except only such houses, &c. as are situate on the south side of the said High Street, &c.]

The other occupiers of the houses, warehouses, and buildings in the said yard as above mentioned, were and are also rated in the said rate in respect of such last-mentioned houses, &c.

The sum of 10*l.* 14*s.*, being the sum total and aggregate of the several sums at and in which the defendant is rated, in and by the said rate as aforesaid was, and the several sums of which the said sum of 10*l.* 14*s.* is such aggregate, were duly demanded of him before the commencement of this action, but he upon such demand refused and continually hitherto hath refused to pay the same, and each of such several sums, and every part thereof. And it is agreed that all steps, matters, and things necessary to be taken and done by the commissioners, the plaintiff, and all other parties to entitle the plaintiff as such clerk to maintain this action, (if the defendant is liable to be rated in respect of the premises occupied by him as aforesaid, and comprised in the said rate, and therein rated at the aggregate sum of 10*l.* 14*s.* as aforesaid, or any part thereof,) were by them and him taken and done previously to the commencement of the action.

Copies of the said acts and of the pleadings in this action accompany this case, and are to be deemed and taken to be part thereof for all purposes.

The question for the opinion of the Court was, whether, under the aforesaid acts or either of them, the defendant is liable to be rated for or in respect of the premises occupied by him as aforesaid, and mentioned in the said rate, or any part thereof, and in respect of which he was rated or assessed in the said rate as aforesaid. If the Court should be of opinion that the defendant is not liable under the said acts or either of them to be so rated, then judgment of *nolle prosequi* is to be entered; but if the Court should be of a contrary opinion, then the plea of the defendant is to be withdrawn, and judgment was to be entered for the plaintiff, for the sum of 10*l.* 14*s.*, or for such other and less sum as

that an interlocutory judgment signed without an appearance entered is a nullity, and cannot be waived.

[PARKE, B.—The defendant has acted in a manner on the Judge's order by moving for judgment as in case of a nonsuit.]

[ALDERSON, B.—The act 3 & 4 Will. 4. c. 42, that enables writs of trial to be executed before the sheriff, had reference to immediate execution; but then, under the statute that power may be taken away by the Judge. But if the Judge does not take it away, execution proceeds, and the effect is the same as in the case of a verdict at Nisi Prius. What then would be the consequence of a single Judge setting aside a verdict at Nisi Prius? If his act would be a mere nullity you are right: if it is an irregularity you are wrong.]

It is submitted that the act of the Judge was a nullity.

POLLOCK, C.B.—This rule must be discharged. The service of the order of July 1846 being an impediment to the plaintiff's proceeding, he ought to have applied in Michaelmas term to set aside the order. Instead of this, he waits until an application is made for judgment as in case of a nonsuit. And he even then omits to apply to this Court to set aside the order until Trinity term in this year. That was too late, for the order of the Judge was not a nullity, but a mere irregularity.

ALDERSON, B.—The act of the Judge in setting aside the verdict was a mere irregularity, and if pointed out at the time would have been set right; and under the circumstances we should not have rigidly scrutinized the time for making the application. The practice in such a case is to apply to the Court promptly to set the order aside. Here, the order was erroneous, but the application to rescind it ought to have been made in Michaelmas term, 1846. The general rule must prevail, as the motion was not made in reasonable time. There must be an end of litigation. The general maxim applies to this case, *quod fieri non debet factum valet*.

ROLFE, B. concurred (2).

*Rule discharged.*

(2) Parke, B. had left the court during the argument.

1847. } PEGLER AND ANOTHER v.  
Nov. 22. } HISLOP.

*Arrest—Statute 1 & 2 Vict. c. 110. s. 3.*

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*Per Curiam*(4).—We are all of opinion that the wife of the testator took an estate in fee in the premises in question; and, therefore, there will be no rule.

*Rule refused.*

1847. }  
Nov. 20. } ORGILL v. BELL.

*Writ of Trial—Judge's Order to set aside Verdict—Irregularity.*

*The plaintiff having obtained a verdict in a writ of trial, a Judge at chambers, instead*

*of staying the execution of the writ, made an order on the 6th of July 1846, for setting aside the verdict, on the ground of the irregularity of the notice of trial:—Held, that this was not a nullity, but an irregularity; and that an application to rescind the order made on the last day of Trinity term 1847 was too late.*

This was a rule calling upon the defendant to shew cause why an order of Platt, B. should not be rescinded. A writ of trial having issued, directing the cause to be tried before the sheriff, the plaintiff gave notice of trial for a time when the Court did not sit, except for the purpose of trying, by adjournment, causes previously undisposed of. The defendant's attorney attended at the court on the day in question, and protested against the trial taking place on the ground of the insufficiency of the notice, but the trial proceeded, and the plaintiff had a verdict.

On the 6th of July 1846, Platt, B. made an order, directing that the *verdict* and all subsequent proceedings should be set aside.

In Michaelmas term, 1846, the defendant obtained a rule for judgment as in case of a nonsuit; and on the last day of Trinity term, 1847, the plaintiff obtained the present rule.

*C. C. Jones, Serj.* shewed cause.—The ground on which this rule was obtained is, that in the case of a writ of trial a Judge at chambers has no power to set aside a *verdict*, his authority being confined to staying execution on the writ. The course, however, taken by the Judge was, at the most, a mere irregularity, and has been waived by the plaintiff's delay in coming to this Court.

[PARKE, B.—If this was a case of an improper exercise of jurisdiction on the part of the Judge, the plaintiff ought to have come promptly to complain of it. The effect of his lying by is, that the verdict stands.]

*Crouch, contra.*—The Judge had no power to set aside the *verdict*; his power under the 3 & 4 Will. 4. c. 42. s. 18. was limited to staying the judgment or the execution upon the writ. The proceeding therefore was not a mere irregularity, but an absolute nullity, and is not cured by the lapse of time. *Roberts v. Spurr*(1) shews

(1) 3 Dowl. P.C. 551.

(1) 2 Bos. & Pul. 247.

(2) 4 East, 500.

(3) 16 Law J. Rep. (N.S.) Exch. 249.

(4) Pollock, C.B., Parke, B., Alderson, B. and Rolfe, B.

order on being shewn to the gaoler was by him forwarded to the sheriff, who lived at some distance from the gaol. On the Sunday following a warrant of detainer, founded on a *ca. sa.* which had been issued on the previous day, was served upon the gaoler, who thereupon detained the defendant:—Held, that the defendant had no right to his discharge, as the sheriff was entitled to a reasonable time to search his office for other writs against the defendant, and that the service of the warrant on the Sunday made no difference in the case.

This was a rule to set aside the execution of a writ of *ca. sa.*, and to discharge the defendant out of the custody of the sheriff of Cambridgeshire, under the following circumstances, disclosed by the affidavits. The defendant having been in custody of the sheriff of Cambridgeshire, in the county gaol at Cambridge, at the suit of a Mr. Brown, received on Saturday, the 12th of November an order from Brown for his discharge out of custody. This order having been shewn to the gaoler, was by him forwarded to the under-sheriff, who resided at Wisbeach. On the Sunday following the gaoler received from the under-sheriff a warrant of detainer under a writ of *capias ad satisfaciendum*, which had been issued on the day previous.

*Pashley* now moved accordingly.—In this case the defendant is entitled to his discharge, for he is detained under a warrant executed on Sunday, and such detainer is void under the stat. 29 Car. 2. c. 7. s. 6, which provides, “that no person or persons upon the Lord’s day shall serve or execute, or cause to be served or executed any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace), but that the service of every such writ, process, order, warrant, judgment, or decree shall be void to all intents and purposes whatsoever.” This case has been moved before Platt, B., and by him referred to the full Court. His Lordship indeed expressed an opinion against the defendant’s discharge, on the ground that by analogy to the 16th section of the Statute of Frauds, relating to a *fi. fa.*, the body of the defendant was bound from the issuing of the writ of *ca. sa.* on the Saturday. It is submitted, however, that that ground cannot be supported.

[PARKE, B.—This is not a service or execution of process. If there had been no warrant of detainer, it does not follow that the defendant would have had a right to his discharge. The sheriff is entitled to wait a reasonable time before he discharges a prisoner; he is to have time to search his office to ascertain if there are other writs lodged against him. If, in this case, a reasonable time had not elapsed until the Monday, the defendant would not be entitled to his discharge before that day.]

The defendant is detained in custody by virtue of the warrant which has been lodged against him on the Sunday.

PARKE, B.—The defendant is not entitled to his discharge. The warrant came from the sheriff on the Sunday, the writ of *ca. sa.* having been lodged with him the day before. The sheriff did not live at Cambridge, and, being responsible for the safe custody of the defendant, was entitled to a reasonable time to inquire if any other writs had been lodged against him.

ALDERSON, B.—I am of the same opinion. The sheriff is entitled to a reasonable time for making inquiries in his office as to other writs against the defendant.

POLLOCK, C.B., and ROLFE, B. concurred.

*Pashley* took nothing.

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1847. } PONTIFEX AND ANOTHER v.  
Nov. 18. } DE MALTZOFF.

*Affidavit to hold to bail, Validity of.*

*An affidavit to hold to bail is bad, which states that the defendant “before and at the time of the commencement of this action was and still is justly indebted to the deponent in 100l., for work done, and materials for the same provided, and goods manufactured and made by the said deponent for the said defendant, and at his request.”*

This was a rule, calling upon the plaintiff to shew cause why an order of Platt, B. for holding the defendant to bail should not be rescinded, on the ground of the insufficiency of the affidavit on which the order was made. The affidavit in question, which was made by one of the plaintiffs, stated that “Sergius de Maltzoff, the defendant in



this action, before and at the time of the commencement of this action was and still is justly and truly indebted to the deponent and to Edward Pontifex, his, deponent's, partner in trade, in 100*l.* for work done, and materials for the same provided, and goods manufactured and made, by the deponent and his said partner, for said Sergius de Maltzoff, and at his request."

*Martin* shewed cause.—The affidavit is sufficient. The goods in question, having been ordered by an individual for a particular purpose, cannot be expected to produce the same price if they were to be re-sold. The case differs from that of the affidavit to hold to bail for goods sold.

*Hoggins*, contra, was not called on.

*PARKE, B.*—The affidavit is indefinite. *Non constat* that any property in the goods passed to the defendant; the defendant may not have accepted the goods. The contract may be executory. The case cannot be put more strongly in favour of the plaintiffs, than by comparing it to the case of goods bargained and sold, without alleging that they are delivered, and an affidavit stating that a party is indebted to another for goods sold cannot be supported (1). The rule for discharging the defendant out of custody must be made absolute. The *capias* is to stand as a justification to the sheriff.

*POLLOCK, C.B., ALDERSON, B., and ROLFE, B.* concurring,—

*Rule absolute.*

1847. }  
Nov. 25. } *SUKER AND ANOTHER v. NEAL.*

#### *Alteration of Record.*

*A declaration on a bill of exchange stated it to be payable at three months, and contained counts for goods sold and delivered and on an account stated. The bill, as produced at the trial, was made payable at two months, and on the record being referred to, appeared payable in like manner at two months, but the word "two," in the record, had been written on an erasure.*

*The plaintiffs having obtained a verdict, the Court set aside the record and all sub-*

*sequent proceedings, refusing leave to the plaintiffs to retain their verdict on the account stated.*

This was a rule calling upon the plaintiffs to shew cause why the record and all subsequent proceedings should not be set aside for irregularity, with costs.

The declaration stated, that the plaintiffs were the drawers, and the defendant the acceptor of a bill of exchange, payable *three* months after date, for the sum of 38*l.* 11*s.* There were also counts for goods sold and delivered and on an account stated.

The pleas were, first, that the defendant did not accept the bill; secondly, to the residue of the declaration, "never indebted."

The issue delivered was in conformity with the declaration and pleas.

At the trial, before *Wilde, C.J.*, at the last Bristol Summer Assizes, the plaintiffs, in support of their case, put in evidence a bill of exchange, drawn by them and accepted by the defendant, payable at *two* months after date, for the sum of 38*l.* 11*s.*

*Ball*, for the defendant, objected that this was not the bill declared on. On reference to the record it appeared that the word "two" had been written on an erasure. The learned Chief Justice said he could only try the issues as they appeared on the record, and accordingly a verdict was returned for the plaintiffs for the amount of the bill and the interest.

*Ball* having obtained a rule *nisi* to set aside the record, &c.,

*Hoggins* shewed cause.—The record has been altered by the plaintiffs' agent at Bristol without their authority; but the plaintiffs may still retain the verdict upon the account stated, abandoning the count upon the bill of exchange.

[*ALDERSON, B.*—Can you hold a verdict on a record that has been improperly altered? We cannot be sure that the defendant may not have had a good defence on the account stated.]

*Ball*, contra, was not called on.

*Per Curiam* (1).—The rule must be *Absolute* (2).

(1) *Pollock, C.B., Alderson, B., and Rolfe, B.*

(1) See *Hopkins v. Vaughan*, 12 East, 398, 1 *Ascar v. Morioseph*, 1 Bing. 357; s. c. 2 Law J. Rep. C.P. 14.

(2) See *Jones v. Tatham*, 8 Taunt. 634; *Drummond v. Burt*, 1 Moo. & Rob. 136; and *Doe d. Cotterill v. Wyld*, 2 B. & Ald. 472.

1847. } SMEETON AND ANOTHER v.  
Nov. 20. } COLLIER.

*Mortgage*—7 Geo. 2. c. 20. s. 1.—*Action of Covenant*—*Jurisdiction of Court and Judge.*

The 7 Geo. 2. c. 20. enacts, that “where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained,” the persons entitled to redeem may pay to the mortgagee the principal, interest, and costs, and the Court may, by rules of the same Court, compel such mortgagee to deliver up all deeds, &c. to the mortgagor:—Held, that the statute was applicable to an action of covenant on a mortgage deed, and that a Judge at chambers, as well as the Court, had power to order the delivering up of the deeds.

All powers possessed by the superior courts at common law, as well as those given by statute to the Court in general terms, without any special limitation, may be exercised by a single Judge, as the delegate of the Court.

This was a rule calling upon the defendant to shew cause why an order of Platt, B. should not be rescinded or varied. It appeared from the affidavits that the defendant having in January 1845 borrowed the sum of 400*l.* of the plaintiffs’ testator, secured by a mortgage, the plaintiffs, as executors of the mortgagee, in December 1846, brought an action of *covenant* against the defendant on the mortgage deed. The defendant then obtained a Judge’s order, by consent, for staying all proceedings in that action on payment of the principal, interest, and expenses, which were accordingly paid. The defendant then demanded the mortgage deed and title deeds, which the plaintiffs refused to deliver up on the ground that the attorney for the plaintiffs had a lien upon them for work done for the defendant. A Judge’s summons for the delivery of the deeds having been taken out, and attended before Platt, B., his Lordship on the 25th of February made an order for the plaintiffs to deliver to the defendant a certain mortgage deed of the 6th of January 1845, and all other deeds and writings relating thereto in the possession of the plaintiffs, the amount of the mortgage, in-

terest, and expenses having been paid and satisfied by the defendant. A rule *nisi* to rescind this order having been obtained,—

*Whitehurst* and *Flood* now shewed cause.—The order of Platt, B. was good, and ought not to be rescinded. It will be contended, on the other side, that the present being an action of *covenant*, the statute 7 Geo. 2. c. 20. does not apply to the case, and that the Judge had no power to make the order in question. The first section of that statute enacts, that “where any action shall be brought on any *bond* for payment of the money secured by such mortgage, on performance of the covenants therein contained, or where any action of ejectment shall be brought,” the mortgagor may pay to the mortgagee all the principal monies and interest due on such mortgage and costs, and may by rules of court compel the mortgagee to surrender the lands and deliver up title deeds, &c. It is true the statute uses the word “bond,” but an action of covenant is clearly within the mischief intended to be prevented, and ought to stand in the same situation. *Anonymous* (1) is precisely in point. That was an action of covenant, and the Court granted a rule to shew cause why, upon payment of interest and costs, the mortgage deed should not be delivered up to the mortgagor. A similar application was made in *Dixon v. Wigram* (2), which was also an action of covenant, and the Court held distinctly that the case was within the statute. Besides, the word “bond” is not to be taken in the limited sense of an obligation under seal for the payment of money. It is often used in a more extensive signification. In *Sawyer v. Mawgridge* (3) the following writing under seal was held to be a bond:—“These are to authorize you to sell my goods to the amount of 9*l.*, which I do hereby acknowledge to owe you.” There Holt, C.J. and Powell, J. held that “the word ‘oblige’ is not necessary to make a bond, for if one under hand and seal acknowledges himself ‘indebted,’ it is enough to bind him.” The authorities are collected in 2 *Roll. Abr.* ‘Obligation,’ p. 146; and in *Petersdorff’s Abridgment*, tit. ‘Bond.’

(1) 2 Chit. Rep. 264.

(2) 2 Cr. & Jer. 613; s. c. 1 Law J. Rep. (n.s.) Exch. 233.

(3) 11 Mod. 218.

Sealed bills for the payment of money were formerly denominated 'bonds.' [They referred to *Doe d. Capps v. Capps* (4).] The other point contended for by the plaintiffs is, that a Judge at chambers has no power to make such an order as the present, but that it ought to be made by the Court. This argument is founded upon the strict words of the statute, which says, that if the mortgagor shall bring into court the principal monies, interest and costs, such money for principal, interest, and costs, to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer (by such Court to be appointed for that purpose), the monies so paid to such mortgagee or mortgagees, or brought in such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge any such mortgagor or defendant of and from the same accordingly; and shall and may, by rule or rules of the same court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or re-convey such mortgaged lands. It may be conceded that a Judge at chambers has no original jurisdiction, but he possesses so much power as the Court may think fit to delegate to him.

[ALDERSON, B.—The act of a Judge setting aside a judgment in vacation is in fact the act of the Court.]

[PARKE, B.—He is the delegate of the Court.]

Where, indeed, a statute directs any act to be done in term time, or in open court, there, indeed, the Court alone have power to act; but where authority is given to the Court generally to do any act, the Court, unless specially prevented, may delegate their authority to a single Judge.

[PARKE, B.—The 43 Geo. 3. c. 46. s. 2. enacts, that where a defendant having deposited a sum of money in lieu of bail, afterwards puts in and perfects bail, the sum of money deposited by him "shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant." The language of the act in that case shews that a Judge at chambers has no power to

interfere. There are cases where the legislature has distinguished between the powers of the Judge and those of the Court; but where no such distinction is drawn, the Judge may do all that may be done by the Court. The act of the Judge, when adopted by the Court, is binding on the Court.]

The order of a Judge may be varied or altered by the Court, and therefore there can be no hardship; but the most monstrous consequences would ensue if a Judge had not the power contended for. (They were then stopped by the Court.)

[ALDERSON, B.—The point is perfectly clear.]

*Martin and Mellor*, contra.—The Judge had no jurisdiction to make this order, for the statute applies only to actions upon bonds, and not to actions of covenant on a mortgage deed. The case of *Dixon v. Wigram* is not law, and ought to be overruled. In the anonymous case in *Chitty's Reports*, Bayley, J. seems to have doubted whether the Court had such authority, for he says, "To grant this motion seems to be converting this court into a court of equity. However, the rule *nisi* may as well be granted, as cause may afterwards be shewn." Parke, B. says, in *Becke v. Smith* (5), "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that it is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further" (6). The statute in question does not, in its terms, apply to an action on a mortgage deed. The words of the preamble also lead to the same conclusion.

[PARKE, B.—The word "mortgage" means the pledge of an estate.]

It is submitted that the word means the deed of mortgage.

[ROLFE, B.—Proceedings have frequently been stayed under circumstances similar to the present. Perhaps the legislature introduced the word "bond" *ex majore cautela*,

(5) 2 Meo. & Wels. 195; a. c. 6 Law J. Rep. (N.S.) Exch. 54.

(6) Per Burton, J., in *Warburton v. Loveland*. 1 Hudson and Brooke's Irish Reports, 648.

(4) 3 Bing. N.C. 768; a. c. 6 Law J. Rep. (N.S.) C.P. 237.

intending to include even actions on collateral securities.]

[ALDERSON, B.—The statute would be rendered almost useless if we adhered to such a literal interpretation as you contend for.]

Secondly, the authority of a Judge at chambers is not a delegation of power from the Court. In the present case the words of the statute are plain and imperative in directing the motion to be made in open court. This is a power which is given solely by statute, and ought, therefore, to be strictly construed.

[ALDERSON, B.—At common law a judgment improperly obtained may be set aside by the Court, and is continually set aside by a Judge at chambers. There are cases, indeed, where the power of the Judge is taken away by statute: for instance, where an act of parliament directs the motion to be made in open court during term time, or in vacation by a Judge. That language shews that in such a case the motion during term time must be made *in banc*. As, therefore, the power given by the common law may be exercised by a Judge, where is the difference in regard to its exercise between such a power and one that is conferred by statute? If your construction were correct a very useful statute would be rendered useless during three-fourths of the year.]

*Jones v. Fitzaddams* (7) and *Shaw v. Roberts* (8) shew that in many cases the authority of a Judge at chambers is taken away.

[ALDERSON, B.—The first section of the Interpleader Act 1 & 2 Will. 4. c. 58. enacts, that "it shall be lawful for the Court, or any Judge thereof, to make rules" of interpleader; whereas the 6th section says that "it shall be lawful to and for the Court" to call the parties before them by rule of court.]

[POLLOCK, C.B.—In that case the statute itself which gives the authority makes the distinction between the powers of the Court and of the Judge.]

They then argued upon the facts of the case.

POLLOCK, C.B.—This rule must be discharged. The two questions in this case lie in a very narrow compass. Mr. Martin contends, first, that the power of a Judge to interfere in this case is confined to actions on bonds or of ejectment; secondly, that a Judge at chambers has no authority in a case like the present. As to the first point, there is an express authority against Mr. Martin's argument, in the shape of a decision of more than twenty years' standing. It is clear that an action of covenant is within the mischief contemplated by the statute, and it would be a strained construction of the statute which should give another meaning to it. I may observe that the statute speaks of an action on a bond for the "performance of the covenant," but says nothing as to an action of debt upon the mortgage deed. The word "bond" has a large meaning; it signifies an obligation to pay a sum of money. I think, therefore, that the Judge had the power of making this order. Where a power is given simply by the legislature to the Court, it is intended that the Judge should exercise all the ordinary powers of the Court; and no distinction exists between powers existing at common law and those conferred by statute, unless such distinction can be collected from the language of the statute itself. That distinction may arise in many ways. Where a motion is by the legislature expressly directed to be made in open court during term, there it may reasonably be urged that the authority was intended to be confined to the Court. This was the case in *Jones v. Fitzaddams*, where the application for the defendant's discharge is directed to be made in term time to one of the superior courts at Westminster. Unless, therefore, the power given by any act of parliament is specially limited by the act itself, it is to be exercised in the same manner as any other of the powers of the Court. The plaintiffs, therefore, are not entitled to succeed on either of the points. With regard to the facts of the case, as the order has been suffered to remain unquestioned for two terms, it is sufficient to say that the Court will not interfere.

PARKE, B.—I am of the same opinion. With regard to the first point: if the matter had been *res nova*, I should perhaps have hesitated to construe the statute 7 Geo. 2.

(7) 1 Cr. & M. 855.

(8) 2 Dowl. P.C. 25.

c. 20. in the manner that it has been lately construed, so as to make it include the action of covenant. But the rule is an important one, and has been acted upon in a different manner for a considerable time. With regard to the principle as to the construction of statutes, I proceed on that which was laid down by Burton, J., in *Warburton v. Loveland*, and, guided by this principle, I should have hesitated to hold that the language of the statute would include an action of covenant. But this is not the first time the point has arisen; for my attention has been called to the case of *Dixon v. Wigram*, and I have acted upon it. The principle laid down in that case is a salutary one, and ought to be abided by. We have authority for holding the present case to be within the statute. The second point is, whether a Judge at chambers has authority to act upon the statute, and make the order in question. In construing this statute we must hold that the legislature intended that the powers conferred by the statute should be exercised in the ordinary way, unless the context shews a different intention. When, therefore, the Judge performs those duties which belong to the Court, he must be considered as exercising a delegated power, and is to exercise it in the same manner as the Court, unless the act of parliament, which confers the power, shews by its context a different intention on the part of the legislature. For example, in the 43 Geo. 3. c. 46, the enactment that the motion is to be made in open court, shews that a Judge was not intended to have any power in the matter. In like manner, the language of the 48 Geo. 3. c. 123, which enacts, that the application must be made in term time to one of the superior courts, shews the intention of the legislature to be that the powers should be exercised by the Court and not by the Judge. So in the Interpleader Act, the 1st section states that it shall be lawful for "the Court or any Judge thereof" to make rules or orders; whereas the 6th section enacts, that "the Court" shall have power, by "rule of court," to call the parties before them. That shews a distinction between the powers to be exercised by the Court and the Judge. I am of opinion, therefore, that in this case the Judge had jurisdiction to make the order. With regard to the other parts of the case, I think the order was proper.

The rule therefore will be discharged, with costs.

ALDERSON, B.—If the matter were *res nova*, I should require some time to consider before giving an opinion. But I am almost inclined to think that the words of the act will bear the construction placed upon them by the defendant. At all events, that construction has been acted on for many years, and no doubt has been entertained on the point. I have acted on this view of the statute, having considered myself bound by the same authorities that have been cited to-day. Those decisions are in conformity with the real spirit and intention of the act; and I am glad that such cases exist, enabling us to do substantial justice, by allowing defendants to get rid of actions against them on doing what is just towards the plaintiffs. It would certainly be strange if the legislature, by allowing parties to shift the form of the action, and bring covenant instead of debt, had enabled them to deprive defendants of the benefit of the statute. I form my opinion, however, on the authority of decided cases. With respect to the other point, as to the authority of a Judge at chambers, I think there is no doubt when the legislature gives the Court powers in general terms, it is the same as if those powers were given by the common law. The legislature is aware of the powers habitually exercised by the Court, and when they grant any fresh powers, they are to be exercised in the same way. If special terms are intended to be imposed, the legislature would so express themselves. Cases of statutes have been referred to, where it is clear that the authority is to be exercised only by the Court *in banc*, and when that intention is expressed, it is reasonable so to construe it. But if authority is given to the Court on the ordinary terms, it is to be exercised in the usual way in which the Court exercises its powers.

ROLFE, B.—I rejoice that an authority can be found in support of the defendant's view of this case; and whatever may be said as to Mr. Justice Bayley's view of this question, in the *Anonymous case* in *Chitty's Reports*, the decision of the Court of Exchequer, of which Bayley, J. was a Judge, fourteen years afterwards, in *Dixon v. Wigram* is to the effect that the case was

clearly within the statute. And certainly it would be most mischievous, if a point which has been settled and acted upon for so many years were now to be called into question. Under some circumstances it is not necessary to inquire if a decision was in the first instance correct; although in the present case I should say that such a decision was a reasonable one. I quite assent to the position that statutes are to be construed according to their plain and obvious meaning; but there are many cases in which a word is introduced into a statute by mistake. In the present case, the act of parliament refers only to one species of action brought with reference to a mortgage. It says, "where any action shall be brought on any bond for payment of the money secured by such mortgage, or performance of the covenants therein contained." Now, the ordinary case is that of an action brought on the mortgage deed itself. I am almost disposed to think that we might reject the words, "on any bond," seeing that the substantial object of the action is to secure the mortgage debt and interest. The words, too, "covenants therein contained," are an imperfect expression. I do not, therefore, think that the defendant's argument would have been hopeless if the matter had been *res integra*; but I am satisfied of the propriety of abiding by a decision which has been acted upon for years. With respect to the jurisdiction of the Judge, I have no difficulty in saying, that I agree with the rest of the Court.

*Rule discharged, with costs.*

1847. { GREEN AND OTHERS, ASSIGNEES  
Nov. 23. { OF OSBORN, A BANKRUPT,  
v. LAURIE, KNT., AND  
OTHERS.

*Bankrupt—Prior Act of Bankruptcy—*  
2 & 3 Vict. c. 29. s. 1, and 5 & 6 Vict. c. 122.  
s. 22.—*Execution.*

*A trader, being indebted to the defendants, on the 1st of July filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122. s. 22, and, on the following day, gave notice thereof to the defendants; at a subsequent period of the same day the defendants levied an execution on the trader's goods. A fiat*

*in bankruptcy issued on the day following:—Held, that the act of bankruptcy dated from the time of filing the declaration of insolvency, and that the defendants, having had notice thereof, were not entitled to the proceeds of the execution within the meaning of the 2 & 3 Vict. c. 29. s. 1.*

*Interpleader.* In this case the plaintiffs, assignees of W. H. Osborn, a bankrupt, affirmed that the proceeds of the goods, seized by the sheriff of Middlesex, under a *fi. fa.*, at the suit of the defendants against W. H. Osborn, were not liable to be paid over to the defendants. The contrary was affirmed by the defendants.

At the trial, before Pollock, C.B., at the London Sittings after Hilary term, 1847, the following facts appeared:—The plaintiffs were the assignees of the estate and effects of W. H. Osborn, a bankrupt; and the defendants were the trustees and directors of the Union Bank of London; and the question was, whether the proceeds of certain goods, which had been seized and sold by the sheriff of Middlesex, were liable to be paid over to the defendants as the execution creditors of W. H. Osborn, under the following circumstances: In 1844, Osborn opened an account with the Union Bank of London, at their branch office in Argyle Place, and was in the habit of discounting bills there. The bank, having discounted a bill for 300*l.*, drawn by Osborn, and the same having been afterwards dishonoured, brought an action against Osborn, who consented to a Judge's order for payment of the amount on the 1st of July, and for the issuing of execution in case of default. On the 1st of July, Osborn signed a declaration of insolvency, attested by his attorney, and a petition to the Chancellor for a fiat in bankruptcy; and on the same day, the declaration of insolvency was filed in the office of the Secretary of Bankrupts, and a docket struck. At five minutes before ten, on the 2nd of July, a notice of the filing of the declaration of insolvency was served on the manager of the branch bank, in Argyle Place; and, at a subsequent period of the same day, a writ of *fi. fa.*, at the suit of the present defendants, was issued against the goods of the bankrupt. The fiat issued on the 3rd of July. Under these circumstances, it was contended, on behalf of the

plaintiffs, that they were entitled to the verdict. The learned Chief Baron was of opinion, on the authority of *Conway v. Nall* (1), that the defendants were entitled to the verdict; and he directed the jury accordingly, reserving leave to the plaintiffs to move to enter a verdict for them for 325*l*.

*Martin* having, in Easter term, obtained a rule *nisi*, accordingly,—

*Gurney* shewed cause.—The question in this case is, whether the execution of the defendants is valid under the 2 & 3 Vict. c. 29. s. 1, which gives validity to executions executed and levied before the date and issuing of the fiat, provided the execution creditor had no notice of any prior act of bankruptcy committed by the bankrupt. Here the defendants, having had notice of the declaration of insolvency on the 2nd of July, levied their execution at a subsequent period of the same day, and on the following day a fiat in bankruptcy issued against the bankrupt. Under these circumstances, it is submitted that the defendants cannot be considered to have had notice of an act of bankruptcy. The question turns upon the construction of the 5 & 6 Vict. c. 122. s. 22, which enacts, "that if any trader shall file in the office of the Lord Chancellor's secretary of bankrupts a declaration in writing (in the form, schedule D, hereunto annexed), signed by such trader, and attested by an attorney or solicitor, that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration;" and then follows the proviso, "provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such declaration." The declaration of insolvency in this case was not in itself an act of bankruptcy; it did not become such until the fiat issued, and as the defendants had levied their execution before the issuing of the fiat, notice to them of the declaration of insolvency was not equivalent to notice of an act of bankruptcy. An act of bankruptcy to affect the creditor must be something upon which he can act at the time; but here the defendants could not act upon the declaration of insolvency, because it

was not certain at the time of its being filed that a fiat would issue within two months; and unless a fiat issued within that period there could be no act of bankruptcy. *Hocking v. Acraman* (2) resembles this case; there it was held, that notice of a docket having been struck was not notice of an act of bankruptcy. In *Conway v. Nall* the notice of the act of bankruptcy was in these terms:—"John Nall has committed an act of bankruptcy. He signed a declaration of insolvency yesterday. He will be declared a bankrupt immediately. I have sent for a fiat." This was held not to be such a notice as would deprive an execution creditor of the protection of the 2 & 3 Vict. c. 29, as the 6th section of the 6 Geo. 4. c. 16, required the declaration of insolvency to be filed, and to be advertised in the *London Gazette*, before it amounted to a complete act of bankruptcy. It is remarkable that in that case the 5 & 6 Vict. c. 122. s. 22. was not referred to either in the argument or in the judgment, and the case, if correctly reported, appears to have turned upon the construction of the 6th section of the 6 Geo. 4. c. 16. The language, however, of Tindal, C.J., however, is important: he says, "The meaning of these words appears to me to be, that the party in order to defeat an execution shall have notice of a prior act of bankruptcy, *complete in itself*, at the time the notice is given to him;" and Cresswell, J. says, "I do not think an execution creditor can be called upon in this way to speculate as to whether or not all the necessary steps will be taken to make the declaration of insolvency an act of bankruptcy."

[POLLOCK, C.B.—Your argument is, that the assignees gave you notice of an incipient act of bankruptcy only.]

Yes; and that the notice to be good ought to have been such as that the party receiving it might safely act upon it. *Doe d. Mann v. Walters* (3) and *Doe d. Lyster v. Goldwin* (4) are in point. It is fit, however, to mention, that a case of *Follett v. Hoppe* (5) was decided yesterday in

(2) 12 Mees. & Wels. 170; s. c. 13 Law J. Rep. (N.S.) Exch. 34.

(3) 10 B. & C. 626; s. c. 8 Law J. Rep. K.B. 297.

(4) 2 Q.B. Rep. 143; s. c. 10 Law Rep. (N.S.) Q.B. 275.

(5) 11 Jurist, 975. This case decides that the

(1) 1 C.B. 643; s. c. 14 Law J. Rep. (N.S.) C.P. 165.

the Common Pleas, and would seem to govern this case.

[**ROLFE, B.**—The declaration of insolvency is to be an act of bankruptcy at the time of filing the declaration, provided a fiat issues, but the filing of the declaration is the only act of bankruptcy.]

[**PARKE, B.**—Under the old law, where the bankrupt's imprisonment was complete, the act of bankruptcy dated from the commencement of it. So in this case, after the fiat issued, the act of bankruptcy is to be considered as complete at the time of filing the declaration.]

*Martin (Bramwell with him).*—The case of *Follett v. Hoppe*, which was decided yesterday in the Court of Common Pleas, is precisely in point. After the fiat has been issued the declaration of insolvency becomes an act of bankruptcy from the time of filing it. The defendant, therefore, is not within the protection of the 2 & 3 Vict. c. 29. (He was then stopped by the Court).

**POLLOCK, C.B.**—This case apparently has been decided by *Conway v. Nall*, although there the statute 5 & 6 Vict. c. 122. s. 22. was not referred to. The case is plain, without reference to the late decision of the Common Pleas in *Follett v. Hoppe*. The rule must be made absolute.

**PARKE, B.**—I am of the same opinion. In the case of *Conway v. Nall* the attention of the Court was not called to the statute 5 & 6 Vict. c. 122. Here the question turns upon the 22nd section of that act, and the point is as clear as possible. [His Lordship read the section.] In this case the fiat issued within two months from the filing of the declaration of insolvency; the act of bankruptcy, therefore, dates from the time of the filing of the declaration, and consequently the defendants, having had notice of the act of bankruptcy before they levied their execution, are not entitled to the benefit of the statute 2 & 3 Vict. c. 29. The rule must, therefore, be made absolute.

**ALDERSON, B.** and **ROLFE, B.** concurred.

*Rule absolute.*

filing of a declaration of insolvency is a complete act of bankruptcy, without the same being advertised in the *London Gazette*, as required by the 6 Geo. 4. c. 16. s. 6, and that a notice of that fact is a sufficient notice of a prior act of bankruptcy to deprive an execution creditor of the protection of the 2 & 3 Vict. c. 29.

1847. }  
Nov. 10. } **BADDELEY v. GINGELL.**

*Statute—Paving Commissioners—Rate—Kent and Essex Yard “within” High Street.*

*By the act, 57 Geo. 3. c. xxix, for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein, all rates made after the passing of that act for paving or repairing the streets in any parochial or other district by virtue of any local act, or of the said act, are (by section 24) to be laid on all persons who shall inhabit, hold, occupy, be in possession of or enjoy any messuages, tenements, lands, grounds, &c., situate or being within any of the streets within the said parochial or other district. By section 76. power was given to number the houses, &c. within the streets.*

*By the act, 11 Geo. 3. c. 15, for the better paving part of the High Street, White-chapel, and for removing obstructions and annoyances therein, commissioners appointed under the act were empowered, for defraying the charges attending the execution of the powers of the act, to rate all and every person and persons who do or shall inhabit, hold, occupy, possess, or enjoy any house, shop, &c., “within the said street.”*

*To the north side of High Street, White-chapel is Kent and Essex Yard, around and within, and opening into which are several dwelling-houses and other buildings, all of which lie and are situated at the back of other houses and premises which front the High Street. The only entrance into the yard is through carriage gates, and along a covered gateway. The yard is a private place, and the paving commissioners have no jurisdiction over it, and do not pave or cleanse it. The houses on either side of the yard abut on other streets and not on High Street, and neither the houses in the yard nor the gateway are numbered:—Held, that the inhabitants of Kent and Essex Yard were liable to be rated in respect of the paving, &c. of High Street, White-chapel, the yard being within that street for such purpose.*

This was an action of debt, brought by the plaintiff, as clerk to the commissioners



appointed under 11 Geo. 3. c. 15. and 57 Geo. 3. c. xxix, for 10*l.* 14*s.*, with a count on an account stated, to which the defendant pleaded *nunquam indebitatus*, and issue having been joined, the parties, under the order of Parke, B., stated the following

#### CASE.

By the 11 Geo. 3. c. 15. (after reciting that that part of High Street, Whitechapel, was extremely ill paved, and the passage through the same greatly obstructed by posts and projections, and annoyed by signs, spouts, and gutters, projecting into and over the same, whereby and by the deep channels across many parts of the said street, the same was rendered incommodious and dangerous to persons passing through the same, and that the methods then prescribed by law were ineffectual for removing such obstructions and annoyances, and for the proper paving of the said street, and keeping such pavement in sufficient repair), certain persons therein named were appointed commissioners for putting the act in execution, and provisions are contained in the act for the electing of commissioners from time to time in the room of those dying or refusing to act; and the said commissioners are empowered by the act to appoint one or more clerk or clerks and such other officers as they shall think proper; and they are empowered and authorized from time to time to cause and order the said street to be new paved, repaired, raised, sunk, or altered, when and as often and in such manner, &c. as they shall think fit. The Commissioners are also authorized to order and direct the houses within the said street to be numbered with figures placed or painted on the doors thereof, or on such other part of the said houses respectively, as the said commissioners should think proper. For defraying the charges and expenses attending the execution of the several powers granted by the act, it is enacted that a rate shall once in every year, or oftener if it shall be thought needful by the commissioners, be made, laid and assessed by them upon all and every person and persons who do or shall inhabit, hold, occupy, possess, or enjoy any house, shop, warehouse, cellar, vault, or other tenement within the said street, for raising such competent sum and sums of money as the com-

missioners shall from time to time judge needful and direct.

By the 57 Geo. 3. c. xxix. intituled "An Act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein," it is enacted, that the said act and the provisions therein contained, shall extend to all streets and public places which then were or thereafter might be paved within the cities of London and Westminster and borough of Southwark, and any other parts of the metropolis which are included within the weekly bills of mortality, and to all streets and public places which then were or thereafter might be paved within the parishes of St. Pancras and St. Marylebone, in the county of Middlesex, (except only any parts thereof which might in that act be particularly excepted). By the 24th section of the last-mentioned act it is enacted, that it may be lawful to and for the persons who, under any local act or acts for any parochial or other district within the jurisdiction of that act, are empowered to make rates for the expenses of paving or keeping in repair the pavements of any streets or public places within such parochial or other districts, either separately or jointly with other purposes, from time to time, after the making and passing of the said act, for and notwithstanding any provisions or restrictions, matters or things in such local act or acts contained, to make and sign all and every or any such rates or assessments as shall be from time to time necessary or expedient for paving or repairing the pavements of the streets and public places, within such parochial or other district, pursuant to the directions of the local act for such district, or of the said act of the 57 Geo. 3. and for the payment of all debts and charges theretofore incurred in and about the execution of such local act and of the said act or either of them as to the paving and repairing the pavements of and in such district, and for the payment of interest, &c. And that such rates may be either substituted for the rates directed by such local act, or may be additional thereto, as the persons making the said rates from time to time at the making thereof, may determine and direct. And all such rates made and signed after the passing of the said act (of the 57th Geo. 3.) for paving or repair-

ing the pavements of the said streets or public places in any parochial or other district by virtue of any local act, or of the said act, and either separately or jointly, with or towards any other object or purposes by virtue of any local act or acts of parliament, or of the said act, shall be laid upon all persons who shall inhabit, hold, occupy, be in possession of, or enjoy any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other district, and should be just and equal pound rates. It is, by section 76, further enacted, that the commissioners, &c. may order and direct all and every the houses, and other tenements, &c. within the streets and other public places within their respective districts to be numbered with figures placed or painted upon or over the doors thereof, or such other part of the said houses, &c. as they should think proper. By the 120th section it is further enacted, that the said commissioners may sue and be sued in the name of their clerk for the time being, and that all actions to be brought for the recovery of any rate, may be brought in the name of such clerk by action of debt in any of his Majesty's courts of record at Westminster.

That part of High Street which is mentioned in the first of the said acts, is and at the time of the passing of the second of the said acts was situate and included within the weekly bills of mortality, and then was and still is, paved, and then was and is under the jurisdiction of the commissioners for the said district as aforesaid, and is not excepted from or out of the operation of the last-mentioned act. After the passing of the first of such acts, the commissioners therein named and appointed new paved, repaired, raised, sunk, and altered the said part of the High Street, as by the same act they were empowered, and they and the commissioners for the time being for putting that act in execution, have thence continually hitherto from time to time repaved, repaired, raised, sunk, and amended the same, and have removed, taken, carried away, and deposited as in the said act mentioned, and still do repave, repair, and amend and remove, take, carry away, and deposit all

carts, &c., making or occasioning annoyance, nuisance, or obstructions in the said street, as by that act they are empowered to do.

To the north of that part of the said High Street which lies in the county of Middlesex, and communicating with the said street by means of the covered gateway hereinafter mentioned, there was long before the making of the rate hereinafter mentioned, and continually thence hitherto hath been and now is a large yard, called the "Kent and Essex Yard," around and within, and opening into which, long before the making of the said rate there had been erected, and at the time of the making of the said rate there were and still are standing several dwelling-houses, warehouses, stables, sheds, a booking-office, and other buildings. The said yard (with the exception of the width of the gateway, which is about ten feet two inches), and all the said dwelling-houses, warehouses, stables, sheds, booking-office, and other buildings round the same, lie and are situate at the back of several houses and premises which front the said High Street; these houses are entirely unconnected in every way with the said yard, dwelling-houses, &c. standing round it, and every of them; and all the said houses which front the High Street are duly rated in and by the said rate. The defendant, for upwards of twelve months before and at the time of the making of that rate, and thence continually hitherto inhabited, held, occupied, possessed, and enjoyed certain of the said houses, warehouses, stables, and lofts, and the booking-office within the said yard, being the houses, warehouses, stables, lofts, and booking-office in the said rate, and hereinafter particularly mentioned and set forth, and certain other persons whose names it is unnecessary to specify, inhabited, held, occupied, possessed, and enjoyed other of the said houses, warehouses, and buildings around and within the said yard.

The entrance into the Kent and Essex Yard is through carriage gates, and along a covered gateway of the length of twenty-two feet or thereabouts. The said gates open internally into such yard, and the gate-posts thereof abut upon the foot pavement of High Street. The gates are left open in the day time, but are usually

closed at night by the defendant or his servants, (the defendant keeping the key thereof).

The gateway into the yard is entirely covered over by a portion of the house, No. 115, in High Street aforesaid, which house stands in the straight and direct line of, and abuts and fronts upon that street to the west of, and over the said gates and gateway, and is duly rated in and by the said rate, and the house adjoining to No. 115, on the east of the said gates and gateway is numbered No. 114, in the High Street, and such last-mentioned house also stands in the straight and direct line of and abuts and fronts upon the High Street, and is also duly rated in and by the said rate. The said gates and gateway are not distinguished by any number at all.

[From a plan which formed part of the case, it appeared the buildings on the one side of the yard abutted on Commercial Street, and those on the other side abutted on Castle Street.]

That part of the footpath of the said street which is opposite to and between the said gates and the general carriageway of the said High Street, is not laid down with flag stones, but with ordinary carriageway pavement, as is usual in similar cases in the metropolis, where a party is entitled to an entrance across the footway, and the carts and other carriages, and the horses and cattle of the defendant, in passing through the said gateway to or from the said yard, houses, &c., have at all times during his occupation and possession as aforesaid, necessarily traversed and passed over, and do necessarily traverse and pass over a large portion of the said street so paved and repaired by such commissioners, and the pavement thereof.

No part of the said yard has ever been paved, repaired, raised, sunk, or altered by the said commissioners, nor have they within the said yard at any time exercised any of the powers conferred upon them by the said acts or either of them, and none of the said houses or other buildings round the said yard ever fronted or were differently placed with respect to or more open to the High Street than they are now.

[The case then stated the making of a rate on the 22nd of November 1844, of one shilling in the pound of the yearly rent or

yearly value of such houses, shops, warehouses, cellars, vaults, or other tenements respectively, (so far as the same can be known,) except only such houses, &c. as are situate on the south side of the said High Street, &c.]

The other occupiers of the houses, warehouses, and buildings in the said yard as above mentioned, were and are also rated in the said rate in respect of such last-mentioned houses, &c.

The sum of 10*l.* 14*s.*, being the sum total and aggregate of the several sums at and in which the defendant is rated, in and by the said rate as aforesaid was, and the several sums of which the said sum of 10*l.* 14*s.* is such aggregate, were duly demanded of him before the commencement of this action, but he upon such demand refused and continually hitherto hath refused to pay the same, and each of such several sums, and every part thereof. And it is agreed that all steps, matters, and things necessary to be taken and done by the commissioners, the plaintiff, and all other parties to entitle the plaintiff as such clerk to maintain this action, (if the defendant is liable to be rated in respect of the premises occupied by him as aforesaid, and comprised in the said rate, and therein rated at the aggregate sum of 10*l.* 14*s.* as aforesaid, or any part thereof,) were by them and him taken and done previously to the commencement of the action.

Copies of the said acts and of the pleadings in this action accompany this case, and are to be deemed and taken to be part thereof for all purposes.

The question for the opinion of the Court was, whether, under the aforesaid acts or either of them, the defendant is liable to be rated for or in respect of the premises occupied by him as aforesaid, and mentioned in the said rate, or any part thereof, and in respect of which he was rated or assessed in the said rate as aforesaid. If the Court should be of opinion that the defendant is not liable under the said acts or either of them to be so rated, then judgment of *nolle prosequi* is to be entered; but if the Court should be of a contrary opinion, then the plea of the defendant is to be withdrawn, and judgment was to be entered for the plaintiff, for the sum of 10*l.* 14*s.*, or for such other and less sum as

the Court should fix and direct, in the event of the Court being of opinion, that he is liable to be rated for and in respect of some portion only of such premises.

*Sir F. Thesiger* (*Manisty* with him), for the plaintiff.—Although the commissioners have no power over this yard to enter and pave it, and so far have no jurisdiction over it, yet they clearly have power to assess and collect this rate. If that be not so, there will be a large number of inn yards and other places which will be exempt, notwithstanding they derive benefit from the paving. The commissioners have power to assess the whole of the street; and although a house may not be quite in the range, it is still “within the street” for that purpose. There would be great difficulty in a different construction. Here, the direct and only communication with the houses in the yard is to the street, and in the popular meaning they are within the street; and that is the true meaning of this statute.

[*ROLFE*, B.—Nobody resides in the street, but in some house abutting on the street.]

The rating of public buildings “within the said street,” is expressly provided for; and that shews the meaning of these words, because public buildings often stand back out of the ordinary range of buildings in the street. The act of parliament uses the words “lands, grounds,” &c. “within the street,” *i. e.* which solely communicate with the street. Suppose this yard not built upon, would it not be clearly within the street? and what difference in principle can it make that the land has been used for the purpose of building on it? The reason of the assessment is, that the property assessed derives a benefit under the act.

[*PARKE*, B.—Yes; we must look to the intention of the act of parliament, which is to make those pay who are benefited.]

[*POLLOCK*, C.B.—It cannot depend on the size of the building.]

The case of *Paul v. James* (1) only decided that Ely Place was a *private* place, and not within the jurisdiction of certain commissioners for the purpose of paving under a local act.

*Butt* (*Hawkins* with him), *contra*.—The facts of this case shew that the houses rated never were connected with, or the owner in any way interested in the High Street. They are in truth in Commercial Street, and, if there were a similar act for that street, would be liable to be rated under it.

[*ALDERSON*, B.—The case of *Doe d. Humphreys v. Roberts* (2) was a devise by will of all the testator’s messuage or dwelling-house in High Street in the town of H, and all and every his buildings and hereditaments in the same street. The testator had only one house in High Street, but behind that house he had two cottages fronting a lane called Backhouse Lane. There was no thoroughfare through that lane, the only entrance into it being from the High Street. In that case it was held that the two cottages passed under the will; and *Holroyd, J.* said, “The only way to these cottages was through the High Street, and there was no thoroughfare through Backhouse Lane. If there had been an opening from the High Street to these two cottages alone they would clearly be in the street, and I can see no difference from the circumstance of there being other houses in the court.”]

If that be so, and the sole access be the criterion, then the making of an entrance into this yard from Commercial Street would take it out of the High Street. It will be found that all the powers of the commissioners are confined to the street strictly so called; for instance, they have power to number the houses within the street, but it is not pretended that they can, nor have they ever attempted to number the houses in this yard. Again they have power to remove carts within the street, but they cannot remove anything from this yard.

[*POLLOCK*, C.B.—Probably you cannot give the word “within” any meaning which shall be commensurate with the use of it in this act of parliament.]

This rate is not made on, nor is this, vacant ground; it is a yard *behind* the street; it is a private yard; and this case is governed by *Paul v. James*, where it was held that Ely Place, which had but one entrance, was not part of the public street. Then is this

(1) 1 Q.B. Rep. 833; s. c. 10 Law J. Rep. (N.s.) Q.B. 246.

(2) 5 B. & Ald. 407.

yard part of or within High Street? The houses have never fronted the street. As to the question of benefit, the defendant has no more benefit from this act than any stranger who casually passes along the High Street, and up Castle or Commercial Street. He is behind the houses abutting on the street, and does not get the benefit which the act contemplates. The object of the act is to remove nuisances, and keep the street in proper repair; and for that purpose the commissioners have power to rate the inhabitants within the street. The commissioners do not pave or cleanse this yard, and, therefore, the dwellers in the yard are not benefited within the meaning of this act.

[PARKE, B.—Possibly a small court like this may have escaped attention; but suppose it were a large public building?]

The commissioners have no jurisdiction for benefit, and why should they have for charge?

[PARKE, B.—The defendant may not have all the benefit that others have; but he must surely derive some benefit.]

Such a benefit would not render him liable to this rate.

*Sir F. Thesiger*, in reply.—Benefit or no benefit is hardly a test of the power to assess this property; but still it is clear the yard must be benefited by what is done under the act. *Paul v. James* did not raise any question of liability to a rate, but only whether "places" in that act of parliament meant public places. Here it is not contended that the commissioners have power to enter the yard. The question is, what is the meaning of the act of parliament in each particular case, and not what the words literally mean? It is said the defendant might be liable to be rated for two different streets; but here the defendant is contending against his liability to be rated at all.

POLLOCK, C.B.—I think the defendant is liable to this rate. The case resolves itself into a short point, not however so clear as it is short. The case turns on whether the property rated is "within" the High Street within the meaning of the act of parliament. The intention of the legislature might have been more clearly expressed, but I think the meaning is ascertained by viewing the

question in this light—Was it the intention of the framers of this act, that a person in the position of the defendant should wholly escape the rate? It is impossible not to see that he derives some benefit under the act of parliament; that as one of the public in the immediate neighbourhood he shares in the public benefit; and it is but reasonable to suppose he should bear his proportion of the public burthen. If he derives any advantage from the act of parliament he ought to pay accordingly, upon the value or the rent of the tenements; and the degree of benefit has nothing to do with the question before the court. It appears to me difficult to give any meaning to the word "within" which would be applicable to all the sections of this act. It may be that this property is not within the street for the purpose of numbering the tenements under the 76th section, though for the purpose of being rated it is within the street. If this were the case of a large establishment like an hotel it would be clearly liable. I have come to the conclusion that the act of parliament intended to make this property liable, because it is within the street in a fair and reasonable sense. If upon the construction of this act it be doubtful whether this tax was intended to be imposed on the defendant, we ought so to construe it as to admit of an equitable arrangement. The same rule does not apply to public taxes, for there you must shew a clear public liability. That is not a correct principle to apply to a case like this, where the benefit intended is confined to a particular neighbourhood, the inhabitants of which are to divide the burthen amongst them. I think for many popular purposes this property is within the street. This is not an independent place like a square. If it had been I should have more doubt, as I think it must then be named in the act. If this were one tenement, it is clear that it would be rateable. How is it less so because the owner has divided it?

PARKE, B.—I am of the same opinion. We cannot understand the word "within" in its strict sense, for it will not bear a strict interpretation. I think that for the purpose of this rate a house is within the street where the sole communication is in the street. I also think this property is within the street.

because it is fronting on the street, for the gateway comes up to the street, and that is the property of the defendant or others within the yard. It abuts on the street, and the defendant cannot be exempt because different houses and buildings have been constructed around it. The sole communication being out of the High Street, I think the property is liable on that account. The rate is for the purpose of keeping the street in repair and free from nuisances, and the inhabitants of the yard must derive some benefit from that. I think, therefore, that this yard is within some parts of the act of parliament "within" the High Street. Other cases might be put in which there would be some difficulty. In so well-known a place as Warwick Square it would not be included, because it is reasonable to suppose that it would have been mentioned. If there were only one occupation these premises would clearly have a frontage towards the street, and on that ground I think it is "within" the High Street for the purpose of this rate. I also think that it is "within" the High Street, because the only communication is with that street.

ALDERSON, B.—I am of the same opinion. It is clear that you cannot say that any house is literally within the street, and we must therefore come to the consideration of what is intended by the expression "within" the High Street. It seems to me that the legislature meant to impose the rate on those to whom there was some immediate benefit from the improvement. Here there was some benefit, and so it is within the street. If this were one house it would be clear. The houses are in this street, because they communicate with it and there is no other into which they have access. Holroyd, J. in *Doe v. Roberts* shews that that is the principle on which to go. It is true you cannot number them, but that is because they are out of the line of the street.

ROLFE, B.—I am of the same opinion.—Even if the commissioners had no power to rate anything but houses I should think these houses were within the street. It might not be so in every case, but *prima facie* if houses are accessible only from the street by a gateway they are within the

street. If you build upon a space before a house so as to leave it with only a narrow entrance from the street, and it has no other access it still remains in the street, though it has become a back tenement.

*Judgment for the plaintiff.*

1847. }  
Nov. 25. } THE QUEEN v. SPELLER.

*Conviction — Maltster — Excise Acts, 7 & 8 Geo. 4. c. 52. s. 33, and 1 Vict. c. 49. s. 5.—Increase, Mode of ascertaining—Discretion of Exciseman.*

*The 7 & 8 Geo. 4. c. 52. s. 33. imposes a penalty on any maltster treading or forcing together corn in a couch-frame. The 1 Vict. c. 49. s. 5. empowers officers of Excise to throw the corn out of the couch-frame, and return it; and if any increase be found in the gauge of the corn after its being returned and laid level in the couch-frame (in any greater proportion, &c.), the increase so found is to be deemed conclusive evidence of such corn having been trodden and forced together; and the maltster is to be convicted in the said penalty. Upon an information, and conviction, before Justices, for the above penalty, it appeared that the uniform mode recently adopted by the Excise of returning the corn was by piling it up in the centre of the couch, in the form of a cone, and then levelling it, instead of by casting the corn equally all over the floor of the couch-frame as formerly usual:—Held, by the Court of Exchequer, upon the construction of the above statutes, that the officer of Excise had some discretion—and it might be, that he had an absolute discretion—as to the mode of returning the grain, and that the above mode not appearing to be improper, an increase so found in the gauge of the corn (beyond the allowed increase) was conclusive evidence of the offence in the 7 & 8 Geo. 4. c. 52. s. 33, and that the conviction was right.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 9.]

1847. } GROUT v. ENTHOVEN AND  
Nov. 12. } OTHERS.

*Bill of Exchange—Partners—Pleading—Argumentative Denial.*

*Plea by E, one of three persons sued as acceptors of a bill of exchange, that before and at the time, &c., the defendants were partners, upon the terms that neither of them should, without the consent of the others, accept any bill of exchange in the name of the firm, otherwise than for the bonâ fide debts or liabilities of the firm; and that the said bill was accepted by the other defendants in the name of the firm without the consent of the defendant E, and in fraud of him, and in violation of the said terms of partnership, and was delivered by the other defendants to the plaintiff for money owing to the plaintiff from one of them, and not for any debt or liability of the firm, of all which the plaintiff had notice at the time of the delivery of the bill to him; and that there never was any value or consideration, except as aforesaid, for the acceptance of the bill, or for the payment thereof by the defendant E; and that he held and now holds the same without value or consideration, concluding with a verification:—Held, on special demurrer, a bad plea, as being an argumentative denial of the acceptance.*

Assumpsit against the defendants as acceptors of a bill of exchange.

Plea by the defendant Enthoven, that long before and at the time of the acceptance of the said bill the defendants were in partnership together in trade under the firm and style of Ricketts, James & Co., upon the terms, amongst others, that neither of the said partners should, without the consent of the others, draw, indorse, accept, or negotiate any bill of exchange or promissory note in the name of the said firm, or so as to render the said firm liable thereon, otherwise than for or in respect of the *bonâ fide* debts or liabilities of the said firm; and that the said bill was drawn upon and accepted by the said other defendants in the name of the said firm, without the knowledge or consent of the said defendant Enthoven, and in fraud of him, and in violation of the said terms of partnership, and was delivered by

the said other defendants to the plaintiff for and on account of money due and owing to the plaintiff from the defendant James and other persons to the said defendant Enthoven unknown, and not for or on account or in respect of any *bonâ fide* debt or liability of the said firm, of all which the plaintiff had notice at the time of the delivery of the said bill to him as aforesaid, and that there never was any value or consideration, except as aforesaid, for the acceptance of the said bill, or for the payment by the said defendant Enthoven, or for his liability to pay the amount of the said bill, or any part thereof, and the plaintiff hath held and now holds the same without such value or consideration. Verification.

Demurrer, assigning for cause that the plea amounts to a denial of having accepted the said bill of exchange as in the declaration alleged, and is an informal and argumentative traverse of that allegation, and amounts to the general issue. Joinder in demurrer.

*Butt*, in support of the demurrer.—This plea is clearly bad upon special demurrer on the authority of *Jones v. Corbett* (1). In that case a plea by A, one of two defendants sued as acceptors of a bill of exchange, stated, that before and at the time, &c. defendants were partners, and as such had accepted bills in the partnership name; that B, the other defendant, accepted the bill in question, using the said name in fraud of A. for his own private purposes, and not those of the partnership, and without the authority of A; and that A. never had any consideration or value for the acceptance and never adopted it: of all which premises the plaintiff, at the times of the drawing and accepting, had notice. That was held on special demurrer a bad plea, as amounting to an argumentative denial of the acceptance. Patten, J. there said, "There is not in this plea any confession of an acceptance in fact; if there had been it would have been proper to plead specially anything that gave it the character of illegality. But when it is said that the person who appears as acceptor was not an authorized agent for the purpose,

(1) 2 Q.B. Rep. 828; s.c. 11 Law J. Rep. (N.S.) Q.B. 181.

that is in effect a denial of the acceptance." The present plea is similar, and bad on the same ground.

*Meymott*, contra, admitted that he could not distinguish the present case from *Jones v. Corbett*.

[*ROLFE*, B.—The meaning of the plea is, that the other defendants, as agents, had no authority to accept the bill.]

[*ALDERSON*, B.—And then the plea should have concluded to the country.]

*Per Curiam* (2).—There must be

*Judgment for the plaintiff.*

1847. } INNES AND ANOTHER v.  
Nov. 9. } MUNRO.

*Bill of Exchange—Agreement, Construction of.*

*H*, being joint owner with the defendant of estates in *Berbice*, advanced to the latter large sums on account of the defendant's share of the liabilities in respect of those estates, and received on account thereof the defendant's acceptance for 3,000*l.* on the following terms, contained in a letter written by the defendant to him:—"Should the crops (of the estates) not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary from the condition of the properties." The crops being and still continuing unproductive, the bills were renewed on three several occasions; but ultimately *H*. refused to renew further, and the plaintiffs, who were indorsees of *H*, with notice of the agreement, brought the present action:—*Held*, that they were entitled to recover, as the agreement stipulated for one renewal only.

Assumpsit on a bill of exchange, drawn, on the 10th of November 1846, by L. L. Hodge, upon and accepted by the defendant, for 3,000*l.*, payable at six months, by L. L. Hodge, and indorsed to the plaintiffs.

Plea.—That the defendant accepted the said bill on certain terms contained in a written agreement of the 13th of November

1843, made between L. L. Hodge and the defendant, that if crops to the value of the amount of the said bill, being the produce of certain estates in the West Indies, should not, before the said bill should become due, have come to England, the said bill should not be paid by the defendant when due, but should then be renewed by L. L. Hodge drawing on the defendant, and by the defendant accepting another bill of exchange for 3,000*l.*, payable to the order of L. L. Hodge, at such a time as should be reasonably necessary to allow of the net produce of crops to the aforesaid value of the produce of the said estates coming to England, by such last-mentioned time, and by the said L. L. Hodge and the defendant drawing and accepting the said other bill, in renewal of the bill in the first count mentioned, to which last-mentioned time the payment of the amount of the bill in the first count mentioned should be postponed; that no net produce of the said estates came to England before the bill became due; that the defendant was ready to renew the bill by accepting another bill for 3,000*l.*, drawn by L. L. Hodge, but that L. L. Hodge would not draw on the defendant any such other bill; and that the plaintiffs at the time of renewing the bill had full knowledge of the same having been accepted on the said terms and conditions. *Verification.*

*Replication de injuriâ.* At the trial, before Parke, B., at the last Kent Summer Assizes, the facts appeared to be as follows:—Mr. Langford Lovell Hodge and the defendant were, in 1843, and still are, joint owners of estates in *Berbice*. These estates having been mortgaged, Hodge had from time to time made advances to the defendant to enable him to pay off his share of the mortgage debt, and received the produce of the estates, which he applied in part liquidation of his claim against the defendant. In November 1843, the advances made by Hodge, on account of the joint estates, amounting to 14,000*l.*, of which the defendant was liable for one-half, it was agreed that, for the future, the entire advances should not exceed 8,000*l.*, and that one-half of the difference between that sum and 14,000*l.*, namely, 3,000*l.*, being the defendant's share of the joint liability, should be paid by him to Hodge. Two bills, one for 2,000*l.* and the other for



1,000*l.*, were accordingly drawn by Hodge, and accepted by the defendant; and at the same time the following letter was written by the defendant, and sent to Hodge.—

"L. L. Hodge, Esq.

"London, 13th Nov. 1843.

"Dear Sir,—According to our calculations this morning there will be 14,000*l.* owing to you by the Berbice estates, after deducting the proceeds of the crops of this year. As the said 14,000*l.* are 6,000*l.* more than the standing balance of 8,000*l.*, I beg to inclose my note for 2,000*l.* and 1,000*l.* together 3,000*l.*, as the one-half of the excess. Should the crops not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary, from the condition of the properties.

"I am, &c., Wm. Munro."

On this letter Mr. Hodge indorsed a memorandum of assent to the within terms, as follows:—

"Dr. Munro.

"Dear Sir,—What is stated on the other side is fully understood between us.

"Langford Lovell Hodge.

"London, 13th Nov. 1843."

The crops in 1844 not being sufficient to discharge the sum of 3,000*l.*, due upon the two bills, the defendant, in consequence of an application from Hodge, forwarded him an acceptance for 3,000*l.*, payable on the 16th of November 1845. On this latter bill becoming due, the crops being in like manner insufficient, it was renewed by another bill of the defendant's, payable in November 1846. On this bill also becoming due, the defendant applied for a further renewal, when it was agreed that the bill, for which the present action was brought, should be given, payable at six months. The produce of the estates had not been sufficient to pay the amount of the bill in question. Under these circumstances, it was contended that the defendant was entitled to the verdict, inasmuch as Hodge the drawer, and the plaintiffs, who were the holders, with notice of the agreement, were bound to renew the bill until such time as the produce of the estates should be sufficient to discharge the amount of the bill. The learned Judge was of opinion, that by the terms of the agreement, Hodge was not bound to renew the bill more than *once*;

and the jury having accordingly found a verdict for the plaintiffs, he gave the defendant leave to move to enter a verdict for him, if the Court should be of opinion that Hodge was bound to renew the bill in question.

*Lush* now moved accordingly.—The plea was proved, and the defendant was entitled to the verdict. The bill in question was in the nature of a bill payable out of a particular fund, and was not to be paid, but to be renewed successively until the crops from the estate should come in.

[ALDERSON, B.—Your argument is, that if the crops came to nothing the bill was not to be paid at all.]

Certainly.

[POLLOCK, C.B.—The meaning of the agreement is, that if the crops failed, the bill was to be renewed *once*.]

At the time of giving the bill the estates were a losing concern, and no one could tell when the crops would be productive; they were to be the primary fund out of which the bill was to be paid.

[POLLOCK, C.B.—The agreement speaks of such "period," not periods.]

[PARKE, B.—And does not contain the words "from time to time."]

The parties were connected in interest, and were not acting hostilely towards each other.

POLLOCK, C.B.—There can be no rule in this case. The defendant as acceptor is primarily liable to pay this bill; then, if he seeks to get rid of his obligation, he must make out a clear case of exemption. This he has not done. The meaning of the agreement is, that there was to be one renewal only.

ALDERSON, B.—I am of the same opinion. If the defendant intended the contract to bear the construction now contended for by him, he ought to have stipulated that the bill should be renewed "from time to time."

PARKE, B.—The true construction of this agreement is, that there was to be one renewal only.

ROLFE, B. concurred.

*Rule refused.*

1847. }  
Nov. 8. } AUGUSTIN v. CHALLIS AND  
ANOTHER.

*Sheriff—Negligence—Execution, Withdrawal of upon Claim for Rent.*

*At the trial of an action by an execution creditor against the sheriff, for not levying a debt of 60l. under a fi. fa. the landlord of the debtor was called as a witness, and stated, that 46l. was due from the debtor for rent, and it appeared that the sheriff had withdrawn the execution upon notice thereof from the landlord, who had subsequently distrained and realized less than the rent due. The landlord having admitted that the debtor held under a lease, but which was not produced,—Held, that the plaintiff was entitled to recover from the sheriff the amount realized under the distress.*

Case against the sheriffs of London, for negligence, in not levying upon the goods of one Leger, under a writ of *fi. fa.* issued upon a judgment recovered by the plaintiff, and indorsed to levy 60l. 15s. 10d.

Pleas—Not guilty: and that Leger had not any goods in the defendant's bailiwick, whereof the defendants could have levied the monies indorsed on the writ. Issues thereon.

The cause was tried, before Platt, B., at the Middlesex Sittings, in this term. It was proved that the sheriff had seized under the writ certain goods in Leger's house, but had withdrawn the execution upon notice from the landlord that rent was due. 18l. was afterwards realized under a subsequent distress for rent. It appeared upon the evidence of the landlord, who was called by the defendants, that 46l. rent was due, but that Leger held under a lease which (though the objection was taken) was not produced. The jury found that the rent was due, and that the sheriff knew it. Under his Lordship's direction, the plaintiff had a verdict for 18l., with leave to the defendants to move to enter a verdict for them.

*Watson* now moved accordingly.—The verdict ought to be entered for the defendants, on the finding of the jury, otherwise the sheriff is at the mercy of the landlord, who may refuse to produce the lease.

[PARKE, B.—Rent due is the fact in dispute in the cause, and as soon as it appeared there was a lease, that fact could not be

proved without producing the lease. It may be an invalid lease.]

[ALDERSON, B.—Rent is one of the terms of the lease, and you must see it before you can know that any rent is due.]

This is an action for negligence, and the existence and validity of a lease is not a matter about which the sheriff need inquire. He must either withdraw the execution or sell under it, and the notice from the landlord that rent was due justified him in withdrawing.]

[ROLFE, B.—The statement of the landlord that rent was due must be struck out, when it appears there was a lease.]

The jury have found the fact, and upon proper evidence. In *Whitfield v. Brand* (1) it was held that the fact that a party has agreed to sell goods on commission, may be proved by oral evidence, though the terms as to its payment have been reduced into writing.

[PARKE, B.—When it appears there is a lease, you cannot talk about the contents of it without producing it. The sheriff must acquit himself of negligence.]

How has the sheriff been guilty of negligence?

[PARKE, B.—In not selling; because you must shew that the landlord was entitled to distrain.]

[POLLOCK, C.B.—The sheriff is bound to ascertain whose goods he is taking. He has a right to say there may be a lease.]

That would be extremely hard on the sheriff.

[ROLFE, B.—Suppose a stranger comes to the door and says, "Take these goods at your peril; they are mine." How is the sheriff better off?]

[PARKE, B.—There would be plenty of nominal landlords, if we were to hold the sheriff not responsible.]

If the sheriff is to be responsible to that extent, he ought to have time to ascertain the fact.

[POLLOCK, C.B.—He made no application to the Court for time.]

[ALDERSON, B.—The duty of the sheriff was to sell, because there was no proof of rent; he does not sell, and that is negligence.]

(1) 16 Mes. & Wels. 282; a. c. 16 Law J. Rep. (N.S.) Exch. 103.

It was proved at the trial, that a distress for rent was put in by the landlord, and there was no dispute about the right to distress.

[ALDERSON, B.—That is only evidence of rent due at the time of the distress, which was subsequent to the withdrawal of the sheriff.]

[POLLOCK, C.B.—What can the execution creditor do but bring an action against the sheriff?]

He does so, and the jury negative negligence.

POLLOCK, C.B.—We are all of opinion, that there was no evidence of any real claim for rent, and that the verdict is right.

*Rule refused.*

1847. }  
Jan. 28. } HARRISON v. WATT AND WIFE.

*Costs—Payment into Court.*

*To debt for goods sold and delivered, the defendant pleaded, first, as to all but 15s., parcel, &c., nunquam indebitatus; second, as to that sum, payment into court of 15s. The plaintiff replied by adding the similitur to the first plea; and as to the second, that the plaintiff accepts the 15s. in full satisfaction and discharge of the cause of action in the introductory part of that plea mentioned, with prayer of judgment for his costs sustained in that behalf. The jury found that the defendants never had been indebted to the plaintiff to a greater amount than 15s.:—Held, that the plaintiff was entitled to costs on the replication to the second plea.*

This was an action of debt for goods sold and delivered to the female defendant while sole, with the common counts. The defendants pleaded except as to 15s., parcel of the monies in the declaration mentioned, never indebted; second, as to the sum of 15s., payment into court of that sum, with an averment that the defendants were never indebted to the plaintiff to a greater amount. Verification.

Replication, *similiter* to the first plea; to the last plea, that the plaintiff accepted and took out of court the 15s. in full satisfaction and discharge of the causes of action in the introductory part of the last plea

mentioned; therefore, as to such causes of action, the plaintiff is satisfied, and prays judgment for his costs and charges by him sustained in that behalf.

The cause was tried, before the undersheriff of Durham, who returned, that on the issue of never indebted, the jury found that the female defendant, except as to the said sum of 15s., was never indebted in manner and form as alleged in the declaration. Upon taxation, the Master allowed the defendants the whole costs of the cause, including those of the plea of payment into court, and disallowed the plaintiff any costs under Reg. Gen. Trin. 1 Vict.

ROLFE, B. had made an order for reviewing the Master's taxation, and taxing the plaintiff his costs on the replication on taking the money out of court in full satisfaction of the causes of action in respect of which it had been paid in.

A rule had been obtained to rescind that order; against which

*Bovill* now shewed cause.—The defendants, instead of pleading payment into court of 15s. to the whole causes of action, have divided their pleas, pleading that payment as to part, and leaving a defence as to the rest.

[PARKE, B.—*Quoad* the 15s. the plaintiff says he is satisfied. No difficulty would have arisen on the old mode of paying money into court. The 15s. would have been struck out, and the plaintiff would have gone on for the rest. Here the defendants insulate one part of the declaration from the rest, pay money into court on it, and the plaintiff says he is satisfied.]

The rule of Trin. term, 1 Vict., is as follows:—"The plaintiff, after the delivery of a plea of a payment into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty, in that case, to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed."

[PARKE, B.—The plaintiff had a right to tax costs *quoad* the 15s., and end the cause so far. He accepted that sum in full satisfaction of 15s., part of the debt and cause of action on which it was paid in. But the plaintiff could not accept it out, if the plea

is thus divided : for if he does, he must accept it on the plea of payment of money into court, and enter a *nolle prosequi* upon the issue on never indebted, and so become liable to pay all costs.]

[ALDERSON, B.—Had he replied that he had sustained damages ultra, the defendants no doubt would have been entitled to costs.]

As to the quantum of costs, it is not only the costs of the plea and replication to which the plaintiff is entitled, though no specific portion of the declaration is recovered on, and no additional costs incurred by him; for he is entitled to the general costs up to the point to which he was right in pursuing his action, viz. the time of paying the money into court. He was obliged to issue a writ, and to declare in order to support the judgment he sought ultimately to recover.

[POLLOCK, C.B.—It will be said, that if the payment into court had been general the plaintiff might have taken the money out, and would then have got his costs; but instead of that the defendants plead a payment into court of 15*s.*, as to 15*s.*, and never indebted as to the rest; so that the plaintiff was driven to join issue and go on to trial, or enter a *nolle prosequi* and become conclusively liable to pay costs.]

[ALDERSON, B.—On the plea of payment into court of 15*s.*, as to 15*s.*, the plaintiff could not say the defendants were indebted to a larger amount. That made the plea of never indebted to the residue necessary.]

*S. Temple*, contra.—*Cauty v. Gyll* (1) is in favour of the defendants. There were five counts in debt, and six pleas; the last being a plea of payment of 30*l.* into court. Issues were joined on the other pleas; and as to the sixth, the plaintiff took the 30*l.* out of court in full satisfaction of all the causes of action as to the 30*l.*, parcel, &c. The plaintiff was held not entitled to tax his costs under Reg. Gen. Trin. term, 1 Vict.

[POLLOCK, C.B.—That case does not alter the plaintiff's argument. It was there attempted to tax the costs before the issues were disposed of; but the Court thought the attempt premature.]

In *Cauty v. Gyll*, Tindal, C.J. says, "I think the meaning of the rule must be, that the plaintiff shall be entitled to tax his costs only where the money is accepted in satis-

(1) 4 Man. & Gr. 907.

faction of the whole demand, and not where there are other issues, upon which the parties are proceeding to trial."

[PARKE, B.—There the plaintiff sought to recover the costs of all the replications to five different special pleas, but was held not entitled to any of them.]

That decision resulted from the form of the pleadings.

[PARKE, B.—All the plaintiff was there entitled to, under the new rule, was the costs of suit for the cause of action in respect of which the money was paid into court; but not to the costs of the replications on special pleas, so that the taxation was properly set aside. The Lord Chief Justice's opinion was quite right, for the plaintiff had *taxed* the costs to that time, but does not hold where there are other issues, &c.]

[PLATT, B.—The principle on which costs are dispensed under this rule is settled in *Goodee v. Goldsmith* (2). That was an action of assumpsit for 28*l.* 5*s.*, money had and received, to which the defendant, as to all except 3*l.* 5*s.*, pleaded non assumpsit; as to all except 3*l.* 5*s.*, a set-off of 25*l.*; and as to the 3*l.* 5*s.*, payment of that sum into court. The plaintiff, by his replication, admitted the set-off, and replied that he would not further prosecute the suit against the defendant, except as to the sum of 3*l.* 5*s.*, and took that sum out of court on the last plea. The Master having allowed the plaintiff, on taxation, his whole costs, the Court reviewed the taxation, giving the defendant the costs on the general issue and set-off, as to which the plaintiff had in fact entered a *nolle prosequi*, and allowing the plaintiff costs as to that part of the cause of action, in respect of which the 3*l.* 5*s.* was paid into court. For, as the replication amounted in effect to a *nolle prosequi*, as to a count or part of count, the costs followed by stat. 3 & 4 Will. 4. c. 42. s. 33.]

The practice hitherto has been never to tax any costs to plaintiffs in such cases.

POLLOCK, C.B.—This rule must be discharged, and with costs, for the reasons I have already stated. We all agree in the decision of my Brother Alderson, which he has stated to us in a similar case.

(2) 2 Mee. & Wels. 202; a. c. 6 Law J. Rep. (N.S.) Exch. 70.

PARKE, B.—If the plaintiff goes on to try, and fails, he must pay the costs of the trial.

ALDERSON, B.—The case of *Goodee v. Goldsmith*, cited by my Brother Platt, puts the present out of court. That authority supports my decision in a case which came before me some terms ago, and in which I drew up my opinion in writing, and delivered it to the Masters. It was as follows:—"In this case, application has been made to review the Master's taxation. It was an action of assumpsit, to which four pleas have been pleaded. First, non assumpsit, except as to a sum afterwards paid into court; second, payment; third, set-off; and fourth, payment of the excepted sum into court. The plaintiff takes that sum out of court, and the result of a reference as to the remainder of the case is, that the arbitrator finds that the defendant was liable to the plaintiff in respect of a certain additional sum to that paid into court; but also finds that, in respect of the sum paid and set off, more is due to the defendant than the amount for which he was originally liable. It is clear, therefore, that on this state of facts, the defendant is entitled to have the issue on the second and third pleas entered for him, and to have the general costs of the trial. But it is clear, on the other side, that the plaintiff is entitled to the costs of the first issue, which must be deducted from the defendant's costs. As to the costs of the last plea, I am also of opinion that the plaintiff is also entitled to them, to be deducted in like manner. The plaintiff was right in bringing his action for this part of his demand, and till the defendant paid the money into court, would have been entitled to recover it. The policy of the new rule was to make each party pay costs in respect of all parts of the case in which he was wrong. Then the defendant was wrong as to this part of the plaintiff's demand, and ought to pay the costs occasioned to the plaintiff by the not having paid it before action brought. The words of the rule embrace this case, and the reason of the rule goes with it. The plaintiff is, therefore, entitled to so much costs as have been incurred, owing to this being included in his declaration and in the replication, and also to the expense of taking the money out of court. If, indeed, the money had

been paid in *generally*, it would have been otherwise; but then it would have become the result of the plea, and would have been different, viz., in favour of the defendant. This taxation must be reviewed."

PLATT, B. concurred.

*Rule discharged, with costs.*

1847. }  
Nov. 11. } GOUDY v. DUNCOMBE.

*Arrest—Privilege of Parliament—Prorogation and Dissolution.*

*Members of the House of Commons are privileged from arrest on a ca. sa. for forty days before and forty days after the meeting of Parliament; and the rule is the same in the case of a dissolution as in that of a prorogation of Parliament.*

This was an application for a rule, calling upon the defendant to shew cause why an order of Williams, J., for discharging him out of the custody of the sheriff should not be rescinded. The defendant, having been taken in execution by the sheriff of Yorkshire, on the 2nd of September 1847, for default in payment of the principal money and interest, secured under a Judge's order, obtained, on the 3rd of September, a summons for his discharge, on the ground that, on the 28th of the July preceding, he had been elected a member of the House of Commons for the borough of Finsbury; that the return of such election had been made to the Crown Office; and that, at the time of such arrest, he was entitled to the privileges of a member of the Commons House of Parliament. It appeared that the Commons House of Parliament was dissolved on the 23rd of July last; and that writs were issued for a fresh election, returnable on the 21st of September last. On the 13th of August there appeared in the *London Gazette* an order of the Queen in Council, proroguing the parliament to the 21st of September. On the 7th of September, Williams, J., made the order, directing the defendant to be discharged out of custody on his consenting to bring no action.

*Willes*, in support of the application.—The order of Williams, J. for discharging the defendant out of custody ought to be

rescinded, as the defendant was not privileged from arrest. In *Jenkins's Centuries*, 3rd Cent. case 35, p. 118, it is said, "If a member of parliament be in execution before the parliament, he shall not be discharged of it by privilege of parliament;" but no mention is there made of the alleged privilege of forty days. In the case of Martin, as stated in *Bac. Abr.* tit. 'Privilege,' C, 4, and in *D'Ewes's Journal*, 410, and which arose in the year 1586, the House of Commons did not claim forty days as the duration of a member's privilege from arrest, but limited a "convenient time" only for that purpose. All the cases on this subject are collected by Mr. May in his book on the law of parliament. In p. 95, he says, "But as the Commons are the judges of their own privileges, some precedents are required to shew that they really claim so long a duration of this immunity; and no such precedents are to be found. By the original law of parliament privileges extended to the protection of members and their servants 'eundo, morando, et exinde redeundo:' but Parliament has never yet determined what time shall be considered convenient for this purpose; and Prynne expresses an opinion that no such definite extent of privilege is claimable by the law of parliament (1). It has, however, always been the general belief that privilege extended to forty days, and several acts of the Irish Parliament have defined that time (2); but the following precedents by no means establish the extent of privilege to be within the law or the practice in England, and leave the matter altogether in doubt." In *Colonel Pitt's case* (3), the parliament was prorogued on the 16th of April 1734, dissolved on the 17th; the new writs bore teste on the 18th, and Pitt, who was a member of the House of Commons, was arrested on the 20th. The Court of King's Bench held the defendant to be entitled to his privilege, but did not determine the exact duration of the privilege. It would seem, therefore, on principle, and on the authorities, that the privilege of Parliament ought not to last for a longer time than is necessary for the member to go to and return from parliament. The privilege of

the House of Lords lasts twenty days only. Modern improvements in travelling have enabled a member of parliament to come from the furthest extremity of the kingdom in a much shorter period than forty days.

[PARKE, B.—The teste of an original writ is fifteen days: ought it to be altered to a shorter period by reason of railway travelling being more expeditious than formerly?]

Mr. Sheridan was arrested by order of Bayley, J., under circumstances similar to the present; but instead of asserting his privilege, he paid the amount for which he was arrested. But at all events, the privilege does not apply when the arrest takes place after the dissolution of one parliament and before the assembling of another. In *Sir Richard Temple's case* (4) the defendant moved to put off the trial, on the ground of his having been elected a Burgess to serve in parliament, which was to meet in eight days; and the Court, in the course of their judgment, said, that if he were taken in execution, it was proper for the Parliament when they should meet to discharge him, for the Court doubted whether they had any power to do so. The privilege is to last for a reasonable time only. Here the defendant was not on his road to or from parliament. In the analogous case of a witness being privileged from arrest, he is entitled to the privilege only whilst he is going to or from court. Again, the rule is, that a party applying to be discharged from arrest, on the ground of privilege may apply for his discharge to that Court to which the privilege belongs. But in this case if the defendant were to apply to the House of Commons, they would allow him no more than a reasonable time; so that, if this order is upheld, the decision of the Court will be at variance with what would have been the decision of Parliament itself.

*Cur. adv. vult.*

POLLOCK, C.B. now delivered the judgment of the Court.—This was a motion to set aside an order of my Brother Williams, discharging the defendant (who had been taken in execution on a *cap. ad sat.*) out of custody on the ground of the privilege of Parliament. We took time to consider whether we should grant a rule to shew

(1) 4 Prynne, Reg. 1216.

(2) See 3 Edw. 4. c. 1. (Irish), 6 Anne, c. 8, (Irish), 1 Geo. 2. c. 8. s. 2. (Irish).

(3) 2 Stra. 985.

(4) 1 Sid. 42.

cause, in order to have an opportunity of referring to the authorities and to my Brother Williams. We are of opinion that the order was right; and, consequently, there ought to be no rule. The date of the order was the 7th of September. The summons on which it was made having issued on the 3rd, and the prorogation of parliament being to the 21st, the interval was less than twenty days. It was contended by Mr. Willes, that the privilege of a member to be free from arrest exists not for any certain time before or after the meeting of Parliament, but for a *convenient* time; and that at the present day, the time in question was more than a convenient time. It was further contended that the privilege was not applicable to the meeting of a new parliament after a dissolution. In the first place, we think there is no foundation for the latter point; whatever privilege necessary to secure their attendance may belong to members of parliament between a prorogation and the next meeting of Parliament, we think, must belong to them before they assemble upon a summons after a dissolution; whatever reasons apply to the one case equally apply to the other; and we think the law or rule of privilege must be the same in both. The question then is, what is the privilege of Parliament with reference to freedom from arrest? In *Blackstone's Commentaries*, vol. 1, p. 165, it is said, that, in the case of a commoner, this privilege from arrest extends to forty days after every prorogation, and forty days before the next appointed meeting. In *Bac. Abr.* tit. 'Privilege,' (C), the authorities are collected. It appears, that in an old Irish statute, 3 Edw. 4. c. 1, the privilege is expressly limited to forty days before, and forty days after, the meeting of Parliament. In the case of *The Earl of Athol v. the Earl of Derby* (5), (cited by Blackstone), and which occurred in the 24 Car. 2. (1672), it is stated that the Commons claimed forty days before, and forty days after, each session. In *Jenkins*, (3rd Cent., case 35) p. 118, it is said that the "privilege extends to forty days before the Parliament and forty days after."

Mr. Willes contended that the period was not a definite but a convenient period. It may be that the rule was originally during a convenient period, and the case cited from

*D'Ewes's Journal* (which is given at large in *Bac. Abr.*) has some tendency to support this view; but it is consistent with this, that for some centuries the period of forty days has been deemed a convenient period. The House of Commons (as might be expected) determined only the question before them, and did not define the limit of convenience, but held twenty days to be within it. The 12 & 13 Will. 3. c. 3. more than once mentions "the time of privilege," but does not mention the duration of it; but the 4 Geo. 3. c. 24. s. 1, which first regulated the privilege of franking, limits that privilege to the session of Parliament, and forty days before and forty days after any summons or prorogation; the same provision is to be found in the 24 Geo. 3. c. 37. s. 7, and the privilege so limited was continued by several statutes (one of which passed since the Union), till the privilege of franking was abolished. We think that the conclusion to be drawn from all that is to be found in the books on the subject is this: that whether the rule was originally for a convenient time or for a time certain, the period of forty days before and after the meeting of Parliament has for about two centuries at least been considered either a convenient time or the actual time to be allowed. Such has been the usage, and the universally prevailing opinion on the subject, and such we think is the law. If any change is necessary or desirable, we are not competent to make it.

*Rule refused.*

1847. }  
Nov. 16. } BAYLIFFE v. BUTTERWORTH.

*Railway Scrip, Sale of—Usage of Place.*

*The defendant having employed the plaintiff, a sharebroker, at Liverpool, to sell twenty railway scrip for him, the plaintiff sold them to F, another Liverpool sharebroker. The defendant not having delivered the shares to the purchaser at the time when they ought to have been delivered, the latter bought twenty other scrip in the market, at an advanced rate, and applied to the plaintiff for the difference between the contract price and that at which he bought them. The plaintiff paid the difference, and brought an action against the defendant for money paid, to recover the amount. By the usage*

of the Liverpool share market, brokers are responsible to each other for the fulfilment of contracts relating to the sale and purchase of scrip:—Held, that the defendant was liable to the plaintiff; and, semble, per Parke, B. and Rolfe, B., that the defendant would have been liable even if he had not been cognizant of such usage.

Assumpsit for work done, money paid, and on an account stated.

Plea—Non assumpsit.

At the trial, before Rolfe, B., at the last Liverpool Spring Assizes, the following facts were proved:—The plaintiff was a sharebroker at Liverpool, and the defendant a linen-draper residing near Oldham, and the action was brought to recover the sum of 97*l.* 10*s.*, in respect of money alleged to have been paid by the plaintiff, on account of the defendant, and 2*l.* 10*s.* for commission, under the following circumstances:—The defendant, on the 3rd of July 1845, directed the plaintiff to sell for him twenty shares or scrip in the Huddersfield and Manchester Railway, at 6*l.* 15*s.* per share; and the plaintiff, accordingly, on that day, sold the same to Messrs. J. Finlay & Son, sharebrokers at Liverpool. On the arrival of the day for the delivery of the scrip to the purchaser, the defendant not being ready to deliver them, the latter, on the 20th of July, bought twenty scrip in the market, at the price of 11*l.* 12*s.* 6*d.* per share, and called upon the plaintiff to pay them the difference between the contract price and the price at which he had bought them. There being a usage in the Liverpool share market that brokers are responsible to each other for the fulfilment of contracts relating to the sale and purchase of scrip, the plaintiff paid to the Messrs. Finlay the difference in question, and sought, in this action, to recover it from the defendant. The existence of the custom was proved, and some evidence was given of the defendant's knowledge of the custom; but no question having been made as to the latter point, it was not submitted to the jury. It was contended, on behalf of the defendant, that he was not bound to pay the amount of 97*l.* 10*s.*, and that it could not be recovered, in an action for money paid. The learned Judge was of opinion that the defendant was liable to the plaintiff for

the amount of the commission only, and he directed the jury to find a verdict for the plaintiff for the sum of 2*l.* 10*s.*, reserving leave to the plaintiff to move to increase the damages, by the amount of 97*l.* 10*s.*, if the Court should be of opinion that the plaintiff was entitled to recover that amount.

Knowles having, in Easter term, obtained a rule nisi, accordingly,

*Martin* and *C. Saunders* shewed cause.—The ruling of the learned Judge was correct, for the plaintiff cannot recover the money paid by him to Messrs. Finlay & Son, the same having been paid without any authority from the defendant. The defendant was not a sharebroker, and is not to be bound by rules of the Liverpool share market, to which he is a stranger.

[PARKE, B.—In *Sutton v. Tatham* (1), it was held by Lord Denman, C.J. and Littledale, J., that a person who employs a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of such rules.]

*Child v. Morley* (2) is directly in point. There it was held that the broker who had sold stock, his principal having refused to make good the bargain, could not by paying the difference to the purchaser make his principal liable for the amount.

[PARKE, B.—In that case there was on proof of such a usage on the Stock Exchange as existed in this case. With respect to the defendant's knowledge of the custom, there are cases in which a party has been held bound by a usage of which he knows nothing, as for instance, the usage of Lloyd's. Besides, if knowledge of the custom were necessary to make the defendant liable, there was ample evidence of such knowledge; and if the point had been made at the trial, and had been submitted to the jury, they would have so found it.]

The cases of *Brittain v. Lloyd* (4), *Bowlby v. Bell* (4), and *Lightfoot v. Creed* (5) are in point.

(1) 10 Ad. & El. 27; s. c. 8 Law J. Rep. (n.s.) Q.B. 210.

(2) 3 Term Rep. 610.

(3) 14 Mea. & Wels. 762; s. c. 15 Law J. Rep. (n.s.) Exch. 43.

(4) 3 Com. B. 284; s. c. 16 Law J. Rep. (n.s.) C.P. 18.

(5) 8 Taunt. 268.



*Knowles* and *Crompton*, contra, were not called upon.

**PARKE, B.**—This rule must be made absolute.—If the plaintiff is to be considered as a surety for the defendant, then he became liable to pay the purchaser the amount of the shares or scrip certificates, as the transaction did not relate to registered shares, but merely to a sale of scrip. The only question is, whether the plaintiff can be considered a surety for the defendant. Evidence was given at the trial of its being the usage on the Stock Exchange for the brokers to be responsible to each other for their principals, and if any question was to be raised as to the proof of that fact, it ought to have been raised at the trial. No such question, however, was made. It is clear law that if any usage exists in a particular place, and a party expressly employs another to make a contract for him, he employs him to make a contract in the usual way; and if the usage be for the broker to make a contract in his own name, there is an implied authority for him so to make it in the particular case. If it were necessary in order to make the defendant liable to shew his knowledge of that usage, there was evidence for the jury of his having had that knowledge. It is not necessary, however, to decide whether the defendant was bound by a usage of which he was not cognisant. It seems to me, that if a party authorizes a contract to be made for him, he authorizes it to be made in the usual way. There are indeed cases which apparently look the other way. *Bartlett v. Pentland* (6) was a case of insurance. There, the assured had employed an insurance broker to recover a loss from the underwriters, which was adjusted by the latter setting off in account against it a debt due from them to the broker for premiums. By the custom of Lloyd's Coffee House such set-off was considered as payment between the broker and the underwriter. This set-off was held not to be payment to the assured, and that the custom of Lloyd's Coffee House was not binding on the assured, as he was not shewn to be cognizant of it, or to have assented to it. That, however, was a different case from the present, which is that of a contract. *Gabay*

*v. Lloyd* (7) was a case of a policy, and it was found by the special verdict that a certain usage with respect to such policies existed amongst the underwriters at Lloyd's, that the policy in question was effected there, but that the plaintiff was not in the habit of effecting policies at Lloyd's. It was held that the plaintiff was not bound by the usage. That case, however, differs from the present, because here, the question is as to the authority that was given to the plaintiff. I therefore concur in the opinion of Lord Denman and Littledale, J. as expressed in *Sutton v. Tatham*; although it is not necessary to decide the same point here, because if knowledge be necessary in this case to make the defendant liable, there is evidence of such knowledge on his part.

**ALDERSON, B.**—If the plaintiff was a guarantor for the defendant, and paid the money for him, the defendant is liable. When a man deals at a market in a particular place, he deals with reference to the custom of that place. In the present case, the custom is for the brokers at Liverpool to be the guarantors.

**ROLFE, B.**—At the trial of this case I took a different view from that which I now entertain, for it was stated to me that the case was governed by a cause that was tried before my Brother Alderson at York; but I rather think that in that case no evidence was given of any knowledge of the existence of the usage; and it may make some difference whether such usage is known to exist or not. In that case the broker was not authorized to make a payment, and to charge for money paid. Here, the course of dealing at the particular place was known to the parties. Probably, however, it is immaterial to the case, whether the existence of the usage is known to the party or not. I fully concur in the law as laid down by Lord Denman, C.J. and Mr. Justice Littledale in *Sutton v. Tatham*.

**POLLOCK, C.B.**—I have abstained from giving any opinion in this case, because I have not heard the arguments. But I may state that I concur in the general principles laid down by the Court.

*Rule absolute.*

(7) 3 B. & C. 793; s.c. 3 Law J. Rep. K.B. 116.

(6) 10 B. & C. 760; s.c. 8 Law J. Rep. K.B. 164.

1847. } MONYPENNY v. DERING AND  
Jan. 29. } OTHERS.

*Devise — Remoteness—Cy-pres doctrine, Application of.*

*Devise of lands to P. M., testator's brother, for life, remainder to use of first son of P. M. for life; remainder to use of first son of said first son and his heirs male; and in default of such issue, to use of all and every other the son and sons of P. M. severally and successively for the like interests and limitations as he had before directed with respect to the first son of P. M. and his issue; and in default of issue of P. M. or in case of his not leaving any at his decease, then over. P. M. never had issue:—Held, that all the limitations subsequent to that to the use of the first son of P. M. were void for remoteness; and that if P. M. had had sons they would not by the application of the doctrine of cy-pres have taken an estate tail, inasmuch as by such a construction the estate would devolve in a line of succession different from that expressly designated by the testator.*

The following CASE was sent by Vice Chancellor Wigram for the opinion of this Court.

James Monypenny, late of Maythorn Hall, in the parish of Rolvenden, in the county of Kent, was, at the time of the making of his last will and testament hereinafter mentioned, and thenceforth up to and at the time of his death, seised in fee simple or otherwise well entitled to the manors or reputed manors of Maythorn, Nether Forsham, and Kensham, in the said count of Kent, and also to the mansion-house, called Maythorn Hall, in the said parish of Rolvenden, and to divers messuages, lands, tenements, and hereditaments situate respectively in the several parishes of Rolvenden, Tenterden, Benendon, Landhurst, Newenham, St. Mary in Wittersham, and Stone in the Isle of Oxney, in the county of Kent, all which said hereditaments and premises were of gavelkind tenure.

The said James Monypenny, being so seised or entitled as aforesaid, and being of sound and disposing mind, on the 11th of February 1804 duly made and published his last will and testament in writing, dated

the 11th of February 1804, and duly executed and attested as by law was then required for passing real estates by devise, and thereby (after devising certain lands, not comprising any of the hereditaments hereinbefore specified, in manner therein appearing), he devised the residue of his said real estates as follows:—"I give and devise my said house, called Maythorn Hall, with all and every the appurtenances, and also all the rest, residue, and remainder of my manors, messuages, farms, lands, tenements, and hereditaments, and real estate whatsoever, in possession, reversion, remainder, or expectancy (except as hereinbefore devised), to the uses, intents, and purposes following (that is to say), to the use, intent, and purpose that my brother Phillips Monypenny shall receive and take the rents, issues, and profits thereof, for and during the term of his natural life, without impeachment of waste; and from and immediately after his decease, to the use of the first son of the body of the said Phillips Monypenny for and during the term of his natural life; and from and immediately after his decease, to the use of the first son of the said first son, and the heirs male of his body; and in default of such issue, to the use of all and every other the son and sons of the body of my said brother Phillips Monypenny, severally and successively, according to seniority of age, for the like interests and limitations as I have before directed respecting the first son, and his issue of the body of my said brother Phillips Monypenny; and in default of issue of the body of my said brother Phillips Monypenny, or in case of his not leaving any at his decease, to the use of my said brother Thomas Monypenny, for and during the term of his natural life, without impeachment of waste; and from and immediately after his decease, to the use of Thomas Monypenny, eldest son of my said brother Thomas Monypenny, for and during the term of his natural life, without impeachment of waste; and from and immediately after his decease, to the use of the first son of the body of the said Thomas Monypenny, son of my said brother Thomas Monypenny, and the heirs male of his body; and in default of issue of the body of the said Thomas Monypenny the son, to the use of all and every other the son and sons of the

*Knowles and Crompton*, contra, were not called upon.

PARKE, B.—This rule must be made absolute.—If the plaintiff is to be considered as a surety for the defendant, then he became liable to pay the purchaser the amount of the shares or scrip certificates, as the transaction did not relate to registered shares, but merely to a sale of scrip. The only question is, whether the plaintiff can be considered a surety for the defendant. Evidence was given at the trial of its being the usage on the Stock Exchange for the brokers to be responsible to each other for their principals, and if any question was to be raised as to the proof of that fact, it ought to have been raised at the trial. No such question, however, was made. It is clear law that if any usage exists in a particular place, and a party expressly employs another to make a contract for him, he employs him to make a contract in the usual way; and if the usage be for the broker to make a contract in his own name, there is an implied authority for him so to make it in the particular case. If it were necessary in order to make the defendant liable to shew his knowledge of that usage, there was evidence for the jury of his having had that knowledge. It is not necessary, however, to decide whether the defendant was bound by a usage of which he was not cognisant. It seems to me, that if a party authorizes a contract to be made for him, he authorizes it to be made in the usual way. There are indeed cases which apparently look the other way. *Bartlett v. Penland* (6) was a case of insurance. There, the assured had employed an insurance broker to recover a loss from the underwriters, which was adjusted by the latter setting off in account against it a debt due from them to the broker for premiums. By the custom of Lloyd's Coffee House such set-off was considered as payment between the broker and the underwriter. This set-off was held not to be payment to the assured, and that the custom of Lloyd's Coffee House was not binding on the assured, as he was not shewn to be cognizant of it, or to have assented to it. That, however, was a different case from the present, which is that of a contract. *Gabay*

*v. Lloyd* (7) was a case of a policy, and it was found by the special verdict that a certain usage with respect to such policies existed amongst the underwriters at Lloyd's, that the policy in question was effected there, but that the plaintiff was not in the habit of effecting policies at Lloyd's. It was held that the plaintiff was not bound by the usage. That case, however, differs from the present, because here, the question is as to the authority that was given to the plaintiff. I therefore concur in the opinion of Lord Denman and Littledale, J. as expressed in *Sutton v. Tatham*; although it is not necessary to decide the same point here, because if knowledge be necessary in this case to make the defendant liable, there is evidence of such knowledge on his part.

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ROLFE, B.—At the trial of this case I took a different view from that which I now entertain, for it was stated to me that the case was governed by a cause that was tried before my Brother Alderson at York; but I rather think that in that case no evidence was given of any knowledge of the existence of the usage; and it may make some difference whether such usage is known to exist or not. In that case the broker was not authorized to make a payment, and to charge for money paid. Here, the course of dealing at the particular place was known to the parties. Probably, however, it is immaterial to the case, whether the existence of the usage is known to the party or not. I fully concur in the law as laid down by Lord Denman, C.J. and Mr. Justice Littledale in *Sutton v. Tatham*.

POLLOCK, C.B.—I have abstained from giving any opinion in this case, because I have not heard the arguments. But I may state that I concur in the general principles laid down by the Court.

*Rule absolute.*

(7) 3 B. & C. 793; s. c. 3 Law J. Rep. K.B. 114.

(6) 10 B. & C. 760; s. c. 8 Law J. Rep. K.B. 164.

and profits of the said estates, and continued in such receipt until the time of his decease.

In Michaelmas term, 1827, P. Monypenny duly suffered a common recovery of the devised estates, in which he was vouched, and vouched over the common vouchee, and such recovery was declared to enure to the use of the said P. Monypenny in fee. By a settlement, executed on the marriage of Robert Joseph Monypenny, the nephew of the said P. Monypenny, with the defendant Susannah Monypenny, dated the 10th of June 1835, the said P. Monypenny charged the said Maythorn Hall estate with the payment of a jointure of 300*l.* per annum to the said S. Monypenny, in the event of her surviving the said P. Monypenny and R. J. Monypenny.

In January 1841, P. Monypenny died, without ever having had any issue, but having made a will, by which he devised the Maythorn Hall estate to certain uses in favour of his nephew, the said R. J. Monypenny for life, with remainder to his eldest son R. P. D. Monypenny for life, with remainder to his first and other sons successively in tail male, with divers remainders over. On the death of the said P. Monypenny, the said R. J. Monypenny entered into the receipt of the rents and profits of the said Maythorn Hall estate, by virtue of the said devise to him in the will of the said P. Monypenny, and continued in such receipt till the time of his death. In September 1842, the said R. J. Monypenny died, leaving the said defendant S. Monypenny his widow, and R. P. D. Monypenny his only son, then an infant of the age of six years, him surviving; and the said R. P. D. Monypenny thereupon, by two of his guardians, (being the defendants S. Monypenny and P. R. Dearden,) entered into the receipt of the rents and profits of the Maythorn Hall estate, subject to the jointure of his mother, the said S. Monypenny, and is still in possession of the said estates by virtue of the devise to him in the said will of the said P. Monypenny.

The said T. G. Monypenny has become entitled to, and is now in the possession of, the estates of the said E. Joddrell. The said T. G. Monypenny is married, and the plaintiff R. T. G. Monypenny is his first son. The defendants T. G. Monypenny, R. P. D. Monypenny, J. T. Monypenny,

P. Monypenny, and W. B. Monypenny, are the co-heirs or representative co-heirs of the testator J. Monypenny, at the time of his own death and of the death of the testator P. Monypenny.

The plaintiff, the said R. T. G. Monypenny, claims the said Maythorn Hall estate, as tenant in tail male thereof, by virtue of the devise to him as the first son of the said T. G. Monypenny, in the will of the said testator J. Monypenny. The defendant, the said R. P. D. Monypenny, claims to retain the possession of the said Maythorn Hall estate as devisee for life under the will of the said P. Monypenny, subject to his mother's jointure, on the ground that the said P. Monypenny acquired the fee simple of the said estate, by the said common recovery suffered by him in 1827; and he also claims as representing two of the co-heirs in gavelkind of the testator J. Monypenny, in case the limitation in the will of J. Monypenny, succeeding the limitations to the first son of P. Monypenny for life, should be held to be void. The defendant T. G. Monypenny claims the Maythorn Hall estate, as tenant for life thereof, by virtue of the devise to him in the will of the said testator J. Monypenny, on the ground that it did not shift from him on his accession to the estates of E. Joddrell, and also he claims by descent as one of the co-heirs in gavelkind of the testator J. Monypenny, in case the limitations in the will of J. Monypenny, succeeding the limitation to the first son of P. Monypenny for life, should be held to be void. The said S. Monypenny claims her said jointure of 300*l.* under the said settlement of 1835, on the same grounds upon which her said son, the said R. P. D. Monypenny, claims his life estate.

The other defendants, representing co-heirs in gavelkind of the said J. Monypenny, claim the said Maythorn Hall estate on the ground that the limitations in the will and codicil of the said J. Monypenny, after the devise to the first son of the said P. Monypenny, were void. The questions in this case have reference to these conflicting claims. The questions for the opinion of the Court were:—first, what estate or estates in possession or in remainder did P. Monypenny take under the will and codicil of the testator J. Monypenny, in the devised pro-

body of my said brother Thomas Monypenny, for the like estates and interests, severally and successively according to the seniority of age; and in failure of all such issue of my said brother Thomas Monypenny, to the use of him, his heirs and assigns for ever. But I do hereby declare, that if it shall happen at any time hereafter that my said brothers, or either of them, their or either of their issue, shall become entitled to the real or copyhold estate, or any part thereof, late of Elizabeth Joddrell, widow, daughter of the late Phillips Gybbon, situate in the said parish of Rolvenden, or in the parishes of Benendon, Tenterden, or either of them, or elsewhere, then and in that case, and immediately upon such an event taking place, the said estates hereinbefore devised for the benefit of my said brothers and their issue, shall be and remain to the use of the next person entitled thereto under and by virtue of this my will, in the same manner as they would have done if the person so succeeding to the said estates late of the said Elizabeth Joddrell were actually dead. And I declare that my said devisees, as they may hereafter respectively become entitled to my said estates, shall be at full liberty to fell and cut all such timber and underwood as will not improve by standing, and shall not be impeached or impeachable for such waste; and shall and may, as they respectively become entitled, grant leases of my said estates, or any part or parts thereof, not exceeding seven years, so that such lease and leases be granted for the best and most improved rent that can be procured for the same, and so that no sum or sums of money be paid by any lessee or lessees in consideration for such lease or leases."

After the date of the will, and before the date of the codicil afterwards stated, the testator's brother, Thomas Monypenny, died, leaving his son Thomas, named in the will, him surviving, and such son afterwards took the name of Thomas Gybbon Monypenny.

On the 26th of July 1818, the said testator, James Monypenny, being of sound and disposing mind, duly made and published a codicil to his said will, dated the 25th of June 1818, and executed and attested as by law was then required for passing real estate by devise, and therein recited

that his brother Thomas had died; and after reciting that by his said will he gave and devised his said house, called Maythorn Hall, with all and every the appurtenances, and also all the rest, residue, and remainder of his manors, &c., hereditaments, and real estate whatsoever, in possession, &c. (except as thereinbefore devised), unto and to the uses in the said will expressed, he revoked the said last-recited devise, and did thereby give and devise his house, called Maythorn Hall, with all and every the appurtenances, and all and every other his said manors, &c., hereditaments, and real estate whatsoever, to the uses, intents, and purposes thereinafter expressed and referred to (that is to say), to the uses, intents, and purposes that his wife should receive and take the issues and profits thereof from the time of his decease, for and during the term of her natural life, without impeachment of waste, but subject to the keeping up, supporting, and maintaining the buildings and fences belonging thereto; and from and immediately after her decease, to such and the same uses as were declared of the said house, manors, &c., hereditaments, and real estate, by his said will, and subject to the declaration contained in his said will, in case his said brothers, or either of them, their or either of their issue, should become entitled to the said estate of E. Joddrell, widow. And the said testator ratified and confirmed his will in all other respects.

The said testator, J. Monypenny, afterwards made two other codicils to his said will, neither of which in any manner affected the disposition of his real estate made by his said will and first codicil.

The said testator, J. Monypenny, died in June 1822, without having in any manner revoked or altered the disposition of the said Maythorn Hall estate, made by his will and first codicil, and leaving him surviving his wife Mary Monypenny, and his brother, the said P. Monypenny, and the said T. G. Monypenny, son of his deceased brother T. Monypenny. On his death, his widow, M. Monypenny, entered into the receipt of the rents and profits of the said Maythorn Hall estate, and continued to receive and enjoy the same until her death, in the year 1826. After the widow's death, the said P. Monypenny, the brother of the testator, entered into the receipt of the rents

penny took an estate for life, with remainder to his first and other sons successively in tail male, with remainder to T. G. Monypenny for life, with remainder to him R. T. G. Monypenny in tail male; and so that P. Monypenny, having died without issue, and T. G. Monypenny having succeeded to the Joddrell estate, R. T. G. Monypenny has become entitled as tenant in tail male in possession. Second, T. G. Monypenny adopts the same construction of the will as that contended for by the son, except that he contends that the shifting clause did not take effect, and so that he is entitled to a life estate, prior to the estate tail of his son. Third, the parties claiming under the recovery and the will of P. Monypenny, argue that he took an estate tail, and so, by the recovery, acquired an absolute estate in fee simple. Fourth, the co-heirs of the testator contend, that P. Monypenny took an estate for life only, with remainder to his eldest son for life, and that all the subsequent remainders were void for remoteness; and so that, on the decease of P. Monypenny in 1841, without issue, the co-heirs of the testator became entitled.

The claim, as well of R. T. G. Monypenny as of his father T. G. Monypenny, is founded on the hypothesis that the sons of P. Monypenny, the first tenants for life, if any such there had been, would have taken in succession as tenants in tail male. Now there is certainly no express gifts to them as tenants in tail; but it is contended that, in order to effectuate the testator's general or leading intention, they must be held so to take, according to what has been called the doctrine of approximation, or *cy-pres*; and as much turns in this case on the question whether that doctrine does or does not apply, it will be right to consider, in the first place, what the doctrine is.

The doctrine of *cy-pres*, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such persons in tail male, or with remainder to the first and other sons of such persons in tail general, with remainder to the daughters as tenants in common in tail, with cross remainders amongst them. In such a case, the course of succession designated by the testator is one allowed by law, but the direction that the first taker should

take for life only, with remainder to his children as purchasers, is illegal, as tending to a perpetuity. In such cases the law, in order to prevent the testator's intention from being entirely defeated, has treated his *expressed intention* as divisible into two parts: first, the intention that the first taker and his issue male or issue general, as the case may be, shall all take in succession, according to the legal course of descent; and, secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers; and the two intentions being thus ascertained, the Courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention, shall not defeat the primary or general intention; and such a devise has therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker. By these means, the estate, if left, as it were, to itself, will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be diverted from that course by the act of the first taker. Whether, in such a simple case as that which we have stated for the purpose of explaining the doctrine, it might not have been better originally to act on a different principle—to have said that the two intentions were blended together, and so that the language of the will afforded no guide to shew what the testator intended, in a case where his will in its integrity could not be carried into effect, is a matter on which it would be vain to speculate. The doctrine has been long recognized; and we should be unsettling land-marks if we were to call it in question. The doctrine is nowhere more clearly stated than in a note of the late Mr. Butler, at the end of *Fearne's* chapter on the rule in *Shelley's case* (1). "The cases," says Mr. Butler, "in which this doctrine has been received, have arisen on devises in which the testator has expressed himself in terms which have been thought by the Courts to contain a clear indication that the devisee and his issue should take the lands, and an intimation of the mode in which he intended the issue should take them; and

(1) *Fearne's Contingent Remainders*, 204.

his language, in respect to the mode of the issue taking them, has been thought by the Courts to be such as, construed literally, imported limitations contrary to law. In construing these devises, the Courts have considered that the testator's primary object was that the issue of the devisee should take the land, and that the mode in which the issue should take it was the testator's secondary object, or, as it has been usually expressed, that the former was his general, the latter his particular intention. Then, in conformity to their uniform practice of effecting the testator's intention as far as possible, they have thought themselves required to adopt that construction of the devise which, by including the devisee, satisfied the testator's general intention that the issue should take, but which, at the same time, by raising in the issue estates different from those which the testator appeared to have intended them, sacrificed to that extent his particular intention. Thus, where the testator has devised lands to a person and his issue, and has appeared to intend to devise estates by purchase to the children of unborn children of the devisee, the Courts have considered such limitations contrary to law; but as the will has appeared to them to shew an intention that the issue should take, and this intention could be effected by the issue taking derivatively through the ancestor, the Courts, rather than the testator's intention should absolutely fail of effect, have put such a construction on the devise as vested the inheritance in the ancestor himself. Such a construction brings all the parties intended to be benefited by the testator within the operation of the devise, and thus satisfies the testator's general intention; but in respect of the mode in which the testator would be thought by the literal meaning of his language to intend they should take, this is materially varied; and thus his particular intention is sacrificed."

Such being the general doctrine, we have only to see whether it is applicable to the will now before us, so as to give estates in tail male to the sons of P. Monypenny. The devise is to P. Monypenny for life, and after his death to the first son of P. Monypenny for his life, and after his decease to the use of the first son of such first son and

the heirs male of his body, and in default of such issue, to the use of every other son of P. Monypenny, severally and successively, according to seniority of age, for the like interest and limitation as in respect of the first son of his issue, and in default of issue of P. Monypenny, then over. Here, it will be observed, no estate is given to any other grandson of P. Monypenny except the eldest son of each of his sons; so that if P. Monypenny had left two sons, and the eldest of those two sons had had two sons, on the death of P. Monypenny and his eldest son and grandson, and failure of issue male of the eldest grandson, the estate would, according to the testator's express intention, have gone, not to the second grandson, but to the second son of P. Monypenny, and so through the whole line of P. Monypenny's sons. In this case, therefore, it was no part of the testator's intention that the male descendants generally of P. Monypenny should take the estate, but only a very small part of those descendants, viz. the eldest direct line tracing from each of his sons, and that eldest line only.

To hold, therefore, that the sons took estates in tail male, would be, not to effectuate a general at the sacrifice of a particular intention, but arbitrarily to force on the testator an intention different from that which he has expressed; to conjecture what the testator would have done if he had been aware of the impossibility of carrying the estate in the course of the descent which he has designated, and then to hold that he has done what the Court supposes he would in such circumstances have wished to do. The doctrine of *cy-près*, if it be such as we have described it, and such as it is stated to be by Mr. Butler, clearly does not warrant any such decision; and what we have to do, therefore, is to see whether the decided cases, which have carried the doctrine the farthest, warrant the construction contended for.

The case which is generally represented as having pushed the doctrine farther than any other, is *Pitt v. Jackson* (2). There, Pinckney Wilkinson, having, under an antenuptial settlement, a power of appointing amongst the children of the marriage, lands to be purchased with certain trust monies

comprised in the settlement, made his will pursuant to the power, and thereby directed a part of the trust funds to be applied in the purchase of real estate, to be settled to the use of his daughter Mary, for her life, for her separate use, with remainder to trustees to preserve contingent remainders, and after her decease, to the use of all her children as tenants in common in tail, with remainder over. Inasmuch as Mary, the daughter, was of course not *in esse* at the time of the settlement, the attempt to give her a life estate, with remainder to her children as tenants in common in tail, was an attempt to do what the law would not allow, as tending to a perpetuity. But Lord Kenyon held that the appointment was not void, but might be carried into effect *cy-pres*, *i. e.* by holding that Mary, the daughter, took an estate tail. The only ground on which this case can be explained is, that the Court divided the expressed intention into several parts, holding the words of the will to express the intention, first, that the daughter, and all who should be heirs of her body, should take before the estate should go over; secondly, that the daughter should have a life estate only; and thirdly, that her children, and the heirs of their bodies, should take in succession, not according to the ordinary rules of law, but that all the children of the daughter should take as tenants in common in tail; and the two latter intentions being illegal, the Court executed, or professed to execute, the testator's intentions as nearly as the rules of law would permit, by giving the estate to the daughter and the heirs of her body. It is very difficult really to treat this as carrying into effect any part of the testator's expressed intention; but the ground of the decision must have been that it did so. In truth, the case can hardly be relied on as an authority; for, as is pointed out by Sir E. Sugden (3), the case afterwards came before Lord Loughborough, on two bills of review, and he, though in words he assented to the doctrine of Lord Kenyon, yet, in truth, acted beside or even against it. It appears from the report of the case on the bills of review—*Smith v. Lord Camelford* (4), that the daughter

under the settlement, took an estate tail in default of appointment, and Lord Loughborough held that the appointment to her for life united with her estate tail under the settlement, the estates appointed after her life being void for remoteness, so that ultimately the daughter took an estate tail, without aid from or application to the doctrine of *cy-pres*. In a late case, however, before Vice Chancellor Wigram, *Vanderplank v. King* (5), that learned Judge, though evidently not approving the doctrine of *Pitt v. Jackson*, yet seemed to think it a subsisting authority, and in fact acted on it as binding him in a case where the devise was in terms precisely similar. In considering how far these two cases are in point with reference to that now before us, it must be observed, that, both in *Pitt v. Jackson* and *Vanderplank v. King*, the persons who would from time to time take under the *cy-pres* doctrine, would never include any one who was not an object of the testator's bounty. In both those cases the intention was, at all times and in all possible states of the family, to benefit heirs of the body, who were the parties taking under the *cy-pres* doctrine. The persons who should from time to time be heirs of the body, were intended to take in common with other lines, if other lines there were; alone, if there were no other lines. Moreover, the estate was not to go over so long as there was any one who would answer the description of heir of the body of the first taker, and in failure of all such persons it was to go over. This intention was effectuated by the *cy-pres* doctrine. In these particulars the present case, it will be observed, differs entirely from the two we have referred to. Here it never was the testator's intention, collecting that intention from the words he has used, to benefit any heir male of the body of any son of P. Monypenny, except those who should derive title through an eldest son; and the doctrine, therefore, which should give the estate to an heir male claiming through any other line, through a second son of P. Monypenny's eldest son for instance, would obviously give it to a line of persons whom the testator did not intend to benefit.

(3) 2 Sugden on Powers, 64.

(4) 2 Ves. jun. 698.

(5) 3 Hare, 1; s. c. 12 Law J. Rep. (n.s.) Chanc. 497.



And again, on failure of the eldest line of male descendants claiming through P. Monypenny's eldest son, the intention was that the estate should go over to the next son of P. Monypenny; whereas the doctrine of *cy-pres* would carry it to the heirs male of the body of P. Monypenny's eldest son, *i. e.* to his second son and his male descendants. These are certainly important distinctions between this case and *Pitt v. Jackson* and *Vanderplank v. King*; and without, therefore, meaning to say that the doctrine on which Lord Kenyon proceeded, and which Wigram, V.C. felt himself bound to follow, is satisfactory to our minds, it is sufficient for us to say that those authorities are not precisely in point, and we do not feel inclined to carry the doctrine on which they rest one step further, which we should be doing, if we held that they governed the case now before us.

There is, however, another reported case of an earlier date, in which this same ground of distinction certainly does not exist. We allude to the case of *Nicholl v. Nicholl* (6). There, the testator devised his real estates to the second son (unborn) of William Nicholl for his life, and after his death, or in case he should inherit the paternal estate, then to his second son and his heirs male, and for default of such issue to the third, fourth, and other sons of W. Nicholl successively in tail male, and for default of such issue, to the first and other sons successively of J. Nicholl (who was unmarried) in tail male, with remainders over. There were two questions: first, whether, until there should be a second son of W. Nicholl, the estate went to the heir-at-law or to the remainderman; and secondly, what estate the second son of W. Nicholl would take. The Court of Common Pleas, on a case sent by the Lord Chancellor, certified their opinion, first, that the heir-at-law, and not the remainderman, took the estate till there should be a second son of W. Nicholl; and, secondly, that such second son, in order to effectuate the general intention, would take an estate in tail male determinable on the accession of the paternal estate. It is certainly very difficult to see how this construction had any tendency to carry into effect any general intention of the testator, collecting the

intention from the words he had used. That intention would clearly never include under any possible circumstances any descendants of the second son of W. Nicholl, except the second son of such second son, and the heirs male of his body, *i. e.* the heirs male of the body of the second son of the second son, not the heirs male of the body of the second son himself. Perhaps the Court, seeing that, as to the third and all subsequent sons, there was a clear expressed intention to give successive estates in tail male, might have felt itself warranted in inferring that, in spite of the language used by the testator, his intention must have been to secure the estate to *all* the male descendants of the second son, though with a superadded impossible intent, that the line of the second son should take in priority to the first, supposing the paternal estate to have descended on the second son of W. Nicholl. However that may be, the case is certainly one which it is very difficult to explain on any principle of construction, which does not leave it to the Courts (where the testator has expressed an illegal intention) to reject what he has said, and make the estate to devolve, not in the course pointed out in the will, but in some other course, which, under the circumstances, may appear convenient and easy to be carried into effect.

We cannot agree with the observations of Mr. Butler, in the subsequent part of the same note we have already referred to, where, in speaking of this case of *Nicholl v. Nicholl*, together with the other cases prior to *Pitt v. Jackson*, he says, that in *all* these cases the ancestor taking an estate tail so far quadrated with the estate intended by the testator for the issue, that though the quality of the estate taken under the *cy-pres* doctrine would be different from the quality of the estate they would have taken under the will, still it would not vary the course or order of the devolution of the land. That observation is applicable to all the cases except *Nicholl v. Nicholl*, but certainly not to that case. The decision there appears to us so unintelligible, that we cannot think ourselves bound by it, except in a case precisely similar, which the case now before us is not.

Taking, then, the doctrine of *cy-pres* to be such as it is from the passage we quoted

from Mr. Butler's note, we do not think it can in any case properly be applied, so as to carry the estate in a line of succession different from that which the testator has directed. Whether we should, in a case precisely similar to *Nicholl v. Nicholl* or *Pitt v. Jackson* (followed, as the latter has been, by Wigram, V.C.), feel ourselves bound to follow those decisions, is a matter which we are not now called on to decide. It is enough at present to say, that they do not seem to us in terms to apply to this case, in which, therefore, our certificate will be in conformity to what we consider to be the true doctrine, as stated by Mr. Butler.

To hold that the sons of P. Monypenny took estates in tail male, would be to hold that they took estates which would carry the property in a different course of succession from that indicated by the testator. This would be to go against the will, and not to carry its provisions or any part of its provisions into effect. The consequence is, that in our opinion the eldest son of P. Monypenny, if he had had a son, would have taken an estate for life only, and all the subsequent estates are void for remoteness. Some stress was laid in the argument on the words giving the property over to J. Monypenny in default of *issue of my brother Phillips, or in case of his not leaving any at his decease*. It was contended

that these latter words, whatever the construction of the limitation to the children of P. Monypenny, made the devise to Thomas and his issue good, inasmuch as it was to take effect on an event which must happen within the allowed period of time, viz., at the death of P. Monypenny, if he should *then* leave no issue, which event happened. But, looking at the whole context, we think the real meaning of the words was only this, *on the death and failure of issue of my brother P. Monypenny*, whether that failure shall occur at his own death or afterwards, I devise to Thomas; and therefore, whether the word "issue," there used, is to be construed to mean issue general, or *such issue* as had been previously designated, in either case the limitation over will be void, as being an attempt to create estates which were to commence at too remote a period, viz., the general failure of issue of P. Monypenny, or the failure of the particular issue mentioned by the testator.

The limitation would not be set up by holding it to have given an estate tail by implication to P. Monypenny, for such an estate tail would be bad, as not being to commence till after the failure of the particular previous estates, which we have already stated are void for remoteness. The consequence will be, that the gavel-kind heirs are the parties entitled, and we shall send our certificate accordingly.

*Certificate accordingly.*

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END OF MICHAELMAS TERM, 1847.

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# CASES ARGUED AND DETERMINED

IN THE

## Court of Exchequer of Pleas.

HILARY TERM, 11 VICTORIÆ.

1848. } GOODCHILD v. LEADHAM AND  
Jan. 25. } FERNYHOUGH.

*Practice—Process—Amendment, to save the Statute of Limitations—Adding Defendant.*

*Where in an action against A. and B. as executors of C, the plaintiff, after declaration and plea, discovered that C.'s widow was co-executrix with A. and B, and the Statute of Limitations had become a bar since the commencement of the suit, this Court refused to allow the writ of summons to be amended, by adding the name of the co-executrix as a defendant, considering that such amendment would not have been made before the Uniformity of Process Act.*

*Quære—If the application to amend had been made before declaration or plea.*

In this case a writ of summons in an action on promises was sued out on the 27th of September 1847, against the defendants, as executors of George Allen, who died on the 28th of June. An appearance was entered for the defendants, and the plaintiff declared on the 15th of November. On the 26th the defendants pleaded *ne unques* executors, and *plene administravit*, as to part of the declaration, and *non assumpsit* to the residue. The plaintiff then discovered that the widow of the testator, G. Allen, was co-executrix with the defendants; and that, on the 21st of October,

she had obtained probate of his will, with power reserved to the defendants to prove afterwards. The action was for goods sold and delivered; and the last item in the account being dated the 29th of September 1841, a fresh action would have been barred by the Statute of Limitations. Under these circumstances, Alderson, B. had made an order at chambers, on the 23rd of December, that on payment of costs the plaintiff should be at liberty to amend the writ of summons and all subsequent proceedings, by adding the name of the co-executrix as a defendant, the defendants to have till the 4th day of Hilary term to plead *de novo*, with liberty to the parties to apply to the Court. A rule was obtained to rescind the order, on the ground that the Judge had no power to make it, against which

*Martin* now shewed cause.—There was no plea in abatement here; and as the plaintiff will otherwise be barred from bringing a fresh action, the Court will amend the writ of summons—*Brown v. Fullerton* (1), and the cases there referred to. This question was definitively settled in the case of *Christie v. Bell* (2). He also referred to *Roberts v. Bate* (3). The amendment will work no hardship here; and is one which might have been made before the Uniformity

(1) 13 Mee. & Wels. 556; s.c. 14 Law J. Rep. (n.s.) Exch. 79.

(2) 16 Law J. Rep. (n.s.) Exch. 179.

(3) 6 Ad. & El. 778.

of Process Act—*Carr v. Shaw* (4), and *Rutherford v. Mein* (5).

*Petersdorff*, contrà.—Neither a Judge nor the Court have power to compel a mere stranger, who has not been served with process, to become a party to an existing suit.

[PARKE, B.—The doubt I entertain is, whether under the old system such an amendment could have been made so late in the suit. In the case cited, *Rutherford v. Mein*, a special *capias* was amended by filling up a blank which had been left for the defendant's christian name; but the report of that case does not shew whether it was before or after declaration. When the Uniformity of Process Act passed there was a meeting of the Judges for the purpose of considering whether amendments ought to be allowed in the new process. My Brother Alderson and myself could not see how that act made any difference with respect to amendments, and we thought that the same rules should prevail as under the old system. There was, however, a large majority against us. In *Roberts v. Bate*, my Brother Paterson says, the Judges resolved not to amend under the new process; and refers to what I said in *Lakin v. Massie* (6). The resolution of the Judges is also correctly stated in *Hodgkinson v. Hodgkinson* (7). We soon found the inconvenience of the rule, and in this court we determined to allow of amendment, by adding a plaintiff where the action would otherwise be barred by the Statute of Limitations; and that is the rule by which we go, though in the case of *Roberts v. Bate*, the Court of Queen's Bench did not agree with us. The question is, could this amendment have been made before the Uniformity of Process Act? Now there is a great difference between adding a plaintiff, which is done by his own consent, and adding a defendant against his consent? in the latter case you undo all that has been done; you must serve the process *de novo* and proceed as in a fresh action.]

[ALDERSON, B.—Is not this an action rather against the estate of the deceased than any particular person? If so, it would be only ante-dating a writ with which the estate had been already served.]

There would be great inconvenience in so considering it. Executors must satisfy the claims of creditors in the order in which they come; and if service of process in this case is notice to the executrix of the plaintiff's demand, she might be rendered liable for payments made between the time of action brought and service of the amended writ. The name of a plaintiff even will not be added except where the Statute of Limitations would otherwise bar the remedy.

POLLOCK, C.B.—I think this rule should be made absolute. It is proposed to amend the writ of summons by adding another defendant to those already sued, and that after declaration and plea—an amendment which, as it seems to me, could not have been made before the Uniformity of Process Act; and I am not aware of any instance in which we have gone further since the alteration of the old practice by that statute. I have myself always considered that the practice of the Court, as to amendments, remained the same, and that whatever would have been done before the Uniformity of Process Act would be done now. I think the proposed amendment would not have been allowed under the old system, and ought not to be allowed now. It is unnecessary to go farther, or to say under what circumstances such an amendment might possibly be allowed. It is proposed to make a person a defendant who is not before the Court, and over whom we have no power, which makes a very great difference between this case and that of adding a plaintiff who appears before the Court and consents to what is done.

PARKE, B.—I am of the same opinion. The cases of *Brown v. Fullerton* and *Christie v. Bell* may be said to have finally settled the practice of this court on this subject. The question was one of considerable importance, and several of the Judges were consulted on the subject prior to those decisions; but it must not be taken that all the Judges were consulted. After much deliberation on the rule come to after the passing of the Uniformity of Process Act, it was agreed that we would abide by that rule, and would not amend process, except when the Statute of Limitations would otherwise be a bar; and also where the writ varied from the præcipe. With these two exceptions we have adhered to the general rule. The

(4) 7 Term Rep. 299.

(5) 2 Smith, 392.

(6) 4 Tyr. 539; s. c. 3 Law J. Rep. (n.s.) Exch. 203.

(7) 1 Ad. & El. 533; s. c. 3 Law J. Rep. (n.s.) K.B. 167.

question, therefore, in this case is, whether this amendment can be made within the scope of the authority we have reserved to ourselves to amend the new process. In such a case as the present, I agree that we ought to have the power of doing whatever would have been done under the old system; but, to say the least of it, I feel very great doubt whether such an alteration as this would have been made under the old system. There is certainly the case of *Rutherford v. Mein*, where under the old practice an amendment in the name of a defendant was allowed in meane process, but at what stage of the proceedings does not appear. When matters have gone to the extent they have here, an amendment by adding a new defendant would be very inconvenient.

ALDERSON, B.—I am glad I raised this question for the opinion of the Court, as the effect will be that we shall now be able to come to some definite rule on the subject. I quite agree that where the Statute of Limitations applies, we ought to amend the new process in the same way as the Courts would have done under the old. That is now the rule in this court, and I believe in all the courts. If the application had been made at an earlier stage, it might have been different. We should, probably, exercise the same discretion that our predecessors did, as in the case of *Rutherford v. Mein*. But we will not make this amendment; for it would not have been allowed under the old practice. It creates too great a disturbance in the proceedings. In the case of adding a plaintiff the disturbance is but slight.

PLATT, B.—I agree that this amendment ought not to be allowed: it, in fact, is asking the Court to repeal the Statute of Limitations as regards the executrix.

*Rule absolute.*

1848. { THE GOVERNOR AND COMPANY  
Jan. 31. { OF THE BANK OF SCOTLAND  
          { v. FENWICK.

*Banking Co-partnership*—Scire Facias against Member of—7 Geo. 4. c. 46. s. 13.

The Court quashed a writ of scire facias on a judgment recovered against the public officer of a banking co-partnership, which alleged that A. B., "at the time of the commencement of the said action in which," &c.,

"and at the time of the recovery and giving of the said judgment, was, and from thence continually has been, and still is, a member of the said co-partnership," &c.

This was a rule, calling on the plaintiffs to shew cause why a writ of *scire fac.* in the following form should not be quashed:—  
"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, to the sheriffs of London, greeting. Whereas the Governor and Company of the Bank of Scotland, lately, on the 21st day of September, in the year of our Lord 1847, in our court, before the Barons of our Exchequer at Westminster, under and by virtue of the statute in such case made and provided, by the judgment of the same Court, recovered against George Burdis,—as and being one of the public registered officers, for the time being, of certain persons united in co-partnership, and carrying on the trade or business of bankers in England, by and under the name and style of and called the North of England Joint-Stock Banking Company, for the purpose of carrying on the business of bankers in England, under the provisions of a certain act of parliament, passed in the 7th year of the reign of his late Majesty King George the Fourth, for, amongst other things, the better regulating co-partnerships of certain bankers in England, and which said G. Burdis had been duly nominated, appointed, and registered one of the public officers of the said co-partnership to be sued, and was then sued as the nominal defendant, for and on behalf of the said co-partnership, according to the form and effect of the said act of parliament,—£6,536*l.* 7*s.* 2*d.*, for their damages, which they had sustained as well on occasion of their not performing certain promises before then made by the said co-partnership, to the said Governor and Company of the Bank of Scotland, as for their costs and charges by them about their suit in that behalf expended, whereof the said G. Burdis, as such public officer as aforesaid, is convicted, as by inspecting the rolls of the said Exchequer appears of record; and whereas, by and according to the provisions and the form and effect of the said statute execution upon any judgment in any action obtained against any public officer for the time being of any such

co-partnership as in the said act mentioned, carrying on the business of banking under the provisions of the said act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such co-partnership, and now on behalf of the said Governor and Company of the Bank of Scotland, in the same court, we have been informed and given to understand that although judgment be thereupon given, yet execution of the said damages still remains to be made to the said Governor and Company of the Bank of Scotland; and that Cuthbert Smith Fenwick, at the time of the commencement of the said action, in which the said judgment was so obtained as aforesaid, and at the time of the recovery and giving of the said judgment, was, and from thence continually has been, and still is, a member of the said co-partnership called "The North of England Joint-Stock Banking Company," then and still being such a co-partnership as in the said statute mentioned, and then and still carrying on the business of banking, under the provisions of the said statute, wherefore the said Governor and Company of the Bank of Scotland have humbly besought us to provide them a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that, by honest and lawful men of your bailiwick, you make known to the said Cuthbert Smith Fenwick that he come before the Barons of our said Exchequer at Westminster, on the 18th day of November A.D. 1847, to shew if he has or knows of anything to say for himself, why the said Governor and Company of the Bank of Scotland ought not to have execution against him, the said Cuthbert Smith Fenwick, for the damages aforesaid, together with interest thereon, at the rate of 4l. per centum per annum, from the said 21st day of September 1847, on which day the judgment aforesaid was entered up, according to the force, form, and effect of the said recovery and of the statute in such case made and provided, if it shall seem expedient for them so to do; and in what manner you shall execute this our writ, make appear to the Barons of our said Exchequer at Westminster on the 18th day of November, in the year of our Lord 1847, and have you there the names of those by whom you shall so make known to him and this writ. Witness, Sir Frede-

rick Pollock, Knight, at Westminster, the 11th day of November in the eleventh year of our reign."

*Sir John Bayley* shewed cause. — The case of *Edaile v. Trustwell* (1) is relied on by the other side; but there the Court came to no decision on the point, the plaintiff's counsel having consented to amend. The objection in truth is, not that the writ gives the defendant insufficient notice, but that it gives him too much.

[*ROLFE, B.*—If the words "member for the time being," in the 13th section of the 7 Geo. 4. c. 46, mean a member at the time the writ of *sci. fa.* issued, then the writ states two grounds of liability.]

In no case is the leave of the Court necessary, except where the party has ceased to be a member. The 12th section of the statute declares that a judgment against the public officer shall have the like effect and operation upon and against the property of the co-partnership, and the property of every member thereof, as if such judgment had been recovered against such co-partnership. If the writ had shewn upon the face of it that the defendant had ceased to be a member of the co-partnership, then it would have appeared that the leave of the Court was necessary. In the absence of any affidavit to shew that the defendant had ceased to be a member, this is the true description.

*Willes*, in support of the rule. — In *Bradley v. Warburg* (2), it was held that the issuing a *scire facias* without leave of the Court could not be pleaded as a defence in bar of the action, but was an irregularity merely, for which an application might be made to the Court to set aside the writ. If the defendant was a member at the time of the judgment, and had ceased to be so, the writ could not issue without leave of the Court. Whatever construction is put upon the words "member for the time being,"—whether it means "member at the time the *scire facias* issued," or "at the time of the commencement of the suit," the present writ is irregular. Suppose the defendant was in fact a member at the time of the judgment, and not a member "for the time being," and a declaration is delivered following the form of the writ, the

(1) 16 Law J. Rep. (N.S.) Exch. 316.

(2) 11 Mee. & Wels. 452; s. c. 12 Law J. Rep. (N.S.) Exch. 458.

defendant by his plea must deny that he was a member at the time of the judgment, and also "for the time being." The plaintiff would prove that the defendant was a member at the time of the judgment, though not for the time being; and the result would be, that the plaintiff would have the benefit of a writ issued without the leave of the Court in a case in which the leave of the Court is required. It was on that ground that the writ was quashed in the case referred to by Parke, B., in *Esdaile v. Trustwell*.

ROLFE, B.—The rule must be absolute. The principle of the case of *Esdaile v. Trustwell* governs this. The statute enables a plaintiff without leave of the Court to issue a *scire facias* against a member for the time being,—and for the purpose of disposing of this question, I will assume that the words "time being" mean at the time the writ issues, for I think it makes no difference whether it mean at the time of the commencement of the suit. The statute also enables a plaintiff to have execution against some person who was a member of the co-partnership at the time of the judgment recovered; but in that case the leave of the Court is necessary before issuing the writ. Here, the *scire facias* describes the defendant as a member for the time being, and also at the time of judgment recovered. The declaration would be in the same form, but no advantage could be taken by demurrer to such a declaration, therefore the defendant must take issue on it, and plead that he was not a member "at the time of judgment recovered," or "for the time being." If it should turn out at the trial that the defendant was a member at the time of judgment recovered, though not for the time being, the plaintiff would be entitled to execution though the writ had issued without leave of the Court.

*Rule absolute, with costs.*

1848. { MARSH v. RICHARD DAVIES,  
Jan. 17. { JAMES DAVIES, R. TEBBOTT,  
AND W. EVANS.

*Contract—Churchwardens and Overseers,  
Liability of—Attorney's Bill—Retainer.*

*Justices, in Quarter Sessions, having confirmed an order of removal, made from the parish of C. to the parish of L, upon a preliminary objection, a rule nisi was after-*

*wards obtained by L, in 1844, for a mandamus to the Justices to enter continuances and hear the appeal. A copy of the rule was served upon two of the defendants, R. D. and R. T, who, at that time, and at the commencement of the suit, were the churchwardens of C. R. T. afterwards signed a retainer to the plaintiff, to act as attorney for the parish of C, but subsequently countermanded it. R. D. did not interfere. Before the rule was argued, J. D. and W. E, the other defendants, were elected overseers, and R. D. and R. T. churchwardens. Before the argument on the rule (which was discharged) the plaintiff's clerk saw J. D. repeatedly about the rule, and was asked by him how the matter was going on; he also saw the other defendant W. E. repeatedly about it, but he was not so active. The plaintiff's bill of costs having been delivered to one of the defendants, they all expressed readiness to pay, but said there was a grudge in the parish:—Held, that the defendants were not liable.*

This was an action of debt for work and labour by the plaintiff, as an attorney, and for money paid and money found to be due on an account stated. The defendants pleaded, first, that they were never indebted; and, secondly, that the plaintiff did not, one month before the commencement of the action, deliver or send a bill of charges subscribed according to the statute. Upon these pleas issue was joined.

The case was tried, before Lord Denman, C.J., at the Summer Assizes for Montgomeryshire, 1846, when a verdict was found for the plaintiff, for the amount of the debt, 109*l.* 7*s.* 8*d.* and 40*s.* costs, subject to the opinion of the Court of Exchequer on the following CASE.

On the 18th of December 1843 an order was duly made by two Justices, for the removal of one Hugh Hughes and family from the parish of Carno, in the county of Montgomery, to the parish of Llanycil, in the county of Merioneth. The paupers were removed to Llanycil, under this order, on the 13th of January following, no notice of appeal having been given. The overseers of the poor of Llanycil then entered and respited an appeal at the ensuing Montgomeryshire Sessions in April 1844; and this appeal came on to be heard at the following Midsummer Sessions, July 4, 1844. A preliminary objection was taken by the

respondents to the appellants being heard; that they had not given twenty-eight days' notice of their intention to try, in compliance with a rule of that court. The Justices held this objection to be fatal, and, without entering into the merits, confirmed the order, with costs. In Michaelmas term, 1844, the appellants obtained a rule *nisi* from the Court of Queen's Bench, calling upon the Justices of Montgomeryshire to shew cause why a writ of mandamus should not issue, commanding them to enter continuances and hear the appeal. Copies of this rule were served upon Richard Davies, who then, and from thence until and at the time of commencing this action, was one of the churchwardens of the parish of Carno, and upon Griffith Gittins, then one of the overseers of the poor of the said parish. One Enoch Morgan was then the other overseer of the poor, and the defendant, Robert Tebbott, the other churchwarden. After Gittins had been served with a copy of the rule *nisi*, he called on the plaintiff at his office, to consult him upon the subject, and signed a written retainer, of which the following is a copy:—

"Parish Officers of Llanycil, appellants.  
 "Parish Officers of Carno, respondents.  
 "Mr. John Marsh, solicitor, Carno.

"We do hereby retain you as our attorney to shew cause, on our behalf, against a rule obtained by the appellant parish for directing continuances to be entered for trying this cause on the merits, and we hereby instruct you to take such steps in the matter as you may think proper. Dated this 18th day of December 1844.

(Signed)

"Griffith Gittins,  
 "The mark + of Enoch } Overseers.  
 Morgan,

"Robert Tebbott, churchwarden.  
 "Witness, W. J. Edwards."

The defendant, Robert Tebbott, one of the churchwardens, shortly afterwards signed the retainer, and Enoch Morgan, the other overseer, put his mark thereto. On the 10th of January 1845, the defendant, Robert Tebbott, gave the plaintiff notice in writing, countermanding such retainer. The following is a copy:—"Sir, on December 18th, 1844, I requested you not to proceed against Mr. Lloyd Williams's mandamus. I again declare that I will not be responsible for any expense you may incur contrary to

my direction, as well as contrary to the wishes of all the parishioners.

"I am, &c., Robert Tebbott."

The defendant, Richard Davies, was never asked to sign the retainer, and did not interfere. The plaintiff obtained copies of the affidavits upon which the rule *nisi* had been obtained from the agents in London, and caused affidavits to be prepared, and drew up a brief for counsel to shew cause against the rule. Before this rule was argued there occurred a change in the parish officers. In the month of March 1845, the defendants, James Davies and William Evans, were duly elected overseers of the poor in the room of Griffith Gittins and Enoch Morgan. The other two defendants, Richard Davies and Robert Tebbott, were re-elected to the office of churchwardens. The plaintiff's clerk saw James Davies repeatedly about the rule, who asked how the matter was going on. He also saw William Evans repeatedly about it, but he was not so active, James Davies being the manager. James Davies often inquired of Griffith Gittins how the affair was going on in London.

The rule came on for argument in Trinity term, 1845, on the 11th of January, in the Bail Court of the Queen's Bench, and after consideration Wightman, J. discharged the rule, without costs. At the latter end of June 1845, the plaintiff communicated the result to the defendant, James Davies, and to other parishioners. On the 28th of January 1846, the plaintiff delivered to the said James Davies a bill of his costs and charges, duly signed, headed, and directed.

All the defendants expressed readiness to pay, but said there was a grudge in the parish. No bill was delivered by the plaintiff to any of the other defendants. James Davies afterwards caused a parish vestry to be summoned, at which it was determined to resist payment of the bill; and this action was commenced in the following March.

Upon this state of facts, it was contended, at the trial, for the defendants, that the plaintiff ought to be nonsuited; first, on the ground that the four defendants were not the proper parties to be sued; secondly, that the delivery of the plaintiff's bill of costs to James Davies alone was not a sufficient delivery thereof within the statute 6 & 7 Vict. c. 73.



If the Court should be of opinion that the action was properly brought against the present defendants, and that the plaintiff's bill of costs was duly delivered in compliance with the statute, the verdict on both issues for the plaintiff is to stand as entered. If the Court should be of a contrary opinion on either of the above points, then a nonsuit is to be entered, or a verdict for the defendants, as the Court may direct.

*Townsend*, for the plaintiff.—All the defendants are liable, as one parish officer can bind the other parish officers. *The King v. Beeston* (1) shews that under an act of parliament which enables the churchwardens and overseers both to contract for the providing for the poor, the contract of the majority of the churchwardens and overseers will bind the rest, and it is not necessary that all should concur.

[ALDERSON, B.—That was not the case of a personal liability on the part of the overseers.]

In *Kirby v. Banister* (2) an action was brought against the five defendants, who were parish officers, and who had given to paupers orders for goods upon the plaintiff, who was a shopkeeper: it was held that the plaintiff might recover against the five, although the orders had been signed by three only.

[POLLOCK, C.B.—That case was put upon the ground that the five were not liable, unless the jury were of opinion that they all jointly contracted.]

[ALDERSON, B.—The plaintiff, in that case, might reasonably contend that although all five did not sign the orders, yet that they authorized the delivery of the goods.]

*Welby v. Brown* (3) is in point.

[PARKE, B.—The defendants had no intention of making themselves personally liable. An attorney will often go on with parish business without any contract at all, on the faith of being paid out of the parish funds.]

An overseer is bound by the contract of his co-overseer—*Malkin v. Vickerstaff* (4).

[POLLOCK, C.B.—That decision is directly against the plaintiff's view of the case.]

Secondly, there was evidence of the adop-

tion of the contract by the defendants; for, James Davies, one of the defendants, in speaking of the rule for the mandamus, repeatedly asked how it was going on; and they all expressed readiness to pay, but said that there was a grudge in the parish.

[PARKE, B.—Tebbutt signed the retainer to the plaintiff, and therefore *prima facie* would be liable; but two days afterwards he stated to the plaintiff in writing that he would not be bound. It is true, he afterwards expressed his readiness to pay, but said there was a grudge in the parish. How is that an adoption of the retainer which he had countermanded? He did not express his readiness to pay out of his own funds, but out of those of the parish, and he was prevented from doing the latter by the grudge that existed in the parish.]

The work was for the benefit of the parish; and the defendants' allowing it to go on, and making inquiries as to its progress are evidence of their assent to the plaintiff's being retained.

[PARKE, B.—That is no evidence of assent.]

Admitting, however, that overseers cannot bind their successors, still if a party acts without the authority of his principal, and the latter afterwards adopts his acts, he is bound by them—*Story on Agency*, 206, *M'Lean v. Dunn* (5). Ex-overseers, however, may be considered as the agents of their successors in office.

[PARKE, B.—If your argument is correct; overseers may be considered as partners in trade.]

*Welby*, contra, was not called on.

PARKE, B.—The defendants are entitled to judgment of nonsuit. If there was no contract at all, and the plaintiff looked to the funds of the parish for re-payment, it follows that he cannot sue anybody. If the retainer is looked at, it appears that one party is not bound, as he disclaimed his retainer; and there is no evidence whatever of his having revoked that disclaimer. The truth is, the defendants would have been willing to pay the plaintiff's debt out of the parish funds, but were prevented by a feud existing in the parish.

POLLOCK, C. B., ALDERSON, B., and PLATT, B. concurred.

*Judgment of nonsuit.*

(5) 4 Bing. 722; s.c. 6 Law J. Rep. C.P. 164.

(1) 3 Term Rep. 592.

(2) 5 B. & Ad. 1069; s.c. 3 Law J. Rep. (N.S.) M.C. 69.

(3) 8 Law Times, 122, 1845.

(4) 3 B. & Ald. 89.

1848. }  
Jan. 14. } VANE & COBBOLD.

*Railway Company—Deposits—Money had and received—Subscribers' Agreement—Fraud.*

In 1845 a railway company, provisionally registered, issued a prospectus, which stated the capital to be 1,500,000*l.*, in 60,000 shares of 25*l.* each. The plaintiff having applied for shares, and having received a letter of allotment for forty shares, requiring him to pay the sum of 105*l.* as a deposit thereon, on or before the 16th of October, paid the amount on that day. On the 4th of November, the plaintiff signed the subscribers' agreement, containing the usual terms as to the disposition of the deposits. Of the whole amount of shares, about 35,000 were allotted, and out of this number deposits were paid up on 18,160 only. These facts were not communicated to the plaintiff before signing the deed:—Held, in an action by the plaintiff to recover from a member of the managing committee the whole amount of his deposits, that the withholding of the above facts did not amount to fraud, so as to avoid the subscribers' agreement.

*Indebitatus assumpsit*, for money paid, money had and received, and on an account stated.

Plea—Non assumpsit.

At the trial, before Pollock, C.B., at the London sittings after Michaelmas term last, the following facts were proved:—The plaintiff is a solicitor, residing in Westminster; and the defendant was one of the managing committee of the Midland and Eastern Counties Railway Company. In the year 1845 a committee was formed for carrying into effect a railway from Cambridge to Worcester, to be called the Midland and Eastern Counties Railway. The prospectus of the company, which was provisionally registered, stated the capital to be 1,500,000*l.*, in 60,000 shares of 25*l.* each; deposit, 2*l.* 12*s.* 6*d.* per share. The plaintiff having, on the 2nd of September, applied for fifty shares in the undertaking, received on the 1st of October, a letter of allotment, stating that the committee had allotted him forty shares in the company, requiring him to pay the sum of 2*l.* 12*s.* 6*d.* per share, amounting to 105*l.*, on or before the 16th

inst., and adding, that in default of payment the allotment would be cancelled. On the 16th of October the plaintiff paid the deposit, and received the scrip. On the 4th of November, the subscribers' agreement, containing the usual terms as to the disposition of the deposits, was sent to London, and was on that day executed by the plaintiff. About 35,000 shares in the whole were allotted, but of this number, in consequence of the sudden depreciation of railway shares, deposits were paid on 18,160 only. The bill of the company was read a third time in the House of Commons, but failed to pass the House of Lords, the committee deciding that the preamble was not proved. Under these circumstances, it was contended, on behalf of the plaintiff, that the permitting the plaintiff to sign the deed without informing him that a portion only of the deposits had been paid, amounted to such a fraud as avoided the subscribers' agreement, and entitled the plaintiff to recover his deposits.

The learned Judge was of opinion that no case of fraud had been established, and he directed a nonsuit.

Martin now moved to set aside the nonsuit, and for a new trial.—In this case there was evidence of fraud: the officer of the company, at the time of sending the deed to the plaintiff for signature, was aware that 18,160 shares only had been paid for; and under those circumstances it was fraudulent in him to send the subscribers' agreement to the plaintiff for signature. There was a fraudulent concealment of a material fact; and, in a case like this, a *suppressio veri* and *allegatio falsi* are the same. The effect of the conduct of the officer of the company was to represent that a sufficient number of shares had been allotted to entitle the company to go on. It is not contended by the plaintiff that the reservation of a few shares, for the purpose of giving a boon to landowners, or for enabling the company to make advantageous arrangements with other companies, is fraudulent; but, in the present case, 18,160 shares only had been paid for out of 60,000—*Nockells v. Crosby* (1). *Walstab v. Spottiswoods* (2) and *Garwood v. Ede* (3) shew what are the

(1) 3 B. & C. 814; s.c. 5 D. & R. 751.

(2) 15 Mee. & Wels. 501; s. c. 15 Law J. Rep. (N.S.) Exch. 193.

(3) *Ante*, Exch. 29.

rights of parties when the consideration for the payment of money has failed.

[ALDERSON, B.—In cases of this kind parties begin to subscribe the deed long before all the deposits are collected. The defendant might honestly believe that other names would come in.]

[POLLOCK, C.B.—The promoters went to parliament, and got through the House of Commons, but failed in the House of Lords. There was no fraud.]

[PARKE, B.—Few deeds are executed at a time when all the shares are allotted.]

[ALDERSON, B.—I think in this instance the plaintiff would have executed the deed, although he had been aware that 18,160 shares only had been paid for.]

*Per Curiam*.—There is no ground for a rule in this case.

*Rule refused.*

1848. } SPOTSWOOD v. BARROW AND  
Jan. 19. } ANOTHER.

*Pleading—Argumentativeness—Readiness and Willingness.*

*The declaration stated, that the plaintiff agreed with the defendants to act as their salesman for a year, and not to be connected with any other house in disposing of their goods, and that the defendants agreed to pay the plaintiff 200*l.* for such servitude. Averment, that the plaintiff entered into the defendants' service, and was not connected with any other house, and had always until the expiration of one year from the making of the agreement, been ready and willing, and offered to remain in such employ. Breach, that the defendants would not suffer the plaintiff to act as their salesman during the remainder of the year, but discharged him from the performance of his agreement, and had not paid him the 200*l.* Plea, as to the non-payment of the 200*l.*, that after the plaintiff ceased to be in the defendants' employ, and during the said year, he entered into the service of another house, and became connected with that house in disposing of their goods:—Held, on special demurrer, that the plea was bad, as amounting to an argumentative denial of the plaintiff's readiness and willingness to continue in the defendants' employment.*

*Assumpsit.* The declaration stated that the plaintiff agreed with the defendants to act as their salesman for one year, to devote the whole of his time to them as their traveller, and not to be connected in any way with any other house, in disposing of their goods; and the defendants agreed to pay the plaintiff 200*l.* per annum for such servitude. The declaration then averred, that the plaintiff entered into the defendants' employ, and continued therein, and devoted the whole of his time as traveller, and was not connected with any other house, and had always until the expiration of one year from the making of the said agreement, been ready and willing, and offered to remain in such employ, and not to be connected with any other house; yet the defendants would not suffer the plaintiff to act as salesman during the remainder of the said year, and wholly discharged him from the further performance of the said agreement, and had not paid the plaintiff the said sum of 200*l.* for the said year.

Fourth plea, as to so much as relates to the not paying the plaintiff the sum of 200*l.* for one year, that after the plaintiff ceased to be in the defendants' employ, and during the said period of one year, the plaintiff entered into the service of another house than that of the defendants, to wit, the house of, &c., and became connected with the said house in disposing of their goods during the remainder of the said year. Verification.

Special demurrer, assigning for causes that the fourth plea neither traversed, nor confessed nor avoided the cause of action; that if it were deemed a traverse it was bad as argumentative, but if it were deemed a plea in confession and avoidance, then it did confess, but did not sufficiently avoid.

*H. Hill*, in support of the demurrer, cited the cases of *Aspden v. Austin* (1) and *Dunn v. Sayles* (2).

*T. Jones*, for the defendants.—The breach in this case is the non-payment of the 200*l.* to the plaintiff, and before the plaintiff can succeed, he must shew that his readiness and willingness to serve, coupled with the defendants' refusal to employ him, are

(1) 5 Q.B. Rep. 671; a.c. 13 Law J. Rep. (N.S.) Q.B. 155.

(2) Ibid. 685; a.c. 13 Law J. Rep. (N.S.) Q.B. 159.

1848. }  
Jan. 14. } VANE v. COBBOLD.

*Railway Company — Deposits — Money had and received — Subscribers' Agreement — Fraud.*

In 1845 a railway company, provisionally registered, issued a prospectus, which stated the capital to be 1,500,000*l.*, in 60,000 shares of 25*l.* each. The plaintiff having applied for shares, and having received a letter of allotment for forty shares, requiring him to pay the sum of 105*l.* as a deposit thereon, on or before the 16th of October, paid the amount on that day. On the 4th of November, the plaintiff signed the subscribers' agreement, containing the usual terms as to the disposition of the deposits. Of the whole amount of shares, about 35,000 were allotted, and out of this number deposits were paid up on 18,160 only. These facts were not communicated to the plaintiff before signing the deed:—*Held*, in an action by the plaintiff to recover from a member of the managing committee the whole amount of his deposits, that the withholding of the above facts did not amount to fraud, so as to avoid the subscribers' agreement.

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Plea—Non assumpsit.

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The learned Judge was of opinion that no case of fraud had been established, and he directed a nonsuit.

*Martin* now moved to set aside the nonsuit, and for a new trial.—In this case there was evidence of fraud: the officer of the company, at the time of sending the deed to the plaintiff for signature, was aware that 18,160 shares only had been paid for; and under those circumstances it was fraudulent in him to send the subscribers' agreement to the plaintiff for signature. There was a fraudulent concealment of a material fact; and, in a case like this, a *suppressio veri* and *allegatio falsi* are the same. The effect of the conduct of the officer of the company was to represent that a sufficient number of shares had been allotted to entitle the company to go on. It is not contended by the plaintiff that the reservation of a few shares, for the purpose of giving a boon to landowners, or for enabling the company to make advantageous arrangements with other companies, is fraudulent; but, in the present case, 18,160 shares only had been paid for out of 60,000—*Nockells v. Crosby* (1). *Walstab v. Spottiswoode* (2) and *Garwood v. Ede* (3) shew what are the

- (1) 3 B. & C. 814; s.c. 5 D. & R. 751.
- (2) 15 Mee. & Wels. 501; s.c. 15 Law J. Rep. (n.s.) Exch. 193.
- (3) *Ante*, Exch. 29.

*Wilkes*, in support of the demurrer.—The declaration is bad in omitting to aver that the defendant had no reasonable and probable cause for arresting the plaintiff—*De Medina v. Grove* (1). He was then stopped by the Court.

*Lush*, for the plaintiff.—The declaration is good. *De Medina v. Grove* is not in point, as the judgment in that case was not regular. There it was necessary to aver that the arrest took place without reasonable and probable cause, because it did not appear that there were not other debts, and the defendant was justified in issuing the writ. But here the defendant was not warranted in issuing execution, for the final order for protection had been made previously and still continued in force.

[PARKE, B.—It may have issued from an improper Court, or have been surreptitiously obtained.]

That supposition is not consistent with the averments in the declaration.

[PARKE, B. — Suppose the defendant considers the document a forgery, in what manner is he to contest it?]

By making an application to the Court. The defendant issued the writ wilfully and maliciously.

PARKE, B.—The defendant is entitled to judgment. He is not liable unless he arrests the plaintiff without reasonable and probable cause. The declaration does indeed contain an averment of the writ having been sued out maliciously, but does not contain an averment of a want of reasonable and probable cause. The defendant may have supposed *bona fide* that the protection was void.

ALDERSON, B. and PLATT, B. concurring,  
*Judgment for the defendant.*

1848. }  
Jan. 19. } LATTIMORE v. GARRARD.

*Pleading — Farming Improvements —  
Averment of Request to appoint Valuer.*

*The declaration stated, that in consideration that the plaintiff had become tenant to the defendant of a farm, upon the terms that if the plaintiff should receive from the defendant notice to quit, and should have made*

(1) In the Queen's Bench; not yet reported.

*expensive improvements upon the farm, for which the subsequent crops should not have compensated the plaintiff, the farm should, upon the determination of the tenancy, be looked over by two men, one to be appointed by each party, and that the persons so appointed should determine to what compensation the plaintiff should be entitled, the defendant promised the plaintiff that if the tenancy should be determined, and the plaintiff should have made improvements for which he should not have been compensated, the defendant would, at the plaintiff's request, appoint a person for such purposes. Averment, that the tenancy was determined by the defendant; that the plaintiff had made improvements for which he had not been compensated; that although the plaintiff, after the determination of the tenancy, appointed J. D. to determine the compensation, and J. D. was ready to act, of which the defendant had notice, and was then requested by the plaintiff to appoint some person on his behalf, yet the defendant did not nor would appoint some person in that behalf:—Held, on special demurrer, that the declaration was ill in omitting to state that the plaintiff had requested the defendant to appoint a valuer before the commencement of the suit.*

The declaration stated, that in consideration that the plaintiff had become tenant to the defendant of a certain farm, at a certain yearly rent, upon the terms that if the plaintiff should receive from the defendant notice to quit, and should have made expensive improvements upon the said farm, for which the subsequent crops should not have sufficiently compensated the plaintiff, the farm should, upon the determination of the said tenancy, be looked over by two men of business, one to be appointed by each party, and that the persons so appointed should determine to what further compensation the plaintiff should be entitled, the defendant promised the plaintiff that if the said tenancy should be determined, and the plaintiff should have made improvements for which he should not have been compensated, he, the defendant, would, at the request of the plaintiff, appoint one of such persons for such purposes. Averment, that the tenancy was determined by the defendant; that the plaintiff had made expensive improvements, for

which he had not been sufficiently compensated by the subsequent crops; that although the plaintiff, after the determination of the tenancy, appointed one J. D. to determine to what further compensation the plaintiff was entitled, and the said J. D. was, and from thence hitherto, hath been ready and willing to act in that behalf, of which the defendant had notice, and was then requested by the plaintiff to appoint, on his behalf, some proper person in that behalf; yet the defendant did not nor would appoint on his, the defendant's, part some proper person in that behalf.

Demurrer, assigning for causes that it did not appear that the appointment of J. D. was made before the commencement of the suit, or such a reasonable time before that period as would have enabled the defendant to appoint another person to meet him; nor did it appear that the defendant had notice of such appointment, or that he was requested to appoint any other person before the commencement of this suit.

*Ogle*, in support of the demurrer, contended that the declaration was bad for the reasons alleged in the body of the demurrer.

[*PARKE, B.*—Does not the obligation to appoint an arbitrator arise at the end of the term? If so, the declaration is bad. The defendant will contend that the legal result of the contract is, that no request to the defendant to appoint an arbitrator was necessary.]

He was stopped by the Court.

*Cowling*, contra.

*PARKE, B.*—The expensive improvements were to be paid for by the subsequent crops. The fact, whether such crops had or had not remunerated the plaintiff would be known to the plaintiff alone, the declaration, therefore, should have contained an allegation that the plaintiff had given the defendant notice of that fact, and had before the commencement of the suit requested him to appoint a valuer. Until such notice, the duty of the defendant to appoint a valuer did not arise. The plaintiff may have leave to amend, otherwise there will be judgment for the defendant.

*ALDERSON, B.* and *PLATT, B.* concurred.

*Judgment for the defendant.*

1848. }  
Jan. 27. } *HARRIES v. LAWRENCE.*

*County Courts Act, 9 & 10 Vict. c. 95. s. 129.—Costs.*

*An action for a matter for which a plaintiff might have issued under the 9 & 10 Vict. c. 95, was commenced in one of the superior courts, after the passing of that act, but before the Order in Council establishing the County Court of the district in which the cause of action arose and the parties resided:—Held, that the 129th section, which deprives parties of costs who, after the passing of that act, sue in the superior courts for causes "for which a plaintiff might have been entered in any court holden under that act," did not apply.*

This was a rule calling on the plaintiff to shew cause "why, on payment of 5*l.*, the amount of the verdict recovered in this case, all further proceedings should not be stayed; or why the judgment should not be entered up for the said sum of 5*l.* only, without costs; or why the plaintiff should not bring the postea into court, and file the plea roll, so that the defendant might enter a suggestion thereon to deprive the plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95. s. 129, for the more easy recovery of small debts and demands in England."

It appeared on affidavit, that this was an action brought in this court for the recovery of 14*l.* for breach of covenant in not repairing a house. The house was situated within the jurisdiction of the Middlesex County Court, established under the 9 & 10 Vict. c. 95, and both the plaintiff and defendant resided within that jurisdiction. The action was commenced after the passing of that statute, but before the Middlesex County Court was constituted, under its provisions, by the order of the Queen in Council. The cause had been tried, before Pollock, C.B., and a verdict found for the plaintiff, damages 5*l.*

*Crowder* now shewed cause.—This rule cannot be supported. The true construction of the 129th section of the 9 & 10 Vict. c. 95. is manifestly contrary to that which must be contended for on the other side. That section enacts, "That if any action shall be commenced after the passing of this act in any of Her Majesty's superior

courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.*, if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs." It is quite clear that when this action was commenced, there was not "any court holden under that act," in which a plaint could have been entered; and the rule will be discharged, with costs.

*Charnock, contra.*—The words of the 129th section of the 9 & 10 Vict. c. 95. are express, that the plaintiff is to lose his costs in a case like the present "if the action shall be commenced after the passing of that act." This act of parliament took effect from the day on which it received the royal assent, which was before the writ issued. The plaintiff ought not to have issued his writ after the act; he would have had his remedy as soon as the county court was established.

*Per Curiam.*—It is quite clear that this rule must be discharged, and with costs. At the time when this action was commenced there was not "any court holden under this act," in which the plaintiff could have sued.

*Rule discharged, with costs.*

1848. } THE NEWRY AND ENNISKILLEN  
Feb. 5. } RAILWAY COMPANY v. EDMUNDS.

*Railway Company—Calls, Liability to—Sealed Register—8 & 9 Vict. c. 16.*

*In an action for calls upon certain shares in a railway company, under the statute 8 & 9 Vict. c. 16. s. 26, it appeared that the defendant was not an original subscriber, but had purchased scrip certificates of the shares in question, and before the call was made sent them in to the company, with a claim to be entered in their books as the holder thereof. His name was entered in a draft register of shares, and a receipt for the scrip sent to him; but his name was not entered in the sealed register until after the call was made:—Held, that the plaintiffs*

*were not entitled to recover; and, semble, that in this respect there is no difference between the case of an original subscriber and that of a transferee.*

This was an action of debt under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, to recover the amount of two calls on fifty shares in the Newry and Enniskillen Railway Company.

Pleas—*Nunquam indebitatus*, and traverses of the defendant's being the holder of the shares, and of the making of the calls. Issues thereon.

The cause was tried, before Lord Denman, C.J., when the following facts appeared:—The company was incorporated by an act of parliament passed subsequently to the 8 & 9 Vict. c. 16; and the first general meeting was on the 30th of August 1845. The defendant had purchased, in the market, the scrip certificates of the fifty shares in question, which he sent in to the company in September 1845, before either of the calls had been made, and claimed to be registered in their books as the holder of that number of shares. His name was thereupon entered in a draft register of shares, and a receipt for the scrip sent to his agent. From this draft "the alphabetical, numerical, and sealed register of the company" was made up, and the corporate seal was affixed to it on the 27th of Feb. 1846, at the second meeting of the company, and after the making of the first of the calls the subject of this action. Upon these facts the plaintiffs obtained a verdict for the amount of both calls, with leave to the defendant to move to reduce it by the amount of the first call. In Easter term a rule was obtained accordingly, against which,

*Shree, Serj., Petersdorff and James now shewed cause.*—This case depends on the construction of the statute, 8 & 9 Vict. c. 16, by the 26th section of which railway companies may sue for calls, and need only allege in their declaration that the defendant is a holder of shares in the company, and is indebted for calls; and, by the 27th section, it is sufficient to entitle the plaintiff to recover to prove that the defendant at the time the call was made was the holder of shares in the company, and that the call was duly made. By section 8, "every

person who shall have subscribed the prescribed sum, or upwards, to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered in the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company;" and the 9th section enacts, that "the company shall keep a book, to be called the 'Register of Shareholders,' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholder shall be respectively entitled, distinguishing each share by its number, and the amount of the subscription paid on such shares, and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or the next subsequent meeting, of the company; and so, from time to time, at each ordinary meeting of the company." By section 28. "the production of the register of shareholders shall be *prima facie* evidence of such defendant being a shareholder, and of the number and amount of his shares." Now, the defendant was not an original subscriber to the capital of the company, and the fact of his name not being entered in the *sealed* register of shareholders at the time the first call was made, does not prevent the plaintiffs recovering for that call; because the statute does not make the sealed register the *only* evidence of a party being a shareholder, nor preclude the company from proving that fact by other evidence. The defendant will probably rely on the case of *The Cheltenham and Great Western Union Railway Company v. Pries* (1). There the Company's act, 6 Will. 4. c. lxxvii., enacted that in actions for calls, the book of shares under the seal of the company should be *prima facie* evidence that a party named therein was proprietor of shares. A call was made in October 1836; the book of shares containing the defendant's name was made up before the end of September 1836, but

(1) 9 Car. & Pay. 55.

the seal was not affixed to it until November. Lord Denman held, that the book was no evidence that the defendant was a proprietor of shares at the time of the call in October 1836. That, however, is a *Nisi Prius* decision prior to the 8 & 9 Vict. c. 16, on which this case depends; and there the book was the only evidence produced. Here, the defendant by letter declares himself the owner of the shares, and claims to be entered as such, and is in fact entered on a draft register of the company before the call is made.

[PARKE, B.—Under the 8th section, that person is to be deemed a shareholder of the company who shall have subscribed the prescribed sum or upwards, or shall otherwise have become entitled to a share, "and" (not *or*) "whose name" shall have been entered on the register of shareholders. Now, whatever may be the case where the party is an original shareholder (and I am disposed to think the words "and whose name" would apply to such parties), certainly in the case of a party purchasing scrip certificates of shares, and so becoming entitled to shares by transfer, it is a condition precedent to his being a shareholder, that he should be on the register of shareholders, and the question is, when does the document become a register; surely not until it is sealed.]

The defendant is not entitled to avail himself of the non-sealing of the register as a defence to an action for calls; the sealing is only a means of authentication for the protection of the company. This is evident from the 18th and 23rd sections. The 18th section enacts, that "If the interest in any share has become transmitted in consequence of the death, or bankruptcy, or insolvency, of any shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing, as hereinafter required, or in such other manner as the directors shall require; and every such declaration shall state the manner in which and the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a Justice, or before a Master or Master Extraordinary of the High Court of Chancery, and such declaration shall be left



with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders; and for every such entry the company may demand any sum not exceeding the prescribed amount, and where no amount shall be prescribed then not exceeding 5s.; and, until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof." Then, by the 33rd section, "a declaration in writing, by some credible person not interested in the matter, made before any Justice, or before any Master or Master Extraordinary of the High Court of Chancery, that the call in respect of a share was made, and notice thereof given, and that a default in payment of the call was made, and that the forfeiture of the share was declared and confirmed in manner hereinbefore required, shall be sufficient evidence of the facts therein stated; and such declaration, and the receipt of the treasurer of the company for the price of such share, shall constitute a good title to such share; and a certificate of proprietorship shall be delivered to such purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase; and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale." Now, it would be hard if the privileges or liabilities of the new proprietor of shares should depend upon the affixing of the seal to the register, inasmuch as he has no means of compelling the company to do that act. The 27th section says, that in an action for calls it shall be sufficient to prove that the defendant was a holder of shares, and that, by section 28, may be proved by the register; but if the company prove that fact by other means, it would not be disproved by the defendant's shewing that his name was not in the register.

[PARKE, B.—What is the meaning of the words "holder of shares" in the 27th section?]

By section 3, the interpretation clause, it means "shareholder, proprietor, or member of the company."

*Montagu Chambers and Bramwell*, contra, were stopped by the Court.

PARKE, B.—The rule must be absolute. These companies seem perfectly satisfied as soon as they have obtained their act of parliament, and never trouble themselves to consult the clauses to ascertain what is required to be done by them. Now, by the 8th section of the Companies Clauses Consolidation Act, all persons who have subscribed the prescribed sum to the capital of the company, or otherwise become entitled to a share in the company, and whose name has been entered in the register of shareholders, become shareholders, which, by the interpretation clause means "shareholders, proprietors, or members" of the company. Then, by the 9th section, the company are to enter in a book to be called "The Register of Shareholders," the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the company. By the 28th section, this register is made *prima facie* evidence of a party therein named being a shareholder in the company. It is not conclusive evidence, because it is open to a party to shew that his name has been inserted without his consent. The company, however, by the 27th section must, in actions for calls, prove that the defendant was a shareholder in the company at the time the call was made, which means a shareholder in the sense of the 8th and 9th sections. Consequently, before the company can call upon a party to pay calls, they must give him a title to his shares by putting his name on the sealed register. This certainly is so in the case of a transferee of scrip certificates of shares, and probably is so in the case of an original subscriber. It is, however, unnecessary to say more than that in the case of a transferee he is not liable for calls made before his name is entered in the sealed register. Here the defendant's name was not entered in the sealed register until after the first of the calls on which the company sue him was made, and the rule must, therefore, be absolute.

ALDERSON, B. and PLATT, B. *concord.*

*Rule absolute.*

1848. }  
Jan. 28. } LEY v. BARLOW.

*Production and Inspection of Documents—Railway Company—Subscribers' Agreement and Parliamentary Contract.*

*An action having been brought by an allottee of railway shares against a member of the committee of management, for the recovery of the plaintiff's deposit, it appeared on affidavit that the subscribers' agreement and parliamentary contract had been signed by both the plaintiff and the defendant, and was in the hands of the solicitors to the defendant and to the company; and the plaintiff's affidavit stated, that an inspection and copy thereof were necessary for the purpose of framing the plaintiff's case, and that he could not safely proceed to trial without them:—The Court thereupon made absolute a rule for liberty to the plaintiff or his attorney to inspect and take copies of those documents.*

In this case, which was an action brought by an allottee of railway shares, for recovery of the amount of his deposit, a rule had been obtained calling on the defendant and Mr. Mason, his attorney, to shew cause why the plaintiff or his attorney should not be at liberty to inspect and take copies of the parliamentary contract and subscribers' agreement of the Grand Junction and Midlands Union Railway Company. The affidavits in support of the application stated, that the defendant had acted as one of the managing committee of the company, and had executed the parliamentary contract and subscribers' agreement, both as a shareholder and member of the managing committee; that the deponent believed that the deeds in question were in the possession or controul of the defendant jointly with the other directors, or of Messrs. Edwards & Mason, the attorneys for the defendant, and that the said attorneys claimed a lien on the said deeds for their charges to the company; that it would form part of the plaintiff's case that the defendant had signed the said deeds, but that deponent was unacquainted with the particulars of the contents of the said deeds, and that he was advised and believed that an inspection and copy of them were necessary for the purpose of framing the plaintiff's case, and that the plaintiff could not safely proceed in the action without

such inspection and copy. The defendant's affidavits stated, that he did not consider himself a party to the deeds in any other manner than the plaintiff was a party to the same, and that up to a certain time he was not concerned in the management of the company, and that the deeds were not in his possession.

*Bramwell* now shewed cause.—This rule must be discharged. The cases where inspection has been granted by the Court have been where the parties have made agreements *inter se*.

[PARKE, B.—That is not the rule.]

Where there is a written agreement between two parties, and one copy only exists, the Court infers from both having an interest in it, an agreement that it shall be produced for the inspection of either party; and the Court also interferes where there is a positive stipulation that the document shall be produced. Here, the defendant did not enter into any covenant with the plaintiff, and it is therefore contended that he was not a trustee. Again, the deed does not appear to be in the defendant's possession.

[PARKE, B.—The party who has the deeds in his possession ought to shew them to the subscribers. Whoever has them is supposed to hold them for the benefit of the company. They are not the private property of anybody.]

If the deeds had been assigned, the assignee would not be bound to produce them. Again, the defendant's attorneys claim a lien on the deeds, and therefore they ought not to be compelled to grant inspection.

[ALDERSON, B.—They will still keep the deeds.]

[PARKE, B.—*Hunter v. Leathley* (1) shews that a broker who has effected a policy, and has a lien on it for his premiums, may be compelled by the assured to produce it on the trial of an action against the underwriters.]

It was ruled, however, by Lord Denman, C.J., that a witness might refuse to produce a document under a *subpoena duces tecum*, if as against the party asking its production the witness had a lien on the document which was called for—*Kemp v. King* (2).

(1) 10 B. & C. 151; a. c. 8 Law J. Rep. K.B. 201.

(2) 2 Moo. & Rob. 437; a. c. Car. & M. 396.

[PARKE, B.—Parties who have the custody of a deed derived from the *cestui que trust* cannot defeat him of his right to see the deed.]

Again, the usual ground of granting an application like the present is, that the plaintiff may be able to declare. *Rowe v. Howden* (3) is in point. The plaintiff ought not to obtain inspection for the mere purpose of procuring evidence.

[PARKE, B.—The plaintiff wishes to see if he can frame his action correctly.]

*Willes*, contra, was not called upon.

*Per Curiam* (4).—This rule must be made absolute. The case of *Steadman v. Arden* (5) is precisely in point.

*Rule absolute.*

1846. }  
June 26. } COOKE v. TURNER.\*

*Will—Conditional Devise—Competency.*

*A testator made his will duly executed so as to pass real estate, whereby he gave considerable interests in his real estate to his daughter, and, subject thereto, gave his property to her children, and in default of issue to his collateral relations; and the will contained a proviso, that if the testator's said daughter, or her husband, or any person or persons on her, or his, or their behalf, should dispute the will or his competency to make it, or should refuse to confirm the will, as far as he or she lawfully could, when required by the executors to do so, the disposition in favour of the testator's said daughter should be revoked:—Held, that this proviso was good and valid in law.*

This was a CASE sent by the Vice Chancellor of England, for the opinion of this Court. It stated, in substance, that Sir G. P. Turner was duly found a lunatic in the year 1823, under a commission of

lunacy. The inquisition, and the finding thereon, were traversed; but the lunacy was established by the verdict of a jury in 1826, and the commission was never superseded. In the year 1841, Sir G. P. Turner made a will, duly executed so as to pass real estate, whereby he gave certain considerable interests in his real estate to his daughter, Mrs. Fryer, and, subject thereto, gave his property to her children; and, in default of issue, to his collateral relations; and in the will was contained the following clause: "And my will further is, that if my said daughter, or her husband, or any person or persons in her, his, their, or any or either of their behalf, shall dispute this my will or my competency to make the same, or if my said daughter and her husband, or either of them, shall refuse to confirm this my will as far as he or she lawfully can, when required by my executors or either of them so to do, or if they, or either of them, or any person or persons, in the name or on behalf of them, or either of them, shall lodge any caveat against proving the same; and if my said daughter and husband, or either of them, shall refuse or neglect to withdraw or cause to be withdrawn such caveat, fourteen days after request made by my executors, or either of them, to that effect; or if any proceedings whatsoever shall at any time be had or taken by any person or persons whomsoever, by any possible result of which any estate or interest could be in any way attainable by my said daughter, or her husband, or any person or persons in her right, of

(3) 4 Bing. 539; s.c. 6 Law J. Rep. C.P. 87.

(4) Pollock, C.B., Parke, B., Alderson, B. and Platt, B.

(5) 15 Mee. & Wels. 587; s.c. 16 Law J. Rep. (N.S.) Exch. 310.

\* This case was decided in the sittings after Trinity term, 1846, and the report thereof has been unavoidably delayed.

this my will ; and in lieu thereof, I devise to the use of my said trustees by and out of the net rents, issues, and profits of my said real estate thenceforth, the yearly sum of 300*l.* only, during the natural life of my said daughter, by equal half-yearly payments, the said yearly sum to be paid into the proper hands of my said daughter, and not into the hands of any other person or persons whomsoever."

Sir G. P. Turner died in 1843, without having revoked or altered his will, leaving Mrs. Fryer his only child and heiress-at-law; and she had no issue. Since the death of Sir G. P. Turner, Mrs. Fryer and her husband have disputed her father's will, and his competency to dispose of his property, and have refused to do any act to confirm the will.

The question submitted for the opinion of the Court was, whether or not Mrs. Fryer had thereby forfeited the devise in her favour contained in the will.

The case was argued in the sittings after Hilary term, 1846, (Feb. 13,) by—

*Peacock*, for the plaintiff.—The condition which the testator has annexed to this devise, viz. that the devisee shall do nothing to contest his will or his competency to make it, is good and valid in law. There is no authority to shew that it is not; and unless the intention of the testator is clearly contrary to the policy of the law, the courts of law are bound to carry it out. There are many cases in which conditional devises have been held good and valid, which in principle do not differ from the present. In *Cleaver v. Spurling* (1), a freeman of London by his will gave 3*l.* to his daughter, provided that if she refuse to give a release, or put the executors to any trouble, then her legacy of 35*l.* to go over to her sister's children. The daughter claimed her orphanage part, and did not claim the 35*l.* legacy. This was held to be a forfeiture, and that the 35*l.* vested in the devisee over, the condition being good in law. In *Simpson v. Tickers* (2) a testatrix devised certain estates to her brother M, on condition that within six months after her decease he should execute to her executor a valid release for

a legacy of 1,000*l.* bequeathed to him by her brother J, otherwise the devise to be void, and in that case she devised the said estates to T. M. M. disputed the will, and on that account neglected to give the release, and this was held to be a forfeiture, and that the limitation over took effect. There was no suggestion there that the condition was invalid. There is an anonymous case in 2 *Mod.* 7. as follows:—"A man devises land to A, his heir-at-law, and devises other land to B. in fee, and saith, if A. molest B. by suit or otherwise, he shall lose what is devised to him, and it shall go to B. The devisor dies; A. enters into the land devised to B, and claims it. The Court were of opinion, that this entry and claim is a sufficient breach to entitle B. to the land of A." A condition against marriage without the consent of a particular person, is valid—*Williams v. Fry* (3), *Fry v. Porter* (4), *Hervoy v. Aston* (5). In *Acherley v. Vernon* (6), a rent-charge was given to the testator's sister, in lieu and satisfaction of all claim she might have on his real or personal estate, and upon condition that she released all right and claim thereto, to his executors and trustees. The sister having lived several years without executing any release, it was held that she was not entitled to the arrears of the rent-charge. The Court there said that the release was a condition precedent, but that if it were only a condition subsequent, it ought to have been performed in a reasonable time, or, at all events, during her life.

[*ROLFE, B.*—Suppose, in this case, the testator had imposed an affirmative duty on the performance of which the estate should rest,—for example, if the devisee should, in six months, execute a deed confirming all the uses of the will,—why would that be invalid? Is there any difference in this respect between conditions precedent and subsequent?]

In *Boughton v. Boughton* (7), it was expressly decided that a legacy to an heir upon the condition that he did not litigate or dispute the will, would put him to an election between the legacy and the lands devised away, the will not being executed

(1) 2 P. Wms. 526.

(2) 14 Ves. 341.

(3) 1 Mod. 86.

(4) 1 Cas. in Chanc. 138.

(5) Willcs, 83.

(6) Ibid. 153.

(7) 2 Ves. sen. 12.

so as to pass real estate. In *Webb v. Webb* (8), a testator bequeathed to his son 40*l.*, on condition that he did not disturb the trustees; and there on the trustees applying for an execution of the trust, the son was ordered either to join in a sale of the trust estates or forfeit his legacy. The principle of these cases governs the present. There is nothing more illegal in this condition than in those which existed in the cases cited. There is nothing contrary to public policy in a man saying that if his child disputes his competency he will not give her his estate.

*Martin*, for the defendant.—This condition is void. From the earliest authorities to the present time there has been a clear distinction between conditions precedent and subsequent. In this case the question is, whether a condition subsequent, which has a direct tendency to induce parties to abstain from contesting the wills of insane persons, and which, if applied to the case of forgery, has a direct tendency to establish forged wills, is legal and valid. It is, in the words of *Shep. Touch.*, "against the liberty of the law," and therefore void. The establishment of wills made by insane persons is opposed to the policy of the law; and how can an estate given to the heir be diverted from him if he inquire into the competency of the testator to make a will? The law is the same as to a conditional limitation like this, as it is with respect to conditions at common law. The Statute of Wills, 34 & 35 Hen. 8. c. 5. s. 14, declares, that wills made by persons of non-sane mind shall not be good or effectual in law; and it cannot, therefore, be a good condition which deprives the heir-at-law of the benefit the testator intends for him, if he institutes an inquiry, with the view of fulfilling the law. There is no person who has, on behalf of the public, any authority to inquire into the sanity of a testator. The condition against marriage is not the only illegal condition known to the law. A condition of this kind is represented by text-writers as generally considered *in terrorem* merely. In *Williams on Executors*, 3rd edit. p. 1099, it is said: "A condition that the legatee shall not dispute the will is in general considered *in terrorem* merely, and will not

operate a forfeiture by reason of the legatee's having disputed the legacy or effect of the will. But where the legacy is given over to another person in case of a breach of such condition, then if the legatee controvert the will, his interest will cease and vest in the other legatee. If indeed the legacy, instead of being given to a stranger, is limited over to the executors in the event of a condition being broken, such condition is still merely regarded as *in terrorem*, and not obligatory. Yet if the testator direct the legacy to fall into the residue upon a breach of the condition, and dispose of that fund, the residuary legatee will be a particular legatee of the individual legacy, and as such will be entitled to it if the condition is broken. In *Jarman on Wills*, p. 836, and *Powell on Devises*, p. 295, the law is stated to the same effect. In no case however has this doctrine been applied to a devise of land. Where upon breach of such a condition, the legacy is limited over to the executors the condition is regarded as *in terrorem* merely and not obligatory—*Cage v. Russel* (9), *Powell v. Morgan* (10) and *Morris v. Borroughs* (11). In *Loyd v. Spillet* (12), which is strongly in favour of the same view, the legacy was to sink, on breach of the condition, into the general fund for the benefit of the party entitled to the inheritance. With respect to the cases cited on the other side, they do not bear out the argument for the plaintiff. *Cleaver v. Spurling*, *Boughton v. Boughton*, and *Webb v. Webb* turned entirely on the doctrine of election, which is quite inapplicable to this case. *Simpson v. Vickers*, and

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(8) 1 P. Wms. 132.

liberty of the law. This case differs from that of a condition precedent, inasmuch as here the estate is on breach of the condition to be divested from the heir-at-law *after* it has vested in him. An investigation into the testator's competency can do no harm, because, if competent, the will will be established; if not, it will be set aside, which is according to the policy of the law. Indeed, in some sense, it is the duty of an heir-at-law to see that the will of a non-sane testator does not take effect.

*Peacock*, in reply.—In the cases in equity relating to personal legacies, if there is a gift over on breach of the condition, it operates, though it may have been intended *in terrorem* only; and the cases cited where such a condition has not operated, are where there has been no limitation over. Then, in deciding whether this condition is void, the Court will regard the question as applicable to all wills, and will not decide with reference merely to the reasonableness of the particular provisions in this will. They will not look to the evidence of insanity of this particular testator.

[PARKE, B.—We must decide this case on the assumption that the testator was sane.]

If this condition be contrary to the policy of the law, a condition precluding the heir-at-law from questioning the competency of the testator to make a marriage settlement, whereby he provided for his wife and younger children, would be so too.

*Cur. ado. vult.*

The judgment of the Court (1) was now, in the sittings after Trinity term, 1846, delivered by—

ROLFE, B.—This was a case sent by the Vice Chancellor of England for the opinion of this Court, on the effect of a proviso contained in the will of the late Sir Gregory Page Turner. [His Lordship then stated the facts and continued]—There is no doubt that by disputing the will, and refusing to confirm it when required so to do, the devisee, Mrs. Fryer, has brought herself both in letter and in spirit within the proviso, by which her interest is made to determine—so that her interest is clearly forfeited, unless the proviso itself is void;

(1) Parke, B., Alderson, B., Rolfe, B., and Platt, B.

and accordingly the argument on her behalf was that the proviso is bad, as being contrary to the policy of the law. The ground on which the argument against the proviso was made to rest was, that every heir-at-law ought to be left at liberty to contest the validity of his ancestor's will, and that any restraint artificially introduced might tend to set up the wills of insane persons, and would, in the language of the *Touchstone*, 132, be against the liberty of the law. We cannot, however, adopt this reasoning. There appears no more reason why a person may not be restrained by a condition from disputing sanity than from disputing any other doubtful question of fact or law, on which the title of a devisee or grantee may depend. In *Stapilton v. Stapilton* (2), a father being entitled to estates for ninety-nine years, if he should so long live, with remainder after his decease to his first and other sons successively in tail, and having two sons, concurred with them in an arrangement to cut off the entail, and settle the estates in equal moieties on his two sons. While the matter was in progress, and before its final completion, the elder son died, and his infant child, having filed a bill to compel a completion of the arrangement, the defendant, the second son, by his answer objected, that his eldest brother was in fact a bastard, and so he insisted that the proposed arrangement was not binding; but Lord Hardwicke held the agreement good, as a provident arrangement to prevent a dispute as to legitimacy, and to save the honour of the family, and compelled the second son to concur in all acts necessary for vesting a moiety of the property in the plaintiff. Now, a provision good by way of contract must also be valid by way of condition, and therefore it seems to us to follow as a necessary corollary from that case that, if A. having succeeded to real property as heir of his father, should devise it partly to a stranger and partly to B. his next brother, subject, as to the gift to B, to a proviso defeating his estate in case he should dispute his (A's) legitimacy, such a proviso would be perfectly good, and yet such a condition would, if we were to adopt the defendant's reasoning in this case, be void,

(2) 1 Atk. 2.

as infringing the liberty of the law. It would prevent or tend to prevent B. from contesting A's. legitimacy, and it is surely as much against the policy of the law, that an heir should be disinherited by an illegitimate child, as by a party claiming under the will of a *non compos*. The same principle applies also to the case of a proviso restraining a devisee from litigating some doubtful question of law. The truth is, that in none of these cases is there any policy of the law, on the one side or the other. The conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act which it is supposed the State has or may have an interest to have done. The State, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the State that he should do. So the State is interested in having its subjects embark in trade or agriculture; and therefore will not allow a condition defeating an estate in case its owner should engage in commerce—or should plough his arable land—or the like. The principle on which such conditions are void is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But in the case of a condition such as that before us, the State has no interest whatever, apart from the interest of the parties themselves. There is no duty on the part of an heir, whether, of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the State whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and arrangements they may think expedient as to raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another. The question, whether this proviso is a proviso void, as being contrary to the

policy of the law, may be well tested by considering how the case would have stood if, instead of a condition subsequent, it had been made, as in substance it might have been, a condition precedent.

Suppose the testator had said, in case my daughter and her husband shall execute all deeds necessary for settling my estates in manner hereinafter mentioned, then I give her, &c. Surely there could be no doubt of the validity of such a condition as a condition precedent, and, if so, it must be good as a condition subsequent; for where a condition is bad on grounds of public policy, it must obviously be bad, whether it be precedent or subsequent. The law will no more allow anything contrary to public policy to be made the means whereby a party shall entitle himself to an estate, than whereby he shall be made to lose that of which he is already in possession.

On these grounds, thinking that there is no question of public policy involved, and considering that the law leaves it to the parties interested in property, and to them alone, to decide for themselves what questions of law or of fact they shall insist on or abandon, we have come to the conclusion, that this proviso is good, and we shall certify accordingly to the Lord Chancellor.

*Certificate accordingly.*

1847. } HAIGH AND ANOTHER v. JOSEPH  
Feb. 12. } AND JOHN JAGGER.\*

*Deed—Mining Lease—Grant for indefinite Term of Years—Operation at Common Law or under Statute of Uses—Pleading.*

*A deed, which may operate either at common law or under the Statute of Uses, must, in pleading, be taken to operate at common law, unless there is an express averment of an election that it shall operate under the statute.*

*Quære, whether an entry by a lessee under such a deed will not be conclusive of an election that it shall operate at common law.*

*Semble—that, under a grant to A, B, and C, their executors, &c. of liberty to get coals under certain closes until all the coals in*

\* Decided in the sittings after Hilary term, 1847.

*the said closes should be gotten, an interest passes to the executors of the survivor if the decd operates under the Statute of Uses.*

Trespass for breaking and entering a coal mine or vein of coal of the plaintiffs, lying under certain closes, pieces, or parcels of land or ground named, and digging coals there. Second count, for carrying away coals.

The third plea to the first count stated, that one John Sykes, before the making of the indenture thereafter mentioned, and long before the said times when, &c. in the declaration mentioned or any of them, and long before the plaintiffs had anything in the said coal mine, or vein of coals, in which, &c., to wit, on the 27th of September 1804, was seised in his demesne as of fee of and in the said several closes, &c. respectively in the first count mentioned; and of the said coal mine or vein of coals situate, lying, and being under the said several closes, &c. in that count mentioned, and being so thereof seised, before the said times when, &c. or any of them, to wit, on, &c. by a certain indenture then made between the said J. Sykes of the one part, and Joseph, Matthew, and James Jagger, in the said indenture mentioned, of the other part (proft of the indenture), the said J. Sykes did, for the considerations in the said indenture in that behalf mentioned and set forth, and for settling and barring all future and other payments more than a certain sum, to wit, 420*l.*, for a certain portion of the said coals under the said closes, &c., to wit, six acres of the said coals, after the rate of 70*l.* per acre, to be paid by portions as in the said indenture mentioned, among other things, by the said indenture, for himself, his heirs, executors, administrators, and assigns, grant to the said Joseph, Matthew, and James Jagger, their executors, administrators and assigns, for and notwithstanding anything thereinbefore or thereafter in the said indenture contained to the contrary, from and after the commencing of the digging and sinking of any pit or shaft for the sale of coals, in the said closes in the said indenture mentioned, whereof the said closes, pieces, or parcels of land or ground in the first count of the declaration mentioned are parcel, the liberty and privilege of getting, selling,

winning, and working the said coals or mines in the said indenture mentioned, being all the coal mines, veins, and seams of coal of him the said J. Sykes, then lying or being within or under the said closes in the said indenture mentioned, whereof the closes, &c. in the first count mentioned are parcel, in as large, ample, and beneficial a manner to all intents and purposes whatsoever as the said J. Sykes could settle and assure the same, for any term or terms of years, computing the same from such time as they, the said Joseph, Matthew, and James Jagger, their executors, administrators, or assigns should so begin to sink as aforesaid, until the said quantity of six acres of coals should be gotten; and, at the expiration of the term of twelve years, then that the said coals should be fairly measured, at the joint expense of the said parties to the said indenture; and upon such admeasurement being taken, if the full quantity of six acres of coals should not be then gotten, then that the said Joseph, Matthew, and James Jagger, their executors, &c. should have liberty to get the remainder of the said six acres of coals, and that when all the said quantity of six acres of the said coals should be gotten in a workmanlike manner, then that *the said getting and selling the said coals should be carried on as aforesaid, until such time as all the coals in the said closes, being the said closes in the said indenture mentioned, and whereof the said closes, &c. in the first count mentioned are part and parcel, should be gotten and disposed of*, the said Joseph, Matthew, and James Jagger, their executors, &c. paying or causing to be paid to the said J. Sykes, his heirs and assigns, for every acre of coals to be gotten over and above the aforesaid quantity of six acres, the said sum of 70*l.* per acre, to be paid for by the said Joseph, Matthew, and James Jagger, their executors, &c. to the said J. Sykes, his heirs, &c., yearly and every year, in such proportion as the sale and consumption of the said coals should or might happen to amount to, according to admeasurement being taken thereof by the said several parties, their respective executors, &c.

The plea then set forth a covenant by J. Sykes, for quiet enjoyment by Joseph, Matthew, and James Jagger, of all the said coals, being the said coals lying under the said



closes in the said indenture mentioned, and whereof the said closes, &c. in the first count mentioned are parcel, premises, privileges, and appurtenances whatsoever, and also full and free liberty for the said Joseph, Matthew, and James Jagger, their executors, &c. to fix all necessary gins or engines, and to build cabins in the said closes, and the same to remove and take away as occasion might require; and also to make roads and ways for horses, carts, and carriages, in and over the closes aforesaid, as by the said indenture, &c. will more fully and at large appear; by virtue of which said hereinbefore partly recited indenture, afterwards and long before the time of committing of any of the said trespasses in the first count mentioned, to wit, on the 1st of January 1805, the said Joseph, Matthew, and James Jagger did commence sinking and digging certain pits or shafts, to wit, three pits or shafts, for the sale of coals in the said closes, in the said hereinbefore partly recited indenture mentioned, and became entitled to the said powers, liberties, privileges, licence, and authority aforesaid, for the said term so to them thereof granted as aforesaid, according to the terms, true intent, and meaning of the aforesaid hereinbefore partly recited indenture.

Averment, that afterwards, and after the making of the said indenture, to wit, on the 1st of January 1805, the said Joseph, Matthew and James Jagger, after sinking the aforesaid pit or shafts in the said closes in the said indenture mentioned, for the sale of coals as aforesaid, and for the purpose of getting and vending of coals, did then, from the time of their sinking the said pits or shafts, proceed to get and win in a workmanlike manner the said coals under the said closes in the said indenture mentioned, until the said quantity of six acres of the said coals was won and gotten in a workmanlike manner.

The plea then averred the deaths of Joseph and Matthew Jagger, leaving James Jagger them surviving, whereupon he "became entitled to the powers, liberties, privileges, licence, and authority aforesaid, for the then residue and remainder of the said term for which the said powers, &c. were so granted as aforesaid to him and the said Joseph and Matthew Jagger, their executors, &c., according to the terms, true

intent, and meaning of the aforesaid in part recited indenture, and which said term had not expired at the time of the commencement of this suit; and the said James Jagger then became and was entitled to carry on the said getting and selling coals until all the coals under the said closes, &c. in the first count mentioned should be gotten and disposed of."

The plea then alleged, that James Jagger made his will, appointing four executors, and on the 28th of April 1843 died so entitled to the said powers, liberties, privileges, &c., (using the same terms as just stated). It then stated the proving of James Jagger's will by his executors, who thereupon, as such executors, became entitled to the said powers, &c., (using the same terms as just stated,) "whereupon the defendants, as the bailiffs and servants of the said executors (named) of the said James Jagger, deceased, as aforesaid, and by their command, divers, to wit, eighteen acres of coals there then being and remaining unworked and ungotten, under the said closes in the said partly recited indenture mentioned, whereof the said closes, &c., in the first count mentioned, are part and parcel as aforesaid, at the said several times when, &c., in the first count mentioned, and during the said term for which the aforesaid powers, liberties, &c., by the said hereinbefore partly recited indenture, were granted to the said Joseph, Matthew and James Jagger, their executors, &c., and which had not expired at the time of the commencement of this suit, and in pursuance and exercise of the powers, &c., granted as aforesaid, by the said partly recited indenture, broke and entered the said coal mine, &c., in the first count mentioned, being part and parcel of the said coal mines, veins, and seams of coal lying under the said closes in the said indenture mentioned, whereof the said closes, &c. in the first count of the declaration mentioned are part and parcel, and there dug out of the said coal mine or vein of coals the said quantities of coal in the said first count mentioned, and took and carried away the same, and converted and disposed thereof to their the defendants' own use, as it was lawful for them to do for the cause aforesaid, which are the several alleged trespasses," &c. Verification.

To this plea, the plaintiffs, after craving oyer of the indenture, demurred specially, assigning for causes, *inter alia*, that no title to the *locus in quo* appeared to be vested in the executors of James Jagger under the deed in question, and that such deed was not pleaded according to its true legal effect.

By the deed, as set out on oyer at the head of the demurrer, it appeared that by indenture, dated the 27th of September 1804, between John Sykes, of the one part, and Joseph, Matthew, and James Jagger, of the other part, it was witnessed, that for and in consideration of the yearly rent thereafter reserved, and the covenants and agreements therein mentioned and contained on the part of the said Joseph, Matthew, and James Jagger, their executors, administrators, and assigns, to be paid and performed, he the said J. Sykes granted, bargained, sold, and confirmed unto the said Joseph, Matthew, and James Jagger, their executors, administrators and assigns, *all the coal mines, veins and seams of coal* of him the said J. Sykes, lying and being within or under his closes of land, belonging to the farm and tenements at Flockton Moor Head, then in the possession of the said J. Sykes, commonly called or known by the several names of, &c., (stating names of closes), together with all necessary roads and ways for horses, carts and carriages, in and over the said closes or any of them, to and from the pits or shafts to be sunk in the said closes, for the convenience of taking and carrying away the said coal, with *full and free liberty* to the said Joseph, Matthew, and James Jagger, their executors, administrators and assigns, at all times during the term thereby granted, *to dig for, sink for, and get the same coal in a fair and workmanlike manner*, in the said closes, or any of them, together with a sufficient ground-room or bank-room in the said closes, near the said pits, to lay all such coals as should from time to time be gotten, and *full and free liberty* to sell and dispose of such coals, and for the purchasers thereof to carry away the same with horses, carts, carriages or otherwise, as they the said Joseph, Matthew, and James Jagger, their executors, &c., should think best, by and along the roads which might be most conveniently made for that purpose, and full and free liberty for the lessees, their executors, &c., for

the getting, selling, and carrying away the said coals, and clearing the same of and from all water, gravel, damp, or other inconveniences, which might obstruct or hinder the winning or working of the said colliery, they, the said Joseph, Matthew, and James Jagger, their executors, administrators and assigns, from time to time, doing as little damage as might be to the owner or occupiers of the said lands and premises; and that, by the said indenture, it was further witnessed, that for and in consideration of the sum of 420*l.*, by the said Joseph, Matthew, and James Jagger, some or one of them, paid to the said J. Sykes in manner following, that is to say, the sum of 35*l.* on or before the 2nd of February 1805, and the further sum of 35*l.* on or before the 2nd of February thence next following, and so, successively, every 2nd day of February in every year, until the full end and term of twelve years, commencing from the 2nd day in February next ensuing the day of the date thereof, although the said Joseph, Matthew, and James Jagger had thereby covenanted to pay to the said J. Sykes, his heirs or assigns, the sum of 420*l.* by yearly portions, as aforesaid, yet they, the said Joseph, Matthew, and James Jagger, their executors, &c., or any of them, should have *liberty or privilege of sinking a pit or pits* on the said closes, or any part thereof, for the use and benefit of getting and selling of coals at any time or times thereafter, during the terms thereinbefore granted, for getting and vending of coals as aforesaid, at their will and pleasure, and to suit the convenience of them, the said Joseph, Matthew, and James Jagger, their executors, &c., and for settling and barring all future and other payments more than the said sum of 420*l.*, for six acres of coals, after the said rate of 20*l.* per acre, to be paid by portions as aforesaid, the said J. Sykes did, for himself, his heirs, executors, administrators, and assigns, thereby grant, agree, and covenant to and with the said Joseph, Matthew, and James Jagger, their executors, administrators, and assigns, that for and notwithstanding anything thereinbefore or after contained to the contrary, they, the said Joseph, Matthew, and James Jagger, their executors, &c., from and after the commencing of digging or sinking any pit or shaft, for sale of coal, in the said closes,

should have and enjoy *the liberty and privilege* of getting, selling, winning, and working of the said coals or mines, in as large, ample, and beneficial manner to all intents and purposes whatsoever, as the said John Sykes could settle and assure the same, *for any time or term of years*, computing the same from such time as the said Joseph, Matthew, and James Jagger, their executors, &c., should so begin to sink as aforesaid, until the quantity of six acres of coal should be gotten, and at the expiration of the *term of twelve years*, then to be fairly measured at the joint expense of the said parties, and upon such admeasurement being taken, the full quantity of six acres of coals being not then gotten, to have *liberty to get* the remainder as aforesaid, and when all the coals were gotten in a workmanlike manner to the quantity of six acres, then the said *business of getting and selling coals to be carried on as aforesaid, until such time as all the coals in the said closes be gotten and disposed of* by the said Joseph, Matthew, and James Jagger, their executors, &c., paying or causing to be paid to the said J. Sykes, his heirs and assigns, for every acre of coals, to be gotten over and above the aforesaid quantity of six acres, the said sum of 70*l.* per acre, to be paid for by the said Joseph, Matthew, and James Jagger, their executors, &c., to the said J. Sykes, his heirs and assigns, yearly and every year, in such proportions as the sale and consumption of the said coals should or might happen to amount to, according to admeasurement being taken thereof by the said several parties, their respective executors, &c.; and that the said Joseph, Matthew, and James Jagger, their executors, &c., should have full and free *liberty and privilege* of getting stones in some convenient part of the said closes, at any time or times, of getting and vending of the said coals, for the use of making and repairing roads, for the use and benefit of carrying away the said coals when gotten, making such satisfaction for the same to the said J. Sykes, his heirs or assigns, as they were then sold for per yard; to have and to hold all and singular the before-mentioned to be thereby granted coals, premises, and privileges, unto the said Joseph, Matthew, and James Jagger, their executors, &c., from the 2nd day of February then next ensuing, for and during

the term of twelve years thence next ensuing, and fully to be complete and ended: yielding and paying therefore to the said J. Sykes, his heirs, &c., the said yearly rent of 35*l.*, at the times and in manner thereinbefore specified; provided always, and upon condition, that if the said yearly rent, or any part thereof, should at any time or times be in arrear and unpaid by the space of thirty days next after any day or time whereat or whereon the same ought to be paid as aforesaid, although not demanded, then and from thenceforth those presents should be absolutely void in case the said J. Sykes, his heirs or assigns, should at any time afterwards choose the same to be void, but not otherwise. And the said J. Sykes did for himself, his heirs, &c. thereby grant, agree and covenant to and with the said Joseph, Matthew, and James Jagger, their executors, &c., that, under payment of the rents and performance of the covenants, conditions, provisoes, and agreements in these presents specified, or mentioned to be by the said Joseph, Matthew, and James Jagger, their executors, &c. paid and performed respectively, they, the said Joseph, Matthew, and James Jagger, their executors, &c. should and lawfully might, peaceably and quietly, without any eviction, ejectment, suit, let, or disturbance, of, from, or by the said J. Sykes, his heirs, &c., have, hold, occupy, and enjoy all the said coals, premises, privileges, and appurtenances whatsoever, and also full and free liberty for the said lessees, their executors, &c., to fix all necessary gins or engines, and build cabins in the said closes, and the same to remove and take away as occasion might require; and also to make roads and ways for horses, carts, and carriages, in and over the said closes aforesaid; and the said Joseph, Matthew, and James Jagger did, and every of them did, jointly and severally for himself and themselves, their respective executors, &c., thereby grant, agree, and covenant to and with the said J. Sykes, his heirs and assigns, that they, the said Joseph, Matthew, and James Jagger, their executors, &c., should and would in every year, during the said term of twelve years, well and truly pay or cause to be paid unto the said J. Sykes, his heirs, &c., the clear yearly rent above thereby reserved, and every part thereof, at the times and in the manner

thereinbefore appointed for payment of the same respectively, and should and would pay, bear, and discharge all taxes, lays, assessments, and impositions whatsoever, which should or might be taxed, layed, assessed, or imposed upon, or become due or payable out of, for, or in respect of the said intended colliery, whether parliamentary or otherwise, and should, whenever any of the said intended pits or shafts ceased to be used, other than one pit or shaft, which it was agreed should be from time to time left open for air or vent during the said term, at their respective costs and charges, sufficiently fence about all such pits as should be kept open for air or any other necessary use, to prevent men and cattle from falling therein; and also should and would, at the end or other sooner determination of the term thereby granted, make the ground to be used as and for roads for carrying off the said coals, only levelling the same; and should and would, at the expiration of the getting of the coals aforesaid, yield up and leave or cause to be yielded up and left, the possession of the said granted premises, and every part thereof, peaceably and quietly, in such repair as aforesaid, unto the said J. Sykes, his heirs or assigns; and that the said J. Sykes, his heirs or assigns, or any of them, or any other person or persons whatsoever, by his, their, or any of their order, should or might, at any time or times thereafter during the said term, come and go into, upon, and from the said hereby granted coal mines and premises, or any part thereof, to view the same without let or disturbance; and that the said J. Sykes, his heirs, &c., should not nor would, at any time or times during the term of getting the said coals in the said closes, suffer or cause to be suffered or made, any road or roads, drain, or drains, in the said closes of land, for the use and benefit of any other person or persons other than the said Joseph, Matthew, and James Jagger, their executors, &c. In witness whereof, &c. (executed by all the parties).

The fourth plea (also to the first count) stated, that J. Sykes, being seised in fee, &c. for a pecuniary consideration demised the mines to the former grantees for one year, under which demise those persons entered and became possessed, &c. It then set out (with profert) the indenture of the 27th of September 1804, and on which the

former plea was founded; but in this plea the deed was described as a *grant and release* of the mines to the grantees, their executors, &c., to hold to them, &c. till six acres of coal should be gotten, and after that all the coal should be gotten and disposed of. In other respects the fourth plea resembled the third.

The plaintiffs' replication, after craving oyer and setting out the indenture as before, traversed both the alleged demise for a year and the alleged grant and release, concluding to the country.

The defendants demurred to this replication for duplicity, &c. and the plaintiffs joined in demurrer; but the grounds of demurrer to this replication need not be stated further, as they were not discussed in the argument, the plaintiffs contending that the fourth plea was bad upon general demurrer, and the judgment of the Court proceeded upon the question of the sufficiency of the pleas only.

The case was argued in last Michaelmas term, (Nov. 16th and 18th) by—

*Atherton*, in support of the demurrer to the third plea.—In the third plea the defendants justify under the executors of James Jagger, who is the survivor of the three lessees in the deed which is set out on oyer; and they set up as the legal effect of the deed a right (after six acres of coal shall be gotten) in the lessees, and their personal representatives, to get coal under particular closes, until such time as all the coals in the said closes should be gotten: this, however, is not the legal effect of the deed. With the exception of one solitary passage, beginning with the words, "And when all the coals are gotten in a workmanlike manner to the quantity of six acres, then the said business of selling and getting coals," &c., the whole deed is framed as a "lease" of the coal under the closes, for twelve years, with "liberty" of getting coal at any time, even after the twelve years, until six acres shall have been gotten. The effect of that particular passage is, that after the getting of the coals to the quantity of six acres, the business of getting and selling coals should be carried on until all the coal under the closes should be gotten and disposed of, the lessees and their executors, &c., paying a proportional yearly rent. The *habendum*

which follows this part of the deed clearly defines a term of twelve years as the limit of the interest conveyed. Now the office of an *habendum* is to "limit the certainty of the estate"—1 *Inst.* 6 a; and it is, therefore, not clear that any estate subsisted after that period, or more than a contract for an interest. Assuming the intention to be clear, still no estate could pass to endure after the death of the surviving lessee. Whether there was a grant of the mines, or only of a liberty to dig for coal, in each case words of inheritance were equally necessary. Beyond the twelve years, no more than a liberty to dig for coal could have passed. (Upon this point *Lord Mounjoy's case* (1), *Chetham v. Williamson* (2), *Doe d. Hanley v. Wood* (3), and *Jones v. Reynolds* (4), were mentioned.) It is true that the one interest would be a corporeal and the other an incorporeal hereditament, yet either would be a tenement—1 *Inst.* 6 a, and 1 *Inst.* 19 b, 20 a. To hold till all the coals should be gotten is necessarily for an uncertain period. That makes the interest a freehold, but a freehold interest in lands or tenements without (in a deed) words of inheritance is but an estate for life, though terms indicating perpetuity may be used—*Littleton*, s. 1. The fourth plea, putting aside the replication, is bad on general demurrer. It describes the deed as a *release*, which the language of the deed itself as set out on over negatives; it equally fails to set out the true legal effect of the deed, at the utmost a grant for the lives of the grantees.

*Cowling*, *contra*.—There is no doubt this deed is a very inartificial instrument. The argument for the plaintiffs goes to shew that, to a great extent, the deed is inoperative, because there could not be a freehold legally conveyed, beginning at the end of the twelve years, nor on the 2nd of February, 1805, inasmuch as there had been no inrolment of the deed; so that it would be reduced to a lease for twelve years. It really amounts to a lease for twelve years certain, and for as much longer as requisite to win the whole of the mines then working in a workmanlike manner; and as it is a deed, and made for a sufficient pecuniary

consideration, it operated under the Statute of Uses as a bargain and sale of a chattel interest, and inrolment was unnecessary. That it was intended that all the coals should be got under it, appears from several expressions in it, as, "the said business of getting and selling coals to be carried on as aforesaid, until such time as all the coals in the said closes be gotten and disposed of," &c. The interest which is contended for might be created by will, and is a mere chattel interest—*Doe d. White v. Simpson* (5), Note 7 by Hargrave & Butler to *Co. Litt.* 42, a. In *Rosse's case* (6), it seems to have been taken for granted that a man levying a fine to the use of himself for life, remainder to executors, until they shall have levied 300*l.* for performance of his will, creates an interest lasting until that sum has been duly raised. No technical words are necessary to carry out the intention, provided the Court can see an intention in the mind of the lessor to convey to, that is, to bargain and sell to the use of the lessees, their executors, &c. The reservation of rent is a sufficient pecuniary consideration to support the deed as a bargain and sale—2 *Sanders on Uses*, pp. 47, 49, 4th edit. Those cases in which uncertain interests have been held not to be chattel interests are distinguishable. If lands be given to a man so long as a tree stands, a freehold interest is conveyed, because a man may have a freehold interest in the tree itself. So, where lands are given until A. makes J. S. bailiff of his manor, as in *Co. Litt.* 42, a. note 6, Hargrave & Butler's edit.; because A. has all his life in which to appoint. But there seems no more reason for holding the interest in the present case to be freehold, than would apply for holding a conveyance till certain debts are paid to be a freehold. If the mines are duly worked, they must be won within a limited period.

[ALDERSON, B.—Has it not been held that though such a construction may be put on wills, it will not hold with respect to deeds?]

*Cordal's case* (7) is the only authority to that effect; but the first resolution there appears to point to deeds operating at common law, and not by way of use; and there

(1) Godb. 18.  
 (2) 4 East, 469.  
 (3) 2 B. & Ald. 724.  
 (4) 4 Ad. & El. 805.

(5) 5 East, 162.  
 (6) Moor, 556.  
 (7) Cro. Eliz. 316.

is no reason why there should in this respect be any difference between deeds operating by way of lease and will.

[**ROLFE, B.**—That explanation of the resolution in *Cordal's case* certainly receives some confirmation from what is said in *Manning's case* (8).]

**Atherton**, in reply.—The defendants cannot contend for the operation of the deed, as a bargain and sale, under the Statute of Uses, for they have not pleaded an election that it should so operate—*Miller v. Green* (9). The right to get all the unsevered coal is a real and not a chattel interest.

*Cur. adv. vult.*

The judgment of the Court (10) was now delivered by—

**PARKE, B.**—[His Lordship stated the pleadings, and continued]—The questions in this case arise upon the special demurrer to the third, and the demurrer to the replication to the fourth plea. The replication being bad for duplicity, the plaintiff contends that the fourth plea is bad on general demurrer. The substantial question on both is as to the legal effect of the deed set out on oyer, and relied upon as a defence in both pleas. This deed is most inartificially drawn. It appears to us, however, to operate as a lease of the mines to the Jagers and their executors, for twelve years, from the 2nd of February 1805, at all events. Whether the deed, as to the subsequent right to get coals, is more than a covenant to grant for a subsequent term, is a question; but we think it operates as a grant of an easement, after the expiration of that lease, to win the remainder of the six acres paid for by the sum of 420*l.*; and whenever that quantity should be got, to win the remainder, paying 70*l.* an acre. The lease for twelve years is good at common law. The limitation for the indefinite term afterwards, of the incorporeal hereditament only, which is to continue for an uncertain period, viz. till all the coals are got, would in a common law conveyance be either an estate for life, in which case it terminated on the death of

the survivor of the grantees; or an estate for term of years, and if so, it would be void for want of the certainty of years. As a common law conveyance, therefore, it would afford no defence. But according to the authorities cited by Mr. Cowling, viz. *Co. Litt.* 42, *Hale's MSS.*, *Rosse's case*, these words would convey that interest only in a conveyance to uses or a will, and would, therefore, devolve on the executor of the surviving lessee; and so there would be a defence to this action. But the defendants' pleadings are open to the objection, that there is no averment that the lessees elected to take the interest by way of use; and this is necessary, on the authority of *Sir Rowland Heyward's case* (11), and *Miller v. Green*; otherwise it must be taken to operate at common law. It appears, indeed, on the pleas, that the lessees entered and got the coals, and this would be an entry under the lease for twelve years; and if so, it would probably be a conclusive election that the whole deed should operate at common law—*Sheppard's Touchstone*, 83. We think, therefore, that the pleas are bad. Mr. Cowling should amend on the usual terms, and plead the deed as operating by the Statute of Uses, and state its legal effect, which is done in neither of the present pleas; and on that account, the third at least is bad, the objection being pointed out on special demurrer.

*Judgment accordingly.*

1848. }  
Jan. 13. } **LAW v. DODD.**

*Statute—Metropolitan Paving Act, 57 Geo. 3. c. 29. ss. 59, 60. and 136.—Action, Notice of.*

*Ashes falling from the furnace of a brass-founder, and containing particles of metal, were by him subjected to a process whereby a portion of the metal was extracted. The residue having been given by him to his apprentices as a perquisite, was by them sold to a brass-refiner, for the purpose of extracting a further quantity of metal. The plaintiff, who was employed by the brass-refiner, whilst in the act of conveying the ashes from the brass-founder's premises for this purpose,*

(11) 2 Rep. 35.

(8) 8 Rep. 96, a.

(9) 8 Bing. 92; s. c. 1 Law J. Rep. (N.S.) Exch. 51.

(10) Pollock, C.B., Parke, B., Alderson, B. and Rolfe, B.

*was apprehended by the defendant under the Metropolitan Paving Act, 57 Geo. 3. c. 29, which gives the power of apprehending all persons who, not being employed by or contracting with the Commissioners under the act, shall carry away any "dust, cinders, or ashes," within the district:—Held, that the ashes in question were not "dust, cinders, or ashes" within the meaning of the act of parliament.*

*The 136th section of the act enacts that no action shall be brought against any person for anything done in pursuance of the act until after twenty-one days' notice in writing; and "if it shall appear that such action was brought before twenty-one days' notice was given," the jury shall find a verdict for the defendant:—Held, that the defendant could not avail himself of a want of notice of action without specially pleading it.*

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 65.]

1848. } THOMPSON v. THE UNIVERSAL  
Jan. 24. } SALVAGE COMPANY.

*Joint-Stock Company—Registration Act, 7 & 8 Vict. c. 110. s. 45.—Promissory Note—Pleading—Declaration.*

*A declaration stated that the company was a joint-stock company completely registered; that one S. P. and one C. L., then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the said company, to pay the plaintiff or his order 32l. 4s. 9d., the balance of his account due from the company, three months after date, which note was signed by the said S. P. and C. L., and made by them, and in their names, and on behalf of the said company, and was expressed by them to be made on behalf of the said company, and countersigned by the secretary of the company; and thereupon the defendants, in consideration of the premises, then promised the plaintiff to pay him the amount of the said promissory note:—Held, on general demurrer, that the declaration was bad.*

The declaration stated that the company was a joint-stock company, completely registered by the name of the Universal Salvage Company, and had obtained a certificate of complete registration according to the statute 7 & 8 Vict. c. 110; that on the 24th of June 1847, one Samuel Price and Christopher Lund, then being two of the directors of the said company, made their promissory note, and thereby promised, on behalf of the said company, to pay the plaintiff or his order 32l. 4s. 9d., the balance of his, the said plaintiff's, account, due from the said company, three months after date, which said note was then signed by the said S. Price and C. Lund, and was then made by them and in their names, and on behalf of the said company, and then was and is expressed by them to be made on behalf of the said company, and was then countersigned by the secretary of the said company; and thereupon the defendants, to wit, on &c., in consideration of the premises, then promised the plaintiff to pay him the amount of the said promissory note, according to the tenour and effect thereof.

*Demurrer and joinder.*

The defendants' points for argument, amongst others, were, that it was not averred that the promise of the company was by virtue of any statute; that it ought to have been averred that the company made their note, and not that Price and Lund made their note which the company promised to pay; that if the note were properly described as the note of Price and Lund, then in order to make the company liable to pay such note, it ought clearly to appear that it was a note made according to the provisions of the 7 & 8 Vict. c. 110; that the persons who made it had authority to bind the company by such note; and that it was not shewn that there was a deed of settlement by which the company were authorized to make promissory notes.

*M. Smith*, in support of the demurrer.—The declaration is bad on several grounds. First, it does not appear that the note in question is the note of the company.

[*PARKE, B.*—It does not appear that the company were authorized by their deed of settlement to make notes. Again, the plain-

tiff might have said that the company made the note.]

The 45th section of the 7 & 8 Vict. c. 110.

(1) requires them to set out the terms in pursuance of which the note was made. (He was then stopped by the Court.)

*Swann*, contra.—The declaration is sufficient. If the note is correct in point of form, it is binding on the company, although the party making it had no authority from them. The 45th section states the mode of making bills of exchange, and requires that they shall be made in the names of two of the directors of the company, and shall be by them expressed to be made on behalf of such company. All these requisites have been complied with.

[*PARKE, B.*—Your argument is, that although the directors were not authorized by the deed of settlement to issue bills of exchange, yet if they do issue them in the form prescribed by the statute, the company will be bound. Surely that position is untenable.]

This question arises on general demurrer.

[*PARKE, B.*—The objection is one of substance.]

[*POLLOCK, C.B.*—The declaration shews no authority, and we cannot infer it.]

Again, admitting the directors had no authority to draw bills of exchange, still a good consideration for making it may appear on the face of the declaration; for the averment is, that two persons were directors and made the note, and that the consideration was the balance due from the company.

*PARKE, B.*—There is no averment of a balance being due; there is only a promise to pay a balance without an averment of there being one. The plaintiff may have a month's time to amend; and if he do not amend, there will be judgment for the defendants.

*POLLOCK, C.B., ALDERSON, B. and PLATT, B.* concurred.

*Judgment accordingly.*

(1) "And be it enacted, with regard to bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or indorsing the same, and to the liability of any such company thereon, that if the

1848. }  
Feb. 9. } *HIBBERD v. JOHN KNIGHT.*

*Power of Attorney; Custody of—Secondary Evidence—Attorney—Production of Title-Deeds.*

*In covenant upon a lease, executed on behalf of the lessor under a power of attorney, there being notice to the defendant to produce the power, but no subpoena duces tecum to the party who executed the lease, —Held, that the power of attorney was the property of the party who executed the lease under its authority, and that secondary evidence of its contents was not admissible.*

*An attorney, who has been served with a subpoena duces tecum to produce a title-deed being privileged from producing it, secondary evidence of its contents is receivable.*

*Though he is not compellable to state its contents, yet if he willingly does so, his evidence is admissible.*

This was an action of covenant upon an indenture of lease, to which the defendant pleaded *non est factum*, and other pleas.

The cause was tried, by *Williams, J.*, at the Somersetshire Summer Assizes, 1847, when it appeared that the action was brought to recover damages in respect of the alleged non-fulfilment of certain covenants in an indenture of lease between the plaintiff and the defendant. The defendant had long resided at Rome, but had considerable estates in this country, which were managed by his

directors of the company be authorized by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company, on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid, shall be countersigned by the secretary or other appointed officer of the company, in whose behalf the same is expressed to be made or accepted."



son, F. W. Knight, under a power of attorney, under seal, granted to him for that purpose by the defendant, and under the authority of which he had signed the lease in question. Notice to produce the power of attorney had been given to the defendant; and a *subpœna duces tecum* to produce it had been served on the son, who was a witness at the trial, but not in time. The defendant was aware of the lease having been granted and had approved of it; and he had on one occasion authorized a distress for rent under it. Secondary evidence of the power of attorney was admitted by the learned Judge; and a verdict was found by consent for the plaintiff, with leave to the defendant to move to enter a nonsuit if the evidence ought not to have been received.

Crowder, in Michaelmas term, having obtained a rule accordingly,—

*Kinglake, Serj.* now shewed cause.—No *subpœna duces tecum* to produce the power of attorney was necessary.

[PLATT, B.—What right had you to read a copy of the document?]

[ROLFE, B.—What was there to let in the secondary evidence?]

It was receivable under the notice to produce, for there was enough to shew it was in the custody of the defendant. That would be the proper custody for it, because it might be necessary for him to prove that he granted the lease, and therefore necessary for him to have the power of attorney in his possession.

[ROLFE, B.—On the contrary, the lessor is the most unlikely party to have it: it would rather be in the hands of the owner.]

[ALDERSON, B.—The proper custody is either the attorney or the lessee.]

The notice is to the party who may be assumed to have it; moreover, there was evidence which amounted to an admission.

[PARKE, B.—There was no admission under seal.]

[ALDERSON, B.—You have consented to a nonsuit if the evidence was improperly received.]

Crowder, in support of the rule, was not called on.

PARKE, B.—This rule must be made absolute. This deed (the power of attorney) is the deed of the attorney to whom

it was given, and who is to keep it for his own protection, that he may be able to shew he had authority to do what he had done under it. The witness should have been duly served with the *subpœna duces tecum*, when, if he had not produced the deed, he might have been punished. The case of *Marston v. Downes* (1) is often referred to. In that case a witness, who was an attorney, refused to produce a mortgage-deed, because it was the title-deed of his client. He was then asked the contents of it, which he willingly stated. My Brother Ludlow objected to that evidence, not on the ground that the attorney was privileged, and need not state the contents of the deed, nor that the evidence could not be obtained from the attorney, but that secondary evidence of the deed was inadmissible, inasmuch as the deed itself was in existence. My Brother Paterson held, that you might give secondary evidence, because the party was at liberty to withhold his title-deeds; and that if the attorney did not insist on his privilege and disclosed the contents of the deed, his evidence was receivable. Explained in that way, the case is rightly decided. If the document is a title-deed, which a man is not bound to produce upon a *subpœna duces tecum*, you cannot punish him for not producing it; but inasmuch as you have done all in your power to get the original, you may give secondary evidence of its contents—*Ditcher v. Kenrick* (2) and *Doe d. Gilbert v. Ross* (3) are authorities for this.

ALDERSON, B.—There was a case to the same effect in the Court of Common Pleas, when I was in that court. From the report of *Marston v. Downes* it would seem as if the attorney was compelled against his will to state the contents of his client's deed; whereas the real decision in that case was, that if he willingly does so the Court will receive his evidence, not that he would be punished for refusing.

ROLFE, B. and PLATT, B. concurred.

*Rule absolute.*

(1) 6 Car. & Pay. 331.

(2) 1 Ibid. 161.

(3) 7 Mee. & Wels. 101; s. c. 10 Law J. Rep. (N.S.) Exch. 201.

1848. } GILES v. HUTT AND OTHERS.  
Jan. 29. }

*Pleading—Several Pleas—Auditâ Querelâ*—4 & 5 Anne, c. 16. s. 4.

*A proceeding by auditâ querelâ is an "action or suit," within 4 & 5 Anne, c. 16. s. 4, and a defendant may plead several pleas thereto.*

In this case, Rolfe, B. having made an order, allowing the defendants in *auditâ querelâ* to plead several matters, a rule had been obtained, calling upon the defendants to shew cause why that order should not be rescinded.

Peacock shewed cause.—The order is right. The case of *auditâ querelâ* is within the statute 4 & 5 Anne, c. 16. s. 4; and the defendants are at liberty, with the leave of the Court, to plead several pleas. That section enacts, that "it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with the leave of the same Court, to plead as many several matters thereto as he shall think necessary for his defence." The cases on the subject are collected in *Turner v. Davies* (1). An *auditâ querelâ* is an equitable action in the nature of a trespass—2 Hen. 4. 17 b., *Bro. Abr. tit. 'Damages,'* p. 38, 'Executors,' p. 42. It is in the nature of a bill in equity—3 Black. Com. p. 405. *Oguel v. Randol* (2) is to the same effect. In *Malyns v. Hawkins* (3) it was held, that the writ abated by the death of the defendant. If a plaintiff be nonsuited he shall have a new writ—*Vin. Abr. tit. 'Auditâ querelâ,'* L. Fitz. N.B. 204. All these cases shew that an *auditâ querelâ* is an "action or suit" within the statute 4 & 5 Anne, c. 16. s. 4. The process of *auditâ querelâ* is in the nature of a writ of *scire facias*; and it is to be inferred, from the language of the Judges, in *Leake v. Dawes* (4), that it is not to be looked upon with so strict an eye as other actions. *Auditâ querelâ* is, in fact, the converse of the *scire facias*: the object of the one proceeding is to relieve a party from a judgment; of the other, to

give effect to a judgment. A *scire facias* is considered in law as an original action—*Underhill v. Devereux* (5). The seventh section of the statute of Anne points out to what cases the statute does not apply. It does not apply, for instance, to a writ of mandamus or *quo warranto*, because, in those cases, the King is the party. *Shaw v. Lord Alvanley* (6) was the case of an application to the Court for leave to plead several matters to a *scire facias*. In *Nathan v. Giles* (7) several pleas were pleaded in *auditâ querelâ*.

G. Pollock, in support of the rule.—The case of *Nathan v. Giles* is not an authority in favour of the defendants, as the question of pleading several pleas was not the subject of discussion in that case. It may be admitted that a proceeding by *scire facias* is an "action or suit" within the statute of Anne, taking those words in their most extensive sense; but that statute is to have a reasonable construction, and is not to extend to every legal proceeding. A defendant in *auditâ querelâ* is in reality a plaintiff, and the effect of giving him two pleas would be to give him two replications.

[POLLOCK, C.B.—There is much strength in Mr. Peacock's argument that a *scire facias* and an *auditâ querelâ* are correlative.]

The judgment of Wightman, J., in *Phillipson v. Tempest* (8), shews the position to have been too broadly laid down, that several pleas are to be allowed in *scire facias*. A declaration in *auditâ querelâ* ought to comprehend only one complaint—*Com. Dig. tit. 'Auditâ Querelâ,'* E. 6.—He referred to 2 Sell. Pract. p. 257, and Fitzh. Nat. Brev. p. 204.

POLLOCK, C.B.—This rule must be discharged, but without costs. The question turns upon the words of the statute of Anne, which enacts, that the defendant in any "action or suit" may plead several matters; and the point is, whether a proceeding by *auditâ querelâ* is an "action or suit." I think it is as much an action or suit as a proceeding by *scire facias*. The language of the learned Judge, in *Phillipson v. Tempest*, shews that the doubts that he

(1) 2 Wms. Saund. 148.

(2) Cro. Jac. 29.

(3) Cro. Eliz. 634.

(4) March, 69.

(5) 2 Wms. Saund. 71, note 4.

(6) 2 Bing. 325; s. c. 9 B. Mo. 694.

(7) 5 Taunt. 558.

(8) 1 Dowl. & L. P.C. 209.

at first entertained were afterwards removed. Many modern cases shew that more pleas than one have frequently been allowed in *scire facias*. The case of *Nathan v. Giles*, which was the case of an *auditi quereld*, was the subject of much consideration in Westminster Hall at the time of its decision, and is a direct authority as to the practice.

PARKE, B.—I am of the same opinion. The practice of pleading double is extremely convenient; and there is no decision which prevents us from holding that the general rule does not apply to this case.

ALDERSON, B.—The writ shows that it was sued out by the plaintiff against the defendants; that brings the case within the very words of the statute.

PLATT, B.—The words of the statute are exceedingly plain. The proceeding by *scire facias* has been held, in many cases, to be within the act, although not mentioned *nominatim*; and the same rule applies to *auditi quereld*.

*Rule discharged, without costs.*

1847. }  
Nov. 23. } BARBER v. GRACE.\*

*Patent; Infringement of—Specification—Hot Boxes—Rollers—Hosiery.*

In an action for the infringement of a patent, the plaintiff's specification alleged that the invention was described by a statement and a drawing annexed, and stated that it consisted in submitting hosiery and similar goods to the finishing process of a press heated by steam, hot water, or other fluid in the manner thereafter described. The drawing was then described, from which it appeared that the invention consisted of two cast-iron boxes filled with steam, between the heated surfaces of which hosiery goods were introduced and subjected to pressure produced by hydraulic power. The pressure generally lasted three minutes, and might be produced either by a screw or by hydraulic power. The specification then stated that the patentee was aware that woollen cloths had been pressed by boxes or surfaces heated by steam or water, and that stockings, &c. had been placed between plates of iron heated by fires or ovens; that

\* Decided in the previous term.

he did not therefore claim the finishing of such goods by heat generally, but what he did claim was the submitting of hosiery, &c. to the pressure of hot boxes or surfaces heated by steam, water or other fluid as above described. The defendant's machine consisted of rollers heated by steam, between which woollen fabrics similar to those of the plaintiff were introduced and subjected to pressure. The jury found that the defendant's rollers were not a colourable imitation of the plaintiff's patent.—Held, that the defendant had not been guilty of an infringement of the plaintiff's patent.

This was an action on the case brought by the plaintiff as the assignee of a patent against the defendant for the infringement thereof. The action was brought by order of the Vice Chancellor Knight Bruce.

The declaration stated that one William Bates was the first inventor of certain improvements in the process of finishing hosiery and other goods manufactured from lambs' wool, angola, and worsted yarn. It then set forth the letters patent and the specification, the latter of which was in these terms:—"Now know ye, that in compliance with the said proviso, I, the said William Bates, do hereby declare that the nature of my said invention and the manner in which the same is to be performed are fully described and ascertained in and by the following statement thereof, reference being had to the drawing hereunto annexed, and to the figures and letters marked thereon; (that is to say), my invention consists in submitting hosiery and similar goods made of elastic stocking fabric, and known by the names of lambs' wool, worsted and angola, to the finishing process of a press heated by steam, hot water, or other fluid in the manner hereinafter mentioned, whereby the surface is laid smooth, and the colour brightened, and has a far superior finish to the ironing or other process to which such goods have heretofore been submitted.

"Description of the drawing:—drawing marked figure 1, is the plan of a cast-iron frame *i*, through which passes the steam-pipe *c*, and the rammer of the hydraulic press; *ff* are iron columns for supporting the steam-box *a*. Figure 2, plan of the steam-box *b*, shewing the surface on which the goods are placed, for the purpose of

pressing them. Figure 3, *a*, is the section of a box of cast iron, filled with steam from a pipe *c*, connected with a boiler; *b* is a similar box, filled with steam from pipe *d*, which works into a stuffing-box *e*, rendered steam-tight by packing, and communicating with a branch pipe from *c*, thus allowing the lower box *b* to fall for the introduction of goods between the two heated surfaces; *ff* are iron columns, firmly fixed to the under side of the steam box *a*, for the support of the same; *n* is the rammer of the press, secured to the under side of the steam box *b*; *gg* are taps to try the state of the steam. Figure 4, hydraulic pump; *a*, pipe of communication. Any number of steam boxes may be attached as may be found convenient to be worked by the same pump. The machine may be worked either by hydraulic power or by a screw. Having thus described the description of the press I prefer for the purpose of my invention, I would remark that it will be evident that in place of the pressure being obtained by hydraulic means, the hot boxes may be pressed together, with the goods between them, by a screw or screws, or by other well-known means, and in place of steam, hot water or other fluid may be caused to circulate in such boxes; and it will be desirable further to remark, that I use steam of twelve pounds pressure on the square inch. I will now proceed to describe the process of applying the hot boxes to the purposes of my invention, and I will explain the same as being performed on stockings. The only difference in applying the process to other goods made of a like description of fabric consists in the shape or form put into the goods. Supposing the process is to be performed on lambs' wool, or on worsted stockings, I place each (inside out and in a dry state) on a leg or shape of wood, or other suitable material, about a quarter of an inch thick; a number of stockings thus prepared are placed between the hot boxes in a single layer. I then cause the boxes to press the same between them for some minutes: three minutes will generally be found sufficient. If angola goods are to be submitted to the hot-pressing process, they are to be put on to the legs or shapes in a damp state; in other respects, the process is the same as that above described for lambs' wool and

worsted. Having thus described the nature of my invention, and the manner of performing the same, I would remark that I am aware that cloths made of wool, but woven with the warp and weft, have been heretofore pressed by boxes or surfaces heated by steam or water; and I am also aware that stockings and other goods made of a similar elastic or looped fabric have been placed between plates of iron, heated by fires or ovens. I do not, therefore, claim the finishing of such goods by heat generally; but what I do claim is the submitting of hosiery and similar goods, made of elastic stocking fabric, to the pressure of hot boxes, or surfaces heated by steam, water, or other fluid, as above described."

The declaration then stated the assignment of the said letters patent to the plaintiff, the use of the invention by the defendant against the will of the plaintiff, and the imitation of the invention in breach of the said letters patent.

The defendant pleaded, with other pleas, first, not guilty; secondly, that W. Bates was not the first inventor; thirdly, that the invention was not new; fourthly, that it was not a new manufacture.

At the trial, before Pollock, C.B., at the London Sittings, after Hilary term, 1847, the following facts were proved:—The plaintiff's invention consisted of a mode of submitting hosiery and similar goods made of elastic cotton fabric to the finishing process of a press worked either by a screw or hydraulic power. The machine consisted of two cast-iron boxes filled with steam, between the heated surfaces of which the goods were introduced and subjected to pressure. The machine used by the defendant, and which was complained of as being an infringement of the plaintiff's patent, consisted of a set of rollers heated by steam, and furnished with pipes and cocks to allow the circulation of the steam therein. Woollen fabrics similar to those of the plaintiff were subjected to pressure by the action of these rollers. Under these circumstances, it was contended on behalf of the plaintiff, that the defendant had been guilty of an infringement of the plaintiff's patent, inasmuch as the specification included the rollers used by the defendant. The learned Judge considered that no infringement of the patent had taken place; and the jury, being

of opinion that the defendant's rollers were not a colourable imitation of the plaintiff's patent, returned a verdict for the defendant on the issue raised on not guilty, and for the plaintiff on the other issues.

*Whitehurst* having in Easter term obtained a rule *nisi* for a new trial on the ground of misdirection,—

*Sir F. Thesiger, Mellor and J. A. Russell* shewed cause.—The view taken by the learned Chief Baron was correct, for the plaintiff's specification does not include rollers heated with steam; it applies merely to a dead pressure.

[ALDERSON, B.—The specification states that a number of stockings are placed between hot boxes in a single layer, and that the inventor then causes the boxes to press the same between them for some minutes, generally for three minutes. That describes a pressure applied to every portion of the stocking at the same time. The question then is, whether a roller applying to one part only of the stocking is the same thing as the plaintiff's patent.]

The drawing is to be taken as forming part of the specification—*Bloxam v. Elsee* (1); and then it appears clearly that the inventor contemplated continuous pressure merely, and that moveable rollers never entered into his consideration. They cited *Stead v. Anderson* (2), *Neilson v. Harford* (3), *Stead v. Williams* (4), and *Heath v. Unwin* (5).—(They were then stopped by the Court.)

*Whitehurst, Humfrey and Mellor*, in support of the rule.—The defendant was guilty of infringing the plaintiff's patent. The invention is stated in the specification to consist in submitting hosiery "to the finishing process of a press, heated by steam, hot water, or other fluid, in the manner *hereinafter mentioned*." The words "*hereinafter mentioned*" refer to the heating only. The specification does not indicate a press of any particular kind, but a press generally, and these rollers form a press. The intention

of the patentee was to submit certain goods to heated surfaces, and the specification says nothing about continuous pressure; neither is any mention made of the exact duration of the pressure.

[ALDERSON, B.—Surely the patent is taken out for a continuous pressure.]

The patent was not intended to apply to boxes merely, but to all surfaces; and the word "box" is used because it will apply to every description of vessel capable of containing a heated fluid.

[ALDERSON, B. mentioned *Branton v. Hawkes* (6) and *Crane v. Price* (7).]

They then cited *Derosne v. Fairie* (8).

POLLOCK, C.B.—I think this rule must be discharged. The real question arises upon the meaning of the specification, whether it includes a pressure by rollers filled with steam. In my opinion cylinders were not dreamt of by the inventor in this case, and certainly were not used by him. There has been a discovery in this case, and the cylinder has been subsequently adopted; but if we were to hold that cylinders were within this patent, the patentee might perhaps enjoy his exclusive right for fourteen years, and the public would remain in ignorance that cylinders could be employed for the same purpose. The question is whether cylinders are included or contemplated in this specification. The specification at first states in general language the effect of the patent, giving but little information; but it afterwards proceeds to a more particular description of the machine, and it then states the invention to consist in placing stockings between hot boxes in a single layer, and then causing the boxes to press the same between them for about three minutes. The patentee then goes on to observe, that there exists an invention not altogether unlike it, but that what he claims is the submitting of hosiery and other articles to the pressure of hot boxes or surfaces, heated by steam, hot water or other fluid, as above described. The meaning of that is, that the surface is the operative part, not that the box produces the effect. The patentee then says, "I do not, there-

(1) 6 B. & C. 169; s.c. 5 Law J. Rep. K.B. 104.

(2) 16 Law J. Rep. (N.S.) C.P. 250.

(3) 8 Mee. & Wels. 806; s.c. 10 Law J. Rep. (N.S.) Exch. 493

(4) 8 Sco. N.R. 454; s.c. 13 Law J. Rep. (N.S.) C.P. 218.

(5) 13 Mee. & Wels. 583; s.c. 14 Law J. Rep. (N.S.) Exch. 153.

(6) 4 B. & Ald. 541.

(7) 4 Man. & Gr. 580; s.c. 12 Law J. Rep. (N.S.) C.P. 81.

(8) Webster's Patent Cases, 162.

fore, claim the finishing of such goods by heat generally." He mentions various modes, but does not suggest that cylinders are capable of being used. The drawing exhibited shews an hydraulic press pressing upward a box filled with steam or hot water, and the object is to subject the articles placed between these hot boxes to a continuous and not to a variable pressure. I think, therefore, that the word "boxes" in this specification, explained as it is by the print annexed, does not include cylinders. The case might have been that the cylinder was obviously within the description, so that the jury could have said that the patent had been infringed by the defendant; but that was not the case here, for the jury found that the invention was not colourable; and I must say I am satisfied with their verdict.

PARKE, B.—I am of the same opinion. The defendant's counsel contends that the plaintiff claims every mode of applying heated surfaces to hosiery fabrics: that, however, is not the meaning of the specification. The true construction of the specification is not that the plaintiff claims to apply every species of surface to the pressure of the articles, but that he claims a particular machine only. [His Lordship read the specification.]—That instrument describes a sort of press, consisting of boxes. The inventor then disclaims the finishing of goods by processes that he enumerates, and states that he claims the submitting of hosiery goods "to the pressure of hot boxes, or surfaces heated by steam, water or other fluid, as above described," that is, by the same machine that he had previously described. He claims for that machine only. If, indeed, the infringement had consisted in the mere alteration of the shape of the box, the same results following, that would have been piracy. If, for instance, the boxes had been half globes, then although not exactly the same in shape they would have fallen within the principle of the plaintiff's patent. The word "surfaces" is used to shew that the inventor claims any other similar machine by which goods can be pressed. The principle of the patent is a simultaneous pressure for a continuous period. The defendant's machine is different, as it does not press simultaneously; it therefore does not fall within the terms of the patent, and does not constitute a piracy.

ALDERSON, B.—The patentee describes his invention, both at the beginning and at the end of his specification, and claims for a patent which produces a particular description of pressure. But I admit he would not be bound by an exact description, and a mere colourable variation would amount to a violation of the patent. The plaintiff's press squeezes together substances at the same time equally. A machine may press hosiery goods either for a long or for a short time. The point then is, whether the jury ought to have found that it was no infringement of the plaintiff's patent to place hosiery goods between rollers, which do not press all parts of them at the same time, but successively. Rollers only press on the same part for a single moment. In my opinion, the jury were warranted in saying that there had been no infringement, and they would have formed a wrong conclusion had they said otherwise.

ROLFE, B.—I am of the same opinion. The patentee begins by stating that the nature of his invention and the manner in which the same is to be carried into effect, are fully described and ascertained by the statement thereof, reference being had to the drawing thereunto annexed. Then follows a long description of the drawing. It might perhaps be argued, even irrespectively of the drawing and its description, that no infringement had been committed by the defendant, seeing that his invention did not consist of a press heated by steam. In my opinion, too, rolling cylinders cannot in common parlance be considered a press. The patentee then states that there are various modes of finishing goods by means of heat, and he then describes more particularly his own method. Without doubt, in order to constitute an infringement, the mode adopted need not be precisely the same; but it must be a press heated by steam. I quite agree with the observations that have fallen from my Brother Alderson. The plaintiff's machine is one that might press for three minutes, whereas that of the defendant would press the articles momentarily only. Indeed, I think it can hardly be called a press at all, but a combination of rollers merely, which, in my opinion, does not constitute an infringement of the plaintiff's patent.

*Rule discharged.*

1847. *In the matter of THE PRINCIPAL*  
 Nov. 25. *OFFICERS OF THE ORDNANCE*  
*AND EDWARD LAWS.*

*Ordnance Act, 5 & 6 Vict. c. 94. ss. 19,*  
*26, Construction of—Costs of Inquiry.*

*The 5 & 6 Vict. c. 94, for the vesting and purchase of lands for the Ordnance services, and for the defence and security of the realm, enacts, in section 19, that in the event of owners of lands refusing, &c. to treat with the Ordnance officers for the purchase of lands, two Justices may put the latter into immediate possession of the lands; and a jury being summoned, shall "find the compensation to be paid, either for the absolute purchase of such lands, or for the possession or use thereof:"—Held, that under this act the jury were not authorized to award the expenses of witnesses, counsel, &c. to a party whose lands had been taken for the purposes of the act.*

This was a rule calling upon the principal officers of Her Majesty's Ordnance to shew cause why the proceedings and the verdict of the jury in this case should not be returned into this court, and why a suggestion should not be entered, in the nature of a new writ for a new trial to the sheriff for the county of Pembroke. The question was whether, under the 5 & 6 Vict. c. 94, a jury, in assessing compensation, was at liberty to give the party whose lands were taken by the Crown the costs of the inquiry, consisting of expenses of witnesses, counsel, &c. The 19th section enacts, that in the event of owners of lands, &c. refusing, declining, or not treating with the Ordnance officers for the purchase of lands, the latter may require two Justices to put them into immediate possession of the lands; and the sheriff may summon a jury, who, "on hearing any witnesses and evidence that may be produced, shall, on their oaths, find the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof, as the case may be (1)."

(1) The 25th section enacts, that when any money shall have been required by the verdict of a jury to be paid by the principal officers, for the absolute purchase of lands, &c., to persons under disability, &c., or not having the absolute interest therein, the money shall be paid into the hands of the Remem-

Mr. Laws, the claimant in this case, is the trustee of an estate, called the Bush Estate, in the neighbourhood of Pembroke Dock at Milford Haven; and the principal officers of Her Majesty's Ordnance having required a portion of this estate for the purpose of constructing batteries and other national defences, and having made an ineffectual attempt to treat with him, offering a sum of 12,000*l.*, obtained possession of the land by the intervention of two Justices, and caused a jury to be summoned for assessing compensation. On the inquiry, it was contended on behalf of the claimant that the jury were entitled to award him the expenses of witnesses and counsel by way of "compensation." On the part of the Crown, it was insisted that the claimant was entitled to no more than the value of the land taken. The jury, acting upon this latter view of the case, awarded to the plaintiff the sum of 15,269*l.* as compensation for the land taken by the officers of the Ordnance.

*Sir J. Jervis (Attorney General) and W. C. Rowe shewed cause.*—The jury were right in giving the claimant the mere value of the land and in refusing him the costs of proving his case. He was bound to make out his title at his own expense. Besides,

[ALDERSON, B. mentioned the case of *Ex parte Layfield* (3).]

Besides, there is a great difference between the case of property taken by the Crown for private purposes and that which is taken for the defence of the realm. The reason of not giving costs in the latter case is, that the Crown in taking lands is exercising a high prerogative for the benefit of the country. In the 20 Geo. 3. c. 38, which is an act for taking lands 'For the better securing his Majesty's Docks, &c. at Plymouth and Sheerness and for the better defending the Passage of the River Thames,' it is enacted that reasonable and just satisfaction shall be made to the parties entitled, but no mention is made of costs or expenses.

The act under which this question arises was framed in accordance with the 44 Geo. 3. c. 95, the 6th section of which resembles the 19th section of the act in question. All the acts above mentioned are silent as to costs, which shews there was no intention that the expenses of the inquiry should be paid by the Crown. Again, the ordinary rule as to the Crown not paying costs applies to this case. They also referred to 43 Geo. 3. c. 120.

*Sir F. Kelly* and *M. Smith*, in support of the rule.—Unless the claimant in this case receives his costs, he will suffer the utmost injustice. It is easy to conceive a case in which the whole value of the estate may be exceeded by the expense of proving the amount of injury sustained. The word "compensation" in the 19th section is sufficiently large to include this case: it means all the damages that have been incurred. The sum awarded by the jury in this case will not be sufficient compensation unless the claimant receives his costs of the inquiry also. If a man is to be compensated for the value of a house taken by the Crown, he would be entitled to remuneration for the injury done by the severance. In order to give a party full compensation for land taken, the jury ought to look at the actual expenditure which is rendered necessary by the land having been taken. The expenses occasioned in the present case constitute a resulting damage.

[ROLFE, B.—Your argument is, that after your land has been taken by the Crown, the claimant ought to be as rich as he was before.]

(3) 1 Y. & Coll. 79.

POLLOCK, C.B.—This rule must be discharged. I regret that the act of parliament does not contain any provision, not indeed for costs, but for expenses. With respect to costs, there is an entire omission; and the jury were not at liberty to take account of them at the trial. It is contended that the expenses necessarily incurred to enable a party to make a demand ought to be recovered by him, and this is sometimes the case. If the question had been what a man was entitled to recover, and the act of parliament had said he was to recover damages, he would then be in a situation to make his claim for the value of the land, for the consequential injury, and for the expenses he had incurred in getting compensation. There occurred in this court, some time ago, the case of an injury to a mine, where it became necessary for the party injured to sink a shaft to ascertain the extent of the injury done. An application was then made for the expenses of parties going down to make a report. This Court said that as the party had done no more than was necessary, a jury were bound to ascertain the amount of expense incurred, and that proof of that fact might be given in evidence. The substance of the transaction there was, that it was necessary to employ parties to see the extent of the mischief. Here, however, costs are not mentioned in the act of parliament, and they cannot be recovered under the word "compensation." The Court may, in considering the value of an estate, take into account the compulsory character of the sale, and a sum of perhaps 10l. per cent. is generally allowed on that account. I regret that by the language of this act of parliament the compensation is to be given for the absolute purchase of the land. That would include consequential damage and the true value of the land, but it would not embrace the expenses the claimant has been put to, and which he now attempts to recover, as they are not provided for by the act. Mr. Laws must seek redress by an application to the Crown, or by a petition to the legislature for an amendment of the law.

ALDERSON, B.—The act of parliament directs that the jury shall find the compensation to be paid either for the absolute purchase of the lands, or for the possession or use thereof. And the sum assessed would not amount to the value of the fee



simple merely, but may extend also to the reversion. All the parties interested are to have compensation out of the entire fund; and the amount is to be settled by the Court of Exchequer. But how can we conclude that in this case the legislature intended costs to form part of the compensation? What have the other parties mentioned in the act of parliament to do, as persons who are to share the sum awarded, with the costs incurred? Nothing; and it would be unjust to give the reversioner the share of the party who has fought the battle at his own expense. The costs are not to be the subject of compensation. The course then is to ascertain the real value of the land, and when that is done the amount given may be easily apportioned amongst the tenants for life, from year to year or in remainder. The tenant for life incurs the first expense, and the legislature considered it hard that he should not be entitled to a portion of the money paid by way of compensation for the land. The act meant that there should be a substitution of money for land. The legislature ought to have provided for repayment to the party paying the costs of the inquiry; but as that has not been done, I can only express my regret that we have no power to do justice to the claimant.

ROLFE, B.—I am of the same opinion. I regret that a party should be liable to have his property taken, and should not be entitled to the repayment of the reasonable preliminary expenses incurred by him. The act of parliament, however, gives us no power to award costs. It is said, that the legislature, looking at the fact that the land taken is intended for the defence of the state, have applied the principle of *damnum absque injuria*. I am inclined, however, to think that the omission has arisen from inadvertence. At all events, this statute gives no compensation for costs, as it enacts that the jury are to find compensation for the absolute purchase of the lands. The question then is, whether, on the jury being assembled, the Judge ought to direct them to allow the claimant the expenses of surveyors and counsel, and of summoning the witnesses and the jury. He ought not; but he ought to direct the jury to give a sum of money which, with the value of the property not taken, would be equivalent to the amount of the whole property. The 26th section

enacts, that the compensation money is to be paid by the Court of Exchequer to parties there specified in certain proportions; but, if the costs incurred by the claimant were awarded by the jury, the result would be that parties who had not incurred any expense would obtain a portion of the money given by way of costs. This, I think, was not contemplated by the legislature. The present view is justified by reference to the act relating to the Woods and Forests as well as by other statutes framed *in pari materia*. In those statutes the words are larger than the present. I think the legislature did not intend, under the word "compensation," that the jury should award costs.

*Rule discharged.*

1848. }  
Jan. 13. } *In re WRIGHT.*

*Attorney and Solicitor—Striking Attorney off the Roll—Misconduct.*

*A rule to strike an attorney off the roll on the ground that he has been convicted of a misdemeanour in the Court of Queen's Bench, and struck off the roll of that court, is a rule nisi only in the first instance, which, in this court, makes itself absolute unless cause is shewn.*

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1848. }  
Jan. 15. } KERSHAW v. BAILEY.

*Slander — Privileged Communication — Appointment of Constables under 5 & 6 Vict. c. 109.—Objections before Justices.*

*Under the statute 5 & 6 Vict. c. 109, the vestry, upon precept from the Justices, are to make out and return a competent number of persons qualified and liable to serve the office of constable; the list is to be published, and notice given of when and where objections will be heard by the Justices, who, at a special session, have power to strike out of the list the names of persons disqualified, and to choose and swear in constables from the list; and the vestry may return a resolution to have paid constables, in which case the Justices are to appoint paid constables.*

*A vestry made out a list, and returned it with a resolution to have a paid constable, and the plaintiff being named in the list was about to be sworn in as a paid constable by the Justices, when the defendant, a parishioner, made a statement to the Justices, in the presence of a number of persons, affecting the plaintiff's character. In an action for slander it being objected that the statement ought to have been made to the vestry, and not to the Justices, who could only hear objections as to qualification and liability to serve,—Held, that the plaintiff was not entitled to recover, if the statement was made bonâ fide in furtherance of the ends of justice.*

This was an action for slander. The declaration stated that whereas before the committing of the grievance by the defendant, as thereafter mentioned, to wit, on &c., at a vestry then held in and for the township of Barnsley, in the parish of Silkstone, in the West Riding of the county of York, the plaintiff was duly elected and chosen by the men inhabiting and residing within the said township to be one of the constables of and for the said township, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; but the plaintiff had not, at the time of the committing of the said grievance by the defendant, taken oath for the execution of his said office; and whereas, on the occasion of the defendant's committing of the grievance,

and speaking of the words by him as thereafter mentioned, to wit, on &c., a special petty session of her Majesty's Justices of the Peace, in and for the West Riding of the county of York acting in and for the upper and lower divisions of the wapentake of Staincross in the said West Riding of the said county of York, was had and held at Barnsley, in and for the said divisions, for the appointment of parochial constables; and the plaintiff then appeared, and was present before John Thorneley, Esq., Thomas Taylor, Esq., and the Rev. William Wordsworth, clerk, respectively, then and there being Justices of the Peace of our said Lady the Queen, in and for the West Riding of the said county, and acting in and for the said divisions assembled at that session, as such Justices, in order that they might cause to be administered to him the oath required by law to be taken by the plaintiff for the due execution of his said office as constable, and that the plaintiff might take that oath; and the defendant then and there before the said Justices, before his said speaking and publishing of the words by him, as thereafter mentioned, objected to the plaintiff being sworn, and to the plaintiff being allowed to take the said oath. Yet the defendant, contriving and wilfully and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to injure him in his said office, and induce the said Justices not to administer the said oath to him, and prevent him taking the same, theretofore, to wit, on &c., in a certain discourse, which the defendant then had, of and concerning the plaintiff, and of and concerning him in his said office, and of and concerning the said objection so made by the defendant as aforesaid, in the presence and hearing of the said Justices and divers other persons, in the presence and hearing of the said Justices, and those persons falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said office, and of and concerning the said objection so made by him as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, "I (meaning the defendant) object to Kershaw (meaning the plaintiff, and meaning that he objected to his being sworn, and to his being allowed

to take the oath aforesaid) on account of his (meaning the plaintiff) being a person not to be believed upon his oath. He (meaning the plaintiff) is a person who would say and swear anything. He (meaning the plaintiff) is a perjured fellow, and would do anything to gain his (meaning the plaintiff's) own ends. He (meaning the plaintiff) is an improper person to be a constable, and not worthy of being trusted." By means of which premises the plaintiff hath been and is otherwise greatly injured in his said office and otherwise; to the damage of the plaintiff of 1,000*l.* &c.

Plea—Not guilty; and issue thereon.

The cause was tried, before Pollock, C.B., at the Middlesex Sittings, after Michaelmas term, 1847, when the following facts were proved:—On the 11th of February 1847 a vestry meeting was held in the township of Barnsley, for the purpose of nominating and electing a competent number of men qualified and liable to serve as constables for the current year, to be returned to the Justices; at which meeting the plaintiff was duly nominated and elected as a person qualified and liable to serve as a paid constable for the said township of Barnsley. At a petty session, holden at Barnsley, for the purpose of swearing into office the constables returned from the parishes and townships of the West Riding of Yorkshire, upon the plaintiff being called upon to be sworn to the faithful performance of the office of a paid constable, the defendant, who was a pawnbroker in Barnsley, (after objectors, if any, had been called upon to state their objections) in the presence and hearing of a number of persons, stated, &c. [the words in the declaration]; and upon being told by one of the Justices that he should have made his objection at the vestry, he added, "I know this is not the proper time, but I feel it my duty to make this statement that

false and malicious. For the plaintiff, it was contended, that the proper time for the defendant to have made his objection was at the vestry, which returned the parties as fit for the office. That the Justices had no authority to hear any other objections than those made by the parties themselves, and that a statement made to the Justices in the presence of a number of people was not a privileged communication.

The Chief Baron was of opinion that the statement might be properly made to the Justices, and directed the jury that if they thought it was honestly made, believing it to be true, he had a right to make it, and they would find their verdict for the defendant: if not, and that the defendant intended to impute an indictable offence, then they would find for the plaintiff. The jury found their verdict for the defendant.

*Overend* now moved for a new trial on the ground of misdirection.—The Chief Baron was wrong in the opinion he formed at the trial, and upon which he directed the jury that the defendant had a right to make his objection before the Justices. The Justices are to judge only of qualification, and all objections of character should be made to the vestry. This will appear upon a review of the sections of the act 5 & 6 Vict. c. 109. The second section empowers the Justices to issue a precept to overseers to make out a list of a competent number of men qualified and liable to serve as constables. Section 3. requires the vestry to make out such list; which by section 8. is to be published by fixing a copy for three Sundays on the principal door of the church, &c. with a notice that all objections to the list will be heard by the Justices at a time and place mentioned therein; and afterwards the list is to be returned to the Justices. Then, by section 10, the overseers are to attend the special session and verify the

sections shew that the Justices are to choose from the list returned, after striking out those who are disqualified or not liable; and they cannot inquire into the fitness of the party if he is qualified. Moreover, this is the case of a paid constable; and by section 18. the vestry may resolve to have paid constables, and the resolution is to be sent to the Justices who, in that case, are by section 19. to "appoint" accordingly. They are to exercise a mere ministerial act; and not, as in the case of an ordinary constable, to "choose" from the list returned.

PARKE, B.—The result is, that the Justices are to select a certain number out of the list so made out. Surely it is very proper for a parishioner to make an objection when the Justices are about to exercise their power of selection.

ALDERSON, B.—If in the case of an ordinary constable the objection would be properly made before the Justices, why not in the case of a paid constable? The only difference is, that the vestry are to return a resolution to have a paid constable, and then the Justices are to appoint one; not however necessarily from the list of names returned by the vestry.

PLATT, B.—I think the defendant chose the most proper occasion for his objection; and certainly it was his duty to make the statement, if he believed it, rather than to stand by and see an improper person appointed as a constable.

*Rule refused.*

1848. }  
Jan. 29. } PARKER v. CROUCH.

*Costs—Suggestion on the Roll—County Court Act, 9 & 10 Vict. c. 95.—Order in Council.*

*The Small Debts Act, 9 & 10 Vict. c. 95. enacts, by sect. 1, that the Queen may order the act to be put in force in such county as to her shall seem fit; and by sect. 129, that if any action shall be commenced in any of the superior courts for any cause for which a plaint might have been entered in any court holden under the act, and a verdict be found for the plaintiff for a less sum than 20l. in contract and 5l. in tort, the plaintiff shall recover no costs. The Queen, by order in Council, directed that the act should be put*

*in force in every county on the 15th of March 1847. On the 25th of March following the present action was commenced in this court, for a cause of action accruing within the jurisdiction of the County Court of Kingston, in Surrey; but there was not then in existence at that place any county court at which a plaint could have been entered:—Held, that the plaintiff, who had recovered a verdict for 40s., was entitled to costs (1).*

A rule had been obtained, calling upon the plaintiff to shew cause why he should not bring the *postea* into court, and file the plea roll, to enable the defendant to enter a suggestion thereon to deprive the plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95. s. 129, the Small Debts Act. The rule was obtained on the ground that the plaintiff was not entitled to costs, as he ought to have brought his action in the county court for Surrey. The 1st section of the 9 & 10 Vict. c. 95. enacts, "That her Majesty may from time to time order that the act shall be put in force in such counties as to her Majesty, from time to time, shall seem fit." The 129th section enacts, "That if any action shall be commenced after the passing of this act, in any of her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20l. if the said action is founded on contract, or less than 5l. if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court."

By two orders in Council, published in the *London Gazette*, it was ordered, that on the 15th of March 1847, the act should be put in force in every county throughout England and Wales. The action was brought in this court on the 25th of March 1847, to recover damages for a trespass committed by breaking and entering the

(1) See *Harries v. Lawrence*, ante, p. 101.

plaintiff's dwelling-house, situate in Wimbledon, in the county of Surrey, and within the jurisdiction of the county court held at Kingston; but it appeared that there was not, at that time, any county court in existence at Kingston in which a plaint could have been entered.

The cause was tried, at the Surrey Summer Assizes, 1847, when a verdict having been found for the plaintiff, damages 40s., the learned Judge refused to certify that the action was fit to be brought in one of the superior courts.

*Petersdorff* appeared to shew cause; but the Court called on—

*Bosill* to support his rule.—The case might have been tried before the sheriff, who, before the appointment of a new Judge under the act, was the Judge of the county court, and ought to have tried the cause.

*Per Curiam*.—The rule must be discharged. *Rule discharged.*

1848. }  
Feb. 11. } JONES v. HARRISON.

*Railway—Abortive Scheme—Action for Return of Deposit—Letter of Allotment, Construction of.*

A party to whom shares in a projected railway company had been allotted received a letter of allotment, on which was indorsed, "The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of," &c. "and to apply the amount paid for deposits in discharge of any liabilities incurred by them, under the general powers vested in them for the prosecution of the undertaking." The allottee paid the deposit on the shares allotted to him, and, the under-

*Whether the deposit-money has been reasonably expended is a question for the jury.*

Indebitatus assumpsit for money received to the plaintiff's use, for money paid, and on an account stated.

Plea—Non assumpsit.

At the trial, before Maule, J., at the Denbighshire Summer Assizes 1847, it appeared that the defendant was one of the managing directors of a projected company, called the Wrexham, Nantwich and Crewe Junction Railway Company, and that the action was brought to recover 31l. 10s., the amount of a deposit paid in November 1845 on fifteen shares, with interest thereon. After the promoters of the scheme had obtained a provisional committee of management, a prospectus, headed as follows, was issued on the 3rd of October 1845:—"Provisionally registered. Capital, 450,000l., in 22,500 shares of 20l. each. Deposit, 2l. 2s. 6d. per share." On the 6th of October in that year the plaintiff applied for shares.—"To the Provisional Committee of the Wrexham, Nantwich and Crewe Junction Railway Company. Gentlemen,—I hereby request that you will allot me 100 shares of 20l. each in the above proposed railway, and I hereby undertake to pay the deposit of 2l. 2s. 6d. per share thereon, or any lesser number of shares which may be allotted to me; and I also undertake to execute the parliamentary contract and the subscribers' agreement when required." The allotments were made on the 25th of October, and the following letter of allotment was sent to the plaintiff:—"Wrexham, Nantwich and Crewe Junction Railway. (Provisionally registered). Capital, 450,000l., in 22,500 shares of 20l. each. Deposit, 2l. 2s. 6d. per share.

"Honblas Street, Wrexham, 25th of October 1845. Allotment No. 64. Deposit, 31l. 17s. 6d.

duly made, this allotment will be then cancelled, and the shares appropriated to other applicants." (Then followed the signature of the secretary, and a list of bankers' names, and the letter continued :) "On payment of the deposit to the bankers, this letter will be exchanged for a receipt. Terms and conditions on which the shares in the company are allotted :—The company is formed for the purpose of constructing a railway from Wrexham to Crewe, (by such route, and with such extensions, as the directors may think necessary on the engineers' report). The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations, as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the *general powers* vested in them for the prosecution of the undertaking. Powers will be applied for to allow interest at the rate of 4 per cent. per annum on the amount of calls paid, until the opening of the line. A subscribers' agreement, and a parliamentary contract, in such form and with such provisions as the committee may think necessary, will be prepared, and lie at the company's offices for signature from the to both inclusive. Arrangements will also be made and duly announced for the execution of the deeds by shareholders resident in or near the provincial towns in which shareholders may reside. The shares, with the deposits made thereon, will be liable to forfeiture, without notice, in respect of which the subscribers' agreement and parliamentary contract are not signed within the specified time." (Signed by the secretary).

On the 1st of November 1845 the plaintiff paid to one of the bankers named in the letter of allotment 81*l.* 17*s.* 6*d.*, the amount of the required deposit, of which the directors returned to him 7*s.* 6*d.*, considering they could not legally take a larger deposit than 2*l.* 2*s.* per share. On the 8th of December 1845 he signed the subscription deed and received scrip certificates for his shares as follows :—"Wrexham, Nantwich and Crewe Junction Railway. (Provision-

ally registered). Capital, 450,000*l.*, in 22,500 shares of 20*l.* each. On which a deposit of 2*l.* 2*s.* per share has been paid. Scrip certificate. Five shares. No. to inclusive. The holder of this certificate having signed the parliamentary contract and subscribers' agreement, and having agreed to pay all future calls, is the proprietor of five shares in the capital, for the time being of the above undertaking." (Signed by two directors).

All the shares were allotted about the same time as the allotment to the plaintiff; but deposits were not paid on more than 4,000, although the time for payment was extended to the 10th of January 1846. In the course of that year the project was abandoned. The deposits had been exhausted in payments for surveys and plans to be deposited at the Board of Trade, and for other preliminary expenses requisite to the carrying out of the undertaking. On behalf of the defendant, it was contended, that by the terms of the letter of allotment the directors were empowered so to apply the deposits, and that the plaintiff was not entitled to recover. The learned Judge left to the jury the question, whether the project was abandoned before the commencement of the action, and they found that it was. He then directed a verdict for the plaintiff, with leave reserved, by consent, to the defendant to enter a nonsuit upon the construction of the letter of allotment.

*Townsend*, in Michaelmas term, obtained a rule accordingly, and now—

*Martin* and *Welsby* shewed cause.—The meaning of the proposal made in this case is, that at least a competent number of the 22,500 shares should be subscribed for. The 1st of November was the day fixed for the payment of the deposits, yet on the 8th of September, when the plaintiff executed the subscription deed, there were not 4,000 shares subscribed for. The plaintiff was allowed to execute the deed in ignorance of that fact, which was a suppression by the directors of a fact material for him to know; and, on the authority of *Wontner v. Shairp* (1), the execution of the deed was obtained by fraud, and the deed is void as against the plaintiff. There was also evidence of fraud to affect the letter of allotment.

[PARKE, B.—The learned Judge reports that no point at all was made about fraud, at the trial; and the only question is, whether there is to be a nonsuit on the construction of the terms of the letter of allotment. Those terms contain a permission to apply the money, and there was no fraud at the time of the deposit. The plaintiff is bound by that, if not by the deed.]

By the terms of the letter of allotment the directors are "to apply the amount paid for deposits in discharge of any liabilities incurred by them under the *general powers* vested in them for the prosecution of the undertaking." That is prospective, and means general powers to be afterwards conferred on the directors after the execution of the subscribers' deed. That deed, being fraudulent, must be considered out of the case, and then the condition on which the directors were to expend the deposits was never fulfilled. Certainly the directors had no power to use the money until there was a reasonable prospect of their being able to carry out the scheme. [They cited *Nockells v. Crosby* (2).] Suppose twenty persons only paid their deposits.

[PARKE, B.—Whether the money had been expended with a reasonable prospect of being able to go on with the project, was a question of fact for the jury; and if the plaintiff meant to rely on that, he should not have consented to a nonsuit being entered on the construction of the letter of allotment. Probably the directors might fairly expect that the allottees would perform their contract.]

[ALDERSON, B.—It may be that part of the money was expended in getting in the deposits.]

[PARKE, B.—It may be that the onus was on the defendant to shew how much was expended for necessary matters.]

The directors proceeded on their own responsibility. The money was not to be applied when paid, but when there was a sufficient amount paid to justify the expectation that the project would be carried out.

*Townsend and Foulkes*, contra, were not called upon.

PARKE, B.—We are all of opinion that this rule must be made absolute. The first

question in this case is, whether upon the true construction of the letter of allotment the directors of the projected company were empowered to apply the deposit towards such preliminary expenses as the directors may think proper to incur in carrying out the object of the deed. The second question raised relates to the subscribers' agreement, which was executed by the plaintiff. It is contended, by his counsel, that the plaintiff's signature to that deed was obtained by fraud, and that there were circumstances in this case, which, if they had been left to the jury would, according to the case of *Wontner v. Shairp*, have justified them in coming to the conclusion that the deed was fraudulent, and therefore that the case must be determined without reference to that deed, and upon the letter of allotment only. It does not appear that the learned Judge was asked at the trial to leave any question to the jury upon the deed or letter of allotment; but the plaintiff's counsel consented to have the question of law upon the letter of allotment reserved for our decision. If there had been any question of fraud, the plaintiff's counsel should have insisted upon having it left to the jury; but he did not, as appears from the learned Judge's note, allege fraud with respect to the letter of allotment; and if he had, it is difficult to perceive how he could have made it out. In *Wontner v. Shairp* there were circumstances tending to shew that the execution of the subscription deed had been obtained by a misrepresentation as to the number of shares allotted; and as in this case it is said there was no sufficient quantity of deposits made, and so that the deed was fraudulent, we will consider the case upon the letter of allotment only.

Now, the letter of allotment, on the construction of which the whole case turns, was issued upon an allotment to the plaintiff of certain shares about the same time as the other allotments were made; and I think the directors must be understood thereby as saying, we shall apply the money deposited in our hands in such manner as we think fit for the purposes of carrying this undertaking into effect, and in discharge of any liabilities we may incur in doing so. One of the terms of the letter of allotment is: "The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite

for obtaining the necessary parliamentary powers to form a company for the construction of," &c. "and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking." The expression "general powers" means those already vested in them, which they have assumed for the purpose of carrying the undertaking into effect; and therefore upon the true construction of this document they may so apply the deposits. The directors had a right to apply the deposits for advertisements, surveys, and necessary plans to be deposited at the Board of Trade, and all reasonable expenses were properly chargeable on the deposits. If there had been an unreasonable application of the deposits that would have raised a question which ought to have been left to the jury. The terms of this letter of allotment distinguish this case from *Walstab v. Spottiswoode* (3), where no such power was reserved to the directors of the projected company. The directors would be bound to return any surplus or any sum expended after it was clear that the undertaking could not go on; but if all the deposits had been reasonably expended in furtherance of the undertaking the plaintiff could not recover.

ALDERSON, B.—The plaintiff undertakes that the directors may employ the money deposited in their hands for the legitimate purposes of the projected company. If it has been so expended he can have no right to recover it back.

ROLFE, B.—I am of the same opinion. "General powers" mean those powers which we are now exercising.—which we assume.

PLATT, B. concurred.

*Rule absolute.*

1847. { ASHLEY AND OTHERS v. PRATT  
Feb. 1; AND OTHERS.  
June 18. { PRATT AND OTHERS v. ASHLEY  
AND OTHERS.

*Insurance—Construction of Policy—Deviation.*

*A policy of insurance was effected on a vessel at and from Liverpool to ports and*

(3) 15 Mee. & Wels. 501; s.c. 15 Law J. Rep. (N.S.) Exch. 193.

*places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any parts or places on either side of, and at the Cape of Good Hope. The vessel sailed direct from Liverpool to a port in China, having on board a cargo for that port, and also for Manilla. She afterwards discharged a portion of her cargo at a port in China, and thence proceeded to Manilla, where she discharged the remainder of her outward cargo. At Manilla the captain took on board on freight 230 chests of opium for Tongkoo, and sailed from Manilla (the vessel not being a tenth part laden), intending to seek there a freight back to England, and whilst he was sailing towards Tongkoo the vessel was by the perils of the sea totally lost. Tongkoo is altogether out of the regular course of a voyage from Manilla to England:—Held, by this Court, and also on error in the Exchequer Chamber, that the sailing from Manilla to Tongkoo was not a deviation; the words in the policy meaning not "from Manilla" only, but "from ports or places in China and Manilla, all or any."*

Assumpsit upon a policy of insurance for 1,000*l.* upon the ship *Mars*. The declaration stated a total loss by perils of the seas, and contained counts for money had and received and on an account stated.

Pleas, first, *non assumpsit*; secondly, to the first count, a denial of the loss; thirdly, that the loss occurred during a deviation by the consent and direction of the plaintiffs.

Issue was joined on the first two pleas, and to the last the plaintiffs replied *de injuriâ*. The facts were afterwards, by a Judge's order and by agreement, stated for the opinion of the Court in the following special case, which was afterwards turned into a special verdict.

#### CASE.

The plaintiffs, Messrs. Ashley, Brothers, of Liverpool, ship-brokers, and Mr. John Worrall, of Liverpool, merchant (being owners of the ship *Mars*, of Liverpool; Gardiner master), by Messrs. Wise, Farbridge & Co. their brokers, effected a policy of insurance, dated the 27th of May 1839, with the General Maritime Insurance Com-



pany, London, which was duly subscribed by the defendants, being then directors, with others, of such company, for 1,000*l.*, upon such ship, "lost or not lost, at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and *from thence* to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of and at the Cape of Good Hope." The *Mars* sailed, on the 5th of July 1839, direct from Liverpool to the port of Lintin, in China, having on board a cargo on account of Messrs. Wise, Holiday & Co. for Lintin aforesaid and Manilla, and some goods for the same place on the owners' account. The master of the *Mars* was instructed, after discharging such outward cargo, to seek, on the owners' account, for a return cargo for the United Kingdom. The *Mars* arrived on the coast of China, and on her arrival, on account of the disturbances then existing between the British and Chinese, was immediately ordered, with all other British merchant vessels, by her Majesty's ship *Volage*, to go to Tongkoo, which is only a few miles from and in sight of Lintin, and in lat. 22° 25' north, long. 113° 40' east. She arrived at Tongkoo on the 23rd of November 1839, and then discharged part of the cargo. The *Mars* proceeded from Tongkoo on the 9th of December 1839 to Manilla, and arrived there on the 16th of December 1839, and then discharged the remainder of her outward cargo, with the exception of a trifling part, belonging to the owners. Manilla is in lat. 14° 35' north, and long. 121° east. The captain, finding freights low at Manilla, took on board there on freight 230 chests of opium for Tongkoo, and sailed from Manilla, with the intention of going back to Tongkoo, and then seeking a freight direct back to the United Kingdom, and while so sailing from towards and in the direction of Tongkoo, and having got to lat. 21° north, long. 117° east, by the Pratas shoal, the ship *Mars* was by the perils of the seas wrecked and totally lost, on the 13th of January 1840.

When the *Mars* sailed from Manilla, with the 250 chests of opium on board, she was not a tenth part laden. Manilla is only seven or eight days' sail from Tongkoo, in favourable weather. Lintin and Tongkoo

are both places in China, which lie in the course of a voyage from Liverpool to China and Manilla. The regular and usual course of a voyage from Manilla to the United Kingdom is S.S.W., for the purpose of passing through the Straits of Sunda, and thence round the Cape of Good Hope; and in the course of such voyage the ship would not have gone to the northward of Manilla. The regular and usual course of a voyage from Manilla to Tongkoo, and that pursued by the *Mars* on the present occasion, is north-westerly; and the point at which she had arrived at the time of the accident is altogether out of the regular and usual course of a voyage from Manilla to the United Kingdom, though in the regular and direct course of a voyage from Manilla to Tongkoo. 110 to 120 days is about the average duration of a voyage from the United Kingdom to China or Manilla, and also of a voyage from China or Manilla to the United Kingdom. The north-east monsoon is not so favourable to a passage from Manilla to Tongkoo as the south-west monsoon. The monsoon always blows from the north-east in December and January, and with the greatest strength. In the months of December, January and February, the voyage from Manilla to Tongkoo can be made during the north-east monsoon without any extraordinary danger; but a vessel must sail a longer distance in making a voyage from Manilla to Tongkoo during the north-east than the south-west monsoon. The due subscription of the policy by the defendants, as Directors of the General Maritime Insurance Company, London, is admitted, as also the sufficiency of the capital, stock and funds of the company, and of the shares of the defendants therein, to pay and satisfy the plaintiffs the amount insured; and the agency of Wise, Farbridge & Co. as alleged in the declaration, and the plaintiffs' interest in the subject-matter of insurance to the amount of all the money by them insured thereon, are admitted. It is agreed that the pleadings and policy annexed may be referred to by either party as part of this case; that the Court shall be at liberty to inspect maps and charts, and draw all conclusions and inferences of fact from the circumstances stated, as a jury might or ought to draw thereupon; and that after judgment

should be given upon the case, either party should be at liberty (with the approbation of this Court, and not otherwise) to turn this case into a special verdict, and to bring a writ of error thereupon, such special verdict to be settled by a Judge of this Court, and all inferences of fact which this Court might draw upon the hearing of the special case were to be stated as facts in the special verdict. The question for the opinion of this Court was, whether the plaintiffs were or were not entitled under the circumstances to recover in this action any and what amount. If the Court should be of opinion that the plaintiffs were so entitled, their judgment was to be entered for the plaintiffs by confession, for such amount as the Court should think that the plaintiffs were entitled to recover; but if the Court should be of opinion that the plaintiffs were not entitled to recover anything, then a judgment of *nolle prosequi* should be entered; unless in either case the Court should think fit that the case should be turned into a special verdict, in which case judgment should be entered up on such special verdict, according to the directions of this Court.

The case was argued, in Easter term, 1846, (April 27,) by—

*Martin*, for the plaintiffs.—The sailing from Manilla to Tongkoo did not amount to such a deviation as to avoid the policy. Assuming that no opium had been taken on board, the loss would have been within the protection of the policy, and the fact of the ship taking in opium at Manilla affords no answer to the action. The voyage contemplated by the policy was “at and from Liverpool to ports and places in China and Manilla, *all or any*, during the ship’s stay for any purposes, and *from thence* to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of and at the Cape of Good Hope.” The words “from thence” are not to be confined to “Manilla,” as will be contended on the other side, but extend to any “ports and places in China and Manilla.” *Beatson v. Haworth* (1) will be relied on by the other side. That was the case of an insurance at and “from Fisherrow to Gothenburgh

and back to Leith and Cockenzie.” The vessel having gone to Cockenzie before Leith, and having been there stranded, this was held to be a deviation, on the ground that unless the general rule was varied by usage or special facts, the assured was bound to go to the places mentioned in the policy in the order in which they were named in it. That case, however, although not overruled, has been the subject of much observation; but, at all events, does not govern this case, because here the vessel did also go to China before proceeding to Manilla. In *Beatson v. Haworth* the Court relied upon *Clason v. Simmonds* (2), which is distinguishable from the present case on the same grounds. *Maraden v. Reid* (3), *Gairdner v. Senhouse* (4), *Metcalf v. Parry* (5), and *Bragg v. Anderson* (6), are authorities in favour of the plaintiffs. *Lambert v. Liddard* (7) is precisely in point. There, a policy at and from Pernambuco, or any other port or ports on the coast of the Brazils, to London, was held to warrant the assured, if he could not get a cargo at Pernambuco, to go to any other port or ports till he got a cargo, and that he was not restricted to those which lay in the direct course between Pernambuco and London. *Hunter v. Leathley* (8), *Raine v. Bell* (9), *Cormack v. Gladstone* (10), *Laroche v. Oswin* (11), and *Armet v. Innes* (12), are in point.

*Watson*, for the defendants.—The return of the ship from Manilla to China amounted to a deviation. Where the insurance is upon a voyage to two or more places named in the policy, all or any, it amounts to a deviation unless the vessel goes to them in the order mentioned in the policy. In the present case, the vessel might have gone either to China or Manilla, and have taken in a cargo at either place; but she was not at liberty to go to Manilla first and then

(2) Stated in the judgment, 6 Term Rep. 533, n.

(3) 3 East, 572.

(4) 3 Taunt. 16.

(5) 4 Campb. 123.

(6) 4 Taunt. 229.

(7) 5 Ibid. 480.

(8) 10 B. & C. 358; s. c. 8 Law J. Rep. K.B. 274.

(9) 9 East, 195.

(10) 11 Ibid. 347.

(11) 12 Ibid. 131.

(12) 4 B. Moo. 150.

(1) 6 Term Rep. 531.

to take the oath aforesaid) on account of his (meaning the plaintiff) being a person not to be believed upon his oath. He (meaning the plaintiff) is a person who would say and swear anything. He (meaning the plaintiff) is a perjured fellow, and would do anything to gain his (meaning the plaintiff's) own ends. He (meaning the plaintiff) is an improper person to be a constable, and not worthy of being trusted." By means of which premises the plaintiff hath been and is otherwise greatly injured in his said office and otherwise; to the damage of the plaintiff of 1,000*l.* &c.

Plea—Not guilty; and issue thereon.

The cause was tried, before Pollock, C.B., at the Middlesex Sittings, after Michaelmas term, 1847, when the following facts were proved:—On the 11th of February 1847 a vestry meeting was held in the township of Barnsley, for the purpose of nominating and electing a competent number of men qualified and liable to serve as constables for the current year, to be returned to the Justices; at which meeting the plaintiff was duly nominated and elected as a person qualified and liable to serve as a paid constable for the said township of Barnsley. At a petty session, holden at Barnsley, for the purpose of swearing into office the constables returned from the parishes and townships of the West Riding of Yorkshire, upon the plaintiff being called upon to be sworn to the faithful performance of the office of a paid constable, the defendant, who was a pawnbroker in Barnsley, (after objectors, if any, had been called upon to state their objections) in the presence and hearing of a number of persons, stated, &c. [the words in the declaration]; and upon being told by one of the Justices that he should have made his objection at the vestry, he added, "I know this is not the proper time, but I feel it my duty to make this statement that the Justices may be aware of Kershaw's character."

On behalf of the defendant, it was contended, that the statement did not impute an indictable offence; that if it did, it was a statement made after being called upon by a competent authority, *bonâ fide* and for the purpose of furthering the ends of justice, and therefore a privileged communication, for which the defendant was not liable unless the plaintiff proved the statement to be

false and malicious. For the plaintiff, it was contended, that the proper time for the defendant to have made his objection was at the vestry, which returned the parties as fit for the office. That the Justices had no authority to hear any other objections than those made by the parties themselves, and that a statement made to the Justices in the presence of a number of people was not a privileged communication.

The Chief Baron was of opinion that the statement might be properly made to the Justices, and directed the jury that if they thought it was honestly made, believing it to be true, he had a right to make it, and they would find their verdict for the defendant: if not, and that the defendant intended to impute an indictable offence, then they would find for the plaintiff. The jury found their verdict for the defendant.

*Overend* now moved for a new trial on the ground of misdirection.—The Chief Baron was wrong in the opinion he formed at the trial, and upon which he directed the jury that the defendant had a right to make his objection before the Justices. The Justices are to judge only of qualification, and all objections of character should be made to the vestry. This will appear upon a review of the sections of the act 5 & 6 Vict. c. 109. The second section empowers the Justices to issue a precept to overseers to make out a list of a competent number of men qualified and liable to serve as constables. Section 3. requires the vestry to make out such list; which by section 8. is to be published by fixing a copy for three Sundays on the principal door of the church, &c., with a notice that all objections to the list will be heard by the Justices at a time and place mentioned therein; and afterwards the list is to be returned to the Justices. Then, by section 10, the overseers are to attend the special session and verify the lists; "and if any man not *qualified and liable* to serve as constable as aforesaid is inserted in any such list, it shall be lawful for the said Justices, upon being satisfied," &c. "to strike his name out of such list." Section 11. enacts, "that whenever any list shall have been allowed, the Justices shall choose from the allowed list the names," &c. It is therefore the vestry who are to judge of and return parties fit, as regards character, to serve the office; and the 10th and 11th

sections shew that the Justices are to choose from the list returned, after striking out those who are disqualified or not liable; and they cannot inquire into the fitness of the party if he is qualified. Moreover, this is the case of a paid constable; and by section 18. the vestry may resolve to have paid constables, and the resolution is to be sent to the Justices who, in that case, are by section 19. to "appoint" accordingly. They are to exercise a mere ministerial act; and not, as in the case of an ordinary constable, to "choose" from the list returned.

PARKE, B.—The result is, that the Justices are to select a certain number out of the list so made out. Surely it is very proper for a parishioner to make an objection when the Justices are about to exercise their power of selection.

ALDERSON, B.—If in the case of an ordinary constable the objection would be properly made before the Justices, why not in the case of a paid constable? The only difference is, that the vestry are to return a resolution to have a paid constable, and then the Justices are to appoint one; not however necessarily from the list of names returned by the vestry.

PLATT, B.—I think the defendant chose the most proper occasion for his objection; and certainly it was his duty to make the statement, if he believed it, rather than to stand by and see an improper person appointed as a constable.

*Rule refused.*

1848. }  
Jan. 29. } PARKER v. CROUCH.

*Costs—Suggestion on the Roll—County Court Act, 9 & 10 Vict. c. 95.—Order in Council.*

*The Small Debts Act, 9 & 10 Vict. c. 95. enacts, by sect. 1, that the Queen may order the act to be put in force in such county as to her shall seem fit; and by sect. 129, that if any action shall be commenced in any of the superior courts for any cause for which a plaint might have been entered in any court holden under the act, and a verdict be found for the plaintiff for a less sum than 20*l.* in contract and 5*l.* in tort, the plaintiff shall recover no costs. The Queen, by order in Council, directed that the act should be put*

*in force in every county on the 15th of March 1847. On the 25th of March following the present action was commenced in this court, for a cause of action accruing within the jurisdiction of the County Court of Kingston, in Surrey; but there was not then in existence at that place any county court at which a plaint could have been entered:—Held, that the plaintiff, who had recovered a verdict for 40*s.*, was entitled to costs (1).*

A rule had been obtained, calling upon the plaintiff to shew cause why he should not bring the *postea* into court, and file the plea roll, to enable the defendant to enter a suggestion thereon to deprive the plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95. s. 129, the Small Debts Act. The rule was obtained on the ground that the plaintiff was not entitled to costs, as he ought to have brought his action in the county court for Surrey. The 1st section of the 9 & 10 Vict. c. 95. enacts, "That her Majesty may from time to time order that the act shall be put in force in such counties as to her Majesty, from time to time, shall seem fit." The 129th section enacts, "That if any action shall be commenced after the passing of this act, in any of her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.* if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court."

By two orders in Council, published in the *London Gazette*, it was ordered, that on the 15th of March 1847, the act should be put in force in every county throughout England and Wales. The action was brought in this court on the 25th of March 1847, to recover damages for a trespass committed by breaking and entering the

(1) See *Harries v. Lawrence*, *ante*, p. 101.

plaintiff's dwelling-house, situate in Wimbledon, in the county of Surrey, and within the jurisdiction of the county court held at Kingston; but it appeared that there was not, at that time, any county court in existence at Kingston in which a plaint could have been entered.

The cause was tried, at the Surrey Summer Assizes, 1847, when a verdict having been found for the plaintiff, damages 40s., the learned Judge refused to certify that the action was fit to be brought in one of the superior courts.

*Petersdorff* appeared to shew cause; but the Court called on—

*Bovill* to support his rule.—The case might have been tried before the sheriff, who, before the appointment of a new Judge under the act, was the Judge of the county court, and ought to have tried the cause.

*Per Curiam*.—The rule must be discharged. *Rule discharged.*

1848. }  
Feb. 11. } JONES v. HARRISON.

*Railway—Abortive Scheme—Action for Return of Deposit—Letter of Allotment, Construction of.*

*A party to whom shares in a projected railway company had been allotted received a letter of allotment, on which was indorsed, "The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of," &c. "and to apply the amount paid for deposits in discharge of any liabilities incurred by them, under the general powers vested in them for the prosecution of the undertaking." The allottee paid the deposit on the shares allotted to him, and, the undertaking having failed, sued one of the directors for a return of the deposit money:—Held, that the expression "general powers" meant the general powers which the directors assumed for the purpose of carrying the undertaking into effect; and that if all the deposits had been applied for that purpose in a reasonable and proper manner, and before it was clear that the scheme must fail, the plaintiff was not entitled to recover.*

*Whether the deposit-money has been reasonably expended is a question for the jury.*

Indebitatus assumpsit for money received to the plaintiff's use, for money paid, and on an account stated.

Plea—Non assumpsit.

At the trial, before Maule, J., at the Denbighshire Summer Assizes 1847, it appeared that the defendant was one of the managing directors of a projected company, called the Wrexham, Nantwich and Crewe Junction Railway Company, and that the action was brought to recover 31l. 10s., the amount of a deposit paid in November 1845 on fifteen shares, with interest thereon. After the promoters of the scheme had obtained a provisional committee of management, a prospectus, headed as follows, was issued on the 3rd of October 1845:—"Provisionally registered. Capital, 450,000l., in 22,500 shares of 20l. each. Deposit, 2l. 2s. 6d. per share." On the 6th of October in that year the plaintiff applied for shares.—"To the Provisional Committee of the Wrexham, Nantwich and Crewe Junction Railway Company. Gentlemen,—I hereby request that you will allot me 100 shares of 20l. each in the above proposed railway, and I hereby undertake to pay the deposit of 2l. 2s. 6d. per share thereon, or any lesser number of shares which may be allotted to me; and I also undertake to execute the parliamentary contract and the subscribers' agreement when required." The allotments were made on the 25th of October, and the following letter of allotment was sent to the plaintiff:—"Wrexham, Nantwich and Crewe Junction Railway. (Provisionally registered). Capital, 450,000l., in 22,500 shares of 20l. each. Deposit, 2l. 2s. 6d. per share.

"Honblas Street, Wrexham, 25th of October 1845. Allotment No. 64. Deposit, 31l. 17s. 6d.

"Sir,—I am directed to inform you, that the committee of management have, in compliance with your application, allotted to you fifteen shares in this company, on the terms and conditions annexed; and you are therefore required to pay the deposit of 2l. 2s. 6d. per share, amounting to 31l. 17s. 6d., to one of the undermentioned bankers, on or before the 1st day of November next. In default of such payment being

duly made, this allotment will be then cancelled, and the shares appropriated to other applicants." (Then followed the signature of the secretary, and a list of bankers' names, and the letter continued :) "On payment of the deposit to the bankers, this letter will be exchanged for a receipt. Terms and conditions on which the shares in the company are allotted :—The company is formed for the purpose of constructing a railway from Wrexham to Crewe, (by such route, and with such extensions, as the directors may think necessary on the engineers' report). The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations, as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the *general powers* vested in them for the prosecution of the undertaking. Powers will be applied for to allow interest at the rate of 4 per cent. per annum on the amount of calls paid, until the opening of the line. A subscribers' agreement, and a parliamentary contract, in such form and with such provisions as the committee may think necessary, will be prepared, and lie at the company's offices for signature from the to both inclusive. Arrangements will also be made and duly announced for the execution of the deeds by shareholders resident in or near the provincial towns in which shareholders may reside. The shares, with the deposits made thereon, will be liable to forfeiture, without notice, in respect of which the subscribers' agreement and parliamentary contract are not signed within the specified time." (Signed by the secretary).

On the 1st of November 1845 the plaintiff paid to one of the bankers named in the letter of allotment 31*l.* 17*s.* 6*d.*, the amount of the required deposit, of which the directors returned to him 7*s.* 6*d.*, considering they could not legally take a larger deposit than 2*l.* 2*s.* per share. On the 8th of December 1845 he signed the subscription deed and received scrip certificates for his shares as follows :—"Wrexham, Nantwich and Crewe Junction Railway. (Provision-

ally registered). Capital, 450,000*l.*, in 22,500 shares of 20*l.* each. On which a deposit of 2*l.* 2*s.* per share has been paid. Scrip certificate. Five shares. No. to inclusive. The holder of this certificate having signed the parliamentary contract and subscribers' agreement, and having agreed to pay all future calls, is the proprietor of five shares in the capital, for the time being of the above undertaking." (Signed by two directors).

All the shares were allotted about the same time as the allotment to the plaintiff; but deposits were not paid on more than 4,000, although the time for payment was extended to the 10th of January 1846. In the course of that year the project was abandoned. The deposits had been exhausted in payments for surveys and plans to be deposited at the Board of Trade, and for other preliminary expenses requisite to the carrying out of the undertaking. On behalf of the defendant, it was contended, that by the terms of the letter of allotment the directors were empowered so to apply the deposits, and that the plaintiff was not entitled to recover. The learned Judge left to the jury the question, whether the project was abandoned before the commencement of the action, and they found that it was. He then directed a verdict for the plaintiff, with leave reserved, by consent, to the defendant to enter a nonsuit upon the construction of the letter of allotment.

*Townsend*, in Michaelmas term, obtained a rule accordingly, and now—

*Martin* and *Welsby* shewed cause.—The meaning of the proposal made in this case is, that at least a competent number of the 22,500 shares should be subscribed for. The 1st of November was the day fixed for the payment of the deposits, yet on the 8th of September, when the plaintiff executed the subscription deed, there were not 4,000 shares subscribed for. The plaintiff was allowed to execute the deed in ignorance of that fact, which was a suppression by the directors of a fact material for him to know; and, on the authority of *Wontner v. Shairp* (1), the execution of the deed was obtained by fraud, and the deed is void as against the plaintiff. There was also evidence of fraud to affect the letter of allotment.

(1) *Ante*, C.P. 38.

[PARKE, B.—The learned Judge reports that no point at all was made about fraud, at the trial; and the only question is, whether there is to be a nonsuit on the construction of the terms of the letter of allotment. Those terms contain a permission to apply the money, and there was no fraud at the time of the deposit. The plaintiff is bound by that, if not by the deed.]

By the terms of the letter of allotment the directors are "to apply the amount paid for deposits in discharge of any liabilities incurred by them under the *general powers* vested in them for the prosecution of the undertaking." That is prospective, and means general powers to be afterwards conferred on the directors after the execution of the subscribers' deed. That deed, being fraudulent, must be considered out of the case, and then the condition on which the directors were to expend the deposits was never fulfilled. Certainly the directors had no power to use the money until there was a reasonable prospect of their being able to carry out the scheme. [They cited *Nockells v. Crosby* (2).] Suppose twenty persons only paid their deposits.

[PARKE, B.—Whether the money had been expended with a reasonable prospect of being able to go on with the project, was a question of fact for the jury; and if the plaintiff meant to rely on that, he should not have consented to a nonsuit being entered on the construction of the letter of allotment. Probably the directors might fairly expect that the allottees would perform their contract.]

[ALDERSON, B.—It may be that part of the money was expended in getting in the deposits.]

[PARKE, B.—It may be that the onus was on the defendant to shew how much was expended for necessary matters.]

The directors proceeded on their own responsibility. The money was not to be applied when paid, but when there was a sufficient amount paid to justify the expectation that the project would be carried out.

*Townsend and Foulkes*, contra, were not called upon.

PARKE, B.—We are all of opinion that this rule must be made absolute. The first

question in this case is, whether upon the true construction of the letter of allotment the directors of the projected company were empowered to apply the deposit towards such preliminary expenses as the directors may think proper to incur in carrying out the object of the deed. The second question raised relates to the subscribers' agreement, which was executed by the plaintiff. It is contended, by his counsel, that the plaintiff's signature to that deed was obtained by fraud, and that there were circumstances in this case, which, if they had been left to the jury would, according to the case of *Wontner v. Shairp*, have justified them in coming to the conclusion that the deed was fraudulent, and therefore that the case must be determined without reference to that deed, and upon the letter of allotment only. It does not appear that the learned Judge was asked at the trial to leave any question to the jury upon the deed or letter of allotment; but the plaintiff's counsel consented to have the question of law upon the letter of allotment reserved for our decision. If there had been any question of fraud, the plaintiff's counsel should have insisted upon having it left to the jury; but he did not, as appears from the learned Judge's note, allege fraud with respect to the letter of allotment; and if he had, it is difficult to perceive how he could have made it out. In *Wontner v. Shairp* there were circumstances tending to shew that the execution of the subscription deed had been obtained by a misrepresentation as to the number of shares allotted; and as in this case it is said there was no sufficient quantity of deposits made, and so that the deed was fraudulent, we will consider the case upon the letter of allotment only.

Now, the letter of allotment, on the construction of which the whole case turns, was issued upon an allotment to the plaintiff of certain shares about the same time as the other allotments were made; and I think the directors must be understood thereby as saying, we shall apply the money deposited in our hands in such manner as we think fit for the purposes of carrying this undertaking into effect, and in discharge of any liabilities we may incur in doing so. One of the terms of the letter of allotment is: "The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite

for obtaining the necessary parliamentary powers to form a company for the construction of," &c. "and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking." The expression "general powers" means those already vested in them, which they have assumed for the purpose of carrying the undertaking into effect; and therefore upon the true construction of this document they may so apply the deposits. The directors had a right to apply the deposits for advertisements, surveys, and necessary plans to be deposited at the Board of Trade, and all reasonable expenses were properly chargeable on the deposits. If there had been an unreasonable application of the deposits that would have raised a question which ought to have been left to the jury. The terms of this letter of allotment distinguish this case from *Walstab v. Spottiswoode* (3), where no such power was reserved to the directors of the projected company. The directors would be bound to return any surplus or any sum expended after it was clear that the undertaking could not go on; but if all the deposits had been reasonably expended in furtherance of the undertaking the plaintiff could not recover.

ALDERSON, B.—The plaintiff undertakes that the directors may employ the money deposited in their hands for the legitimate purposes of the projected company. If it has been so expended he can have no right to recover it back.

ROLFE, B.—I am of the same opinion. "General powers" mean those powers which we are now exercising,—which we assume.

PLATT, B. concurred.

*Rule absolute.*

1847. { ASHLEY AND OTHERS v. PRATT  
Feb. 1; AND OTHERS.  
June 18. { PRATT AND OTHERS v. ASHLEY  
AND OTHERS.

*Insurance—Construction of Policy—Deviation.*

*A policy of insurance was effected on a vessel at and from Liverpool to ports and*

(3) 15 Mees. & Wels. 501; s.c. 15 Law J. Rep. (N.S.) Exch. 193.

*places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any parts or places on either side of, and at the Cape of Good Hope. The vessel sailed direct from Liverpool to a port in China, having on board a cargo for that port, and also for Manilla. She afterwards discharged a portion of her cargo at a port in China, and thence proceeded to Manilla, where she discharged the remainder of her outward cargo. At Manilla the captain took on board on freight 230 chests of opium for Tongkoo, and sailed from Manilla (the vessel not being a tenth part laden), intending to seek there a freight back to England, and whilst he was sailing towards Tongkoo the vessel was by the perils of the sea totally lost. Tongkoo is altogether out of the regular course of a voyage from Manilla to England:—Held, by this Court, and also on error in the Exchequer Chamber, that the sailing from Manilla to Tongkoo was not a deviation; the words in the policy meaning not "from Manilla" only, but "from ports or places in China and Manilla, all or any."*

Assumpsit upon a policy of insurance for 1,000*l.* upon the ship *Mars*. The declaration stated a total loss by perils of the seas, and contained counts for money had and received and on an account stated.

Pleas, first, *non assumpserunt*; secondly, to the first count, a denial of the loss; thirdly, that the loss occurred during a deviation by the consent and direction of the plaintiffs.

Issue was joined on the first two pleas, and to the last the plaintiffs replied *de injurid*. The facts were afterwards, by a Judge's order and by agreement, stated for the opinion of the Court in the following special case, which was afterwards turned into a special verdict.

#### CASE.

The plaintiffs, Messrs. Ashley, Brothers, of Liverpool, ship-brokers, and Mr. John Worrall, of Liverpool, merchant (being owners of the ship *Mars*, of Liverpool; Gardiner master), by Messrs. Wise, Farbridge & Co. their brokers, effected a policy of insurance, dated the 27th of May 1839, with the General Maritime Insurance Com-



says that it shall be lawful for the sheriff to take such fees, and no more, as shall from time to time be allowed by any taxing officer of the courts of law, under the sanction and authority of the Judges of such courts. Now it is not shewn here that any scale of fees has been made under the statute of Victoria. If a higher scale of fees than that allowed by the former act has been made, that should have been pleaded; for the Court cannot take judicial notice of it. A court of error could not, if the case were carried there.

As regards the grounds of special demurrer, there can be no doubt that an action on the case, as well as an action of debt, may be founded on the general prohibition in the 28 Eliz.; and in *Buckle v. Bewes* and *Ashby v. Harris* the declaration was in the same form as in this case. With respect to the statement of the amount extorted, the declaration was drawn in order to comply with the suggestion thrown out by the Court in *Ashby v. Harris*, that the amount actually taken should be stated. It is laid under a *videlicet*, and the sum is not material. Either it is a mere inference of law or a statement of fact for a jury. If the former, the Court, if it be wrong, can see it, and may reject it; if the latter, the Court cannot judicially notice that it is wrong in fact. It is not, therefore, a matter of special demurrer. The plaintiff goes only for the violation of the act, and does not seek to recover treble damages.

*Rew*, in reply.—If the statement that the defendant took more than is allowed by law be an inference, it is an inconsistent and repugnant statement, of which the Court will take notice. The Court will take judicial notice of the order of the Judges as to the scale of fees under the statute of Victoria, inasmuch as it is the act of the Court done under that statute. The case of *Thibault v. Gibson* is distinguishable. There the 2 & 3 Vict. c. 37. merely created an exception out of the statute of 12 Anne, st. 2. c. 16: here there are two inconsistent enactments.

[*PARKE, B.*—There certainly appears to be an inconsistency in the mode of alleging the damage here; but as we should give leave to amend in this respect, we will determine the other point.]

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

*PARKE, B.*—This case was argued before my Brothers Alderson, Rolfe, Platt, and myself, at the Sittings after Trinity term, by Mr. Rew, for the plaintiff, and Mr. Cowling, for the defendant, and a question of importance having been raised it stood over for consideration. The declaration was framed upon the statute 29 Eliz. c. 4, and was for the recovery of treble damages against the sheriff of Yorkshire, for taking more than was allowed by that statute for serving and executing a *feri facias*, and there was a special demurrer assigning several causes, upon which the Court expressed its opinion during the argument, and therefore it is unnecessary to repeat them. The substantial ground of objection to the right of action was, that the remedy given by the statute of Elizabeth is virtually repealed by the 1 Vict. c. 55; or, if it still existed, that it could only be enforced for the receipt of more than was authorized by either statute; and that the declaration should have been framed on both acts, and shewn that the receipt was in violation of both. After much consideration we think that the objection ought not to prevail. The statute of Elizabeth provides, that it shall not be lawful for any sheriff, under-sheriff, &c., or their officers, ministers, servants, bailiffs, or deputies, by reason or colour of their offices, to take of any persons, directly or indirectly, for the serving and executing of any extent or execution, more or other recompense than by that act is limited and appointed, which is thereby made lawful to be had, received, and taken, viz. 1s. in the pound, up to 100l., and 6d. in the pound above that sum, upon pain that the officer offending shall pay treble damages to the party grieved, and forfeit 40l., half to the Crown, half to the informer. The statute 1 Vict. c. 35. was passed to increase and fix the remuneration to be paid to the sheriff and his officers according to the discretion of the Judges. It first recites the statutes 42 Edw. 3. c. 9. and 1 Hen. 5. c. 4, containing prohibitions to under-sheriffs, sheriff's clerks and bailiffs continuing in office beyond certain times, and repeats those prohibitions. It then refers to 23 Hen. 6. c. 9, which limits the fees to be taken to 20d. to the

sheriff, and 4d. to the bailiff, for an arrest or attachment, and 4d. to the sheriff for making a return, and repeals that portion of the statute; and then by section 2. provides, that from the passing of the act it *should be lawful* for the sheriffs or their officers, concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law at Westminster, charged with the duty of taxing costs in such courts under the sanction and authority of the Judges of the said courts respectively; and the 3rd section gives a summary jurisdiction over such officers as shall extort, take, or receive any fee, gratuity, or reward not allowed as *aforsaid*.

This statute does not recite the 29 Eliz. c. 4, nor expressly repeal it, or any part of it. It leaves the sheriff's right to poundage untouched, as this Court has already decided in the case of *Davies v. Griffith*. But it is said, that it impliedly repeals the statute of Elizabeth, and the clause inflicting a penalty. If the statute of Victoria had enacted that it should be lawful in *all cases* to take more for the future than the statute of Elizabeth allows, no difficulty would have arisen in holding the statute of Elizabeth to have been thereby abrogated and rendered inoperative afterwards, upon the well known principle, that *leges posteriores priores contrarias abrogant*. It would not be strictly correct to say, that it was *repealed*, because a repeal has the effect of annulling the statute, as if it had never been made. But the statute of Victoria provides only that the sheriff, &c. shall take so much as shall be allowed by any officer with the sanction of the Judges of the Court from which the process issues; and some difficulty arises as to the meaning of that clause. By the words of the second section it seems to have contemplated that there should be a taxation in each case before the claim by the sheriff, or other officer, should be lawful; and, consequently, that the third section giving a remedy against officers, would apply only to cases where fees were demanded and received by them after *taxation*, which construction would render that section almost inoperative. Such can hardly have been the intention of the framer of the act; but if any doubt could be entertained

in that respect, it is quite certain that the sanction of the Judges of each Court could not have been intended to be required to *each act of allowance* by the officer; and the sanction meant by the act must have been by some general order or regulation of the Judges providing for classes of cases; and in that sense it has been understood by them. The effect, therefore, of the statute of Victoria is to legalize the receipt of fees beyond the poundage, *only* if the Judges should make a regulation, and only in those cases in which the Judges should by such regulation permit it; and it was by no means certain that any would ever be made, or, if made, that it would apply to writs of execution.

The truth is, that the statute gives the power only to the Judges of allowing, and thereby rendering lawful, an additional payment for the executing of a *fi. fa.*; but it does not absolutely legalize any. The Judges might never exercise their power, in any case; or if they did, might not choose to make any additional allowance for the proceeds of execution. It was wholly contingent whether the statute of Elizabeth would be altered or abrogated in pursuance of the statute of Victoria or not; it depended wholly upon the exercise of the power given to the Judges; and if the Court could take notice that the Judges have exercised that power, as perhaps they ought, (for they are bound to take notice of the course of proceeding of all the superior courts,) still we could not assume that such regulation had been made before the particular sum mentioned in the declaration was received; and, consequently, for anything that appears, (whatever we may suspect from the dates,) the statute of Elizabeth was in full force, unaltered in any respect at the time of the alleged offence; and, therefore, the declaration seems to us to be sufficient. If it had appeared by the declaration or by plea simply stating that fact, that the receipt was since the date of the Judges' regulation, it would have raised a different question.

There is a further reason for which we come to the same conclusion. If the statutes of Victoria had expressly enacted in positive terms, that in all cases in which the sheriff took no more than the additional sums which should be allowed and sanctioned by the Judges, they should be exempt from

the penalties of the statute of Elizabeth, there is no doubt that the declaration would have been good; and if the defendant was authorized by the regulation under the statute of Victoria, that regulation and the acting in pursuance of it must have come by way of defence from the defendant, and that upon the principle laid down in the note in 1 *Saund.* p. 262, b, and acted upon in the case of *Thibault v. Gibson*, as being an exemption contained in a subsequent act.

The question then is, whether the enactment of the statute of Victoria is not in effect the same thing as a positive contingent exemption from the operation of the statute of Elizabeth, which still continues in force; and we think that it is, and that the operation of the statute of Victoria is to constitute an exemption from the statute in those cases only, in the same way as if it had expressly enacted that such cases should be exempt from the operation of the statute of Elizabeth; and, consequently, that the declaration is sufficient on this ground; and therefore our judgment must be for the plaintiff.

If the defendant will procure an affidavit that no more was taken than the scale of fees allowed, he may be let in to amend on the usual terms.

*Judgment accordingly.*

1848. }  
Jan. 20. } SIMPSON v. RAND.

*Pleading — Several Counts—Reg. Gen. Hil. Term, 4 Will. 4. r. 5.—Railway—Sale of Shares—Money paid.*

*In assumpsit, a count for money paid was pleaded with a special count which stated in substance, that in consideration of the plaintiff having, at the defendant's request, contracted to sell to a third party on his own credit and responsibility certain shares in a railway company, of which the defendant was the registered holder, the defendant promised to deliver to him all new shares allotted in respect of such shares while he continued the registered holder thereof, on payment to him of all payments made by him to the company in respect of such new shares, and to indemnify the plaintiff from all loss which might arise by reason of the non-performance of his said promise; alleging the non-delivery to the*

*plaintiff of certain new shares so allotted to the defendant, and that by reason thereof the plaintiff had necessarily expended a large sum of money in the purchase of other shares, in order to perform his said contract of sale:—Held, not to be in violation of the pleading rules of Hilary term, 4 Will. 4. r. 5, whereby several counts are not to be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each.*

This was a motion for a rule to shew cause why the first or second count of the declaration in this case should not be struck out at the cost of the plaintiff, on the ground that both those counts were founded on the same subject-matter of complaint, unless a Judge at chambers, upon reference had to him, shall allow the counts to stand under the conditions of the rule of Hil. term, 4 Will. 4, rules 6 & 7.

The first count of the declaration stated that theretofore and before the commencement of this suit, and before and at the time of making the promise thereafter mentioned, and thence afterwards, to wit, hitherto, the defendant was lawfully possessed and the registered holder of divers, to wit, fifty shares of and in a certain railway company, that is to say, the Leeds and Bradford Railway Company, being a company mentioned in and incorporated by a certain act of parliament, made and passed in the 8th year of the reign of her present Majesty, intituled, "An act for making a railway from Leeds to Bradford, with a branch to the North Midland Railway," and thereupon, before the commencement of this suit, to wit, on &c., in consideration of the premises, and that the plaintiff at the request and on the behalf of the defendant had theretofore, to wit, then, in the name of him, the plaintiff, and on the personal credit and responsibility of him, the plaintiff, contracted to sell fifty shares of and in the said railway company, that is to say, the said fifty shares, to certain persons unknown to the defendant, and to which said persons also the defendant was unknown, at and for certain prices in that behalf, that is to say, twenty of the said shares, to wit, to one Thomas Hemmant, at and for the price of 22*l.* 17*s.* 6*d.* for each and every of the said last-mentioned shares, and thirty of the said shares, to wit, to certain persons carrying on business

under the name or firm of Messrs. Rhodes & Co., at and for the price of 23*l.* 2*s.* 6*d.* for each and every of the said last-mentioned shares, with all advantages which should accrue in respect of or be incident to the said shares respectively, he, the defendant, then promised the plaintiff, amongst other things, to deliver to the plaintiff all the scrip in respect of all new shares in the said company, which should be issued to and received by the defendant in respect of such new shares, which said new shares should be allotted in respect of the said fifty shares respectively, or any of them, to the defendant as the registered holder of the last-mentioned shares, or any of them; that is to say, prior to the defendant ceasing to be the registered holder thereof, under or in consequence of the said contracts of sale, on payment and satisfaction by the plaintiff to the defendant, of all payments made by the defendant as such registered holder to the said company in respect of such new shares and such scrip, and to save harmless and indemnify the plaintiff from all loss, damage, costs, and charges which should or might arise or happen to, or be incurred by the plaintiff for or by reason of the non-performance, non-observance or non-fulfilment by means of the defendant of the said contracts entered into by the plaintiff in manner aforesaid, or either of them, or any part thereof respectively. And the plaintiff, in fact, saith, that afterwards and whilst the defendant continued to be and was lawfully possessed of, and the registered holder of divers of the said fifty shares, and before ceasing to be such, under or in consequence of the said contracts of sale, or otherwise, to wit, twenty thereof, to wit, on &c., the said railway company allotted to the defendant, as and then being such registered holder thereof, divers, to wit, twenty new shares in the said company of 50*l.* each respectively, and twenty other new shares therein of 12*l.* 10*s.* each respectively, under and subject to the payment of, to wit, 5*l.* by the hundred of the said amounts of the said several new shares so allotted, that is to say, the sum of 62*l.* 10*s.*, by the defendant to the said company, on or before the 20th of December in the year last aforesaid; and afterwards, to wit, on &c., he, the defendant, having theretofore, to wit, on &c., paid to the said railway

company the said 5*l.* by the hundred of the said amounts, that is to say, the said sum of 62*l.* 10*s.* in respect of the said several new shares so allotted as aforesaid, the said company thereupon then and whilst the defendant continued such registered holder as aforesaid, issued to the defendant, and the defendant then received from the said company twenty scrip, in respect of the said twenty new shares of 50*l.* each, so allotted as aforesaid, and twenty other scrip, in respect of the said twenty other new shares of 12*l.* 10*s.* each so allotted as aforesaid. And the plaintiff further says, that the said sum of 5*l.* by the hundred, so amounting as aforesaid, so paid as aforesaid, was the only payment made by the defendant as such registered holder as aforesaid, to the said company, in respect of such new shares as aforesaid and such scrip, and that he, the plaintiff, has always, from the time of the said allotting of the said new shares, been ready and willing to pay to the said defendant the said sums so amounting as aforesaid, under and subject whereto the said several new shares were so allotted as aforesaid, and afterwards and within a reasonable time after the said shares were so allotted as aforesaid, to wit, on &c., offered to the defendant to pay him the said sums so amounting as aforesaid, and then requested him, the defendant, to deliver to him, the plaintiff, the said scrip, in respect of the several new shares in the said company, of all which the defendant, to wit, then, had notice. Nevertheless the defendant disregarded his said promise in this, to wit, that although a reasonable time from and after the said request, and also from and after the said receipt by the defendant of the said scrip, had elapsed before the commencement of this suit for the delivery of the said scrip by the defendant to the plaintiff, the defendant did not nor would, when he was so requested as aforesaid, or at any other time deliver the said scrip, or any part thereof, to the plaintiff, by means and in consequence whereof the plaintiff was afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid, forced and obliged to expend, and did expend, by reason of the said contract so made by him as aforesaid, and the said neglect of the defendant as aforesaid, divers large sums of money to a large amount, to wit,

710*l.*, in and about the purchase of twenty other of the said new shares of 50*l.* each, and of twenty other thereof at 12*l.* 10*s.* each, in order and for the purpose of performing the said contract so made with the said Thomas Hemmant as aforesaid, and in and about the discharging and satisfying the loss and damages caused by the inability of the plaintiff to perform the said contract as aforesaid, so made by him on behalf of the defendant as aforesaid, and has lost all interests, gains, and profits which he might and otherwise would have made from using the said sum of money so expended as aforesaid. And for assigning a further breach of the said promise of the defendant, the plaintiff says, that although afterwards, to wit, on the day and year last aforesaid, the plaintiff gave notice to the defendant of the last-mentioned premises, and then requested the defendant to save harmless and indemnify him, the said plaintiff, from and against the said sums of money so laid out and expended by the plaintiff for the due performance of the said contract for sale as aforesaid, and from and against all loss and damage in respect thereof, yet the defendant did not nor would when he was so requested as last aforesaid, or at any other time, indemnify and save harmless the plaintiff from the said sums of money or any part thereof, or of all loss and damage in respect thereof, but hath wholly neglected and refused so to do, by means whereof the plaintiff hath from thence hitherto lost and been deprived of the use and benefit of the said sums of money, and of divers great gains and profits amounting, to wit, to 1,000*l.*, which he might, and but for the premises, would have had and received in respect thereof. The second count was for money paid by the plaintiff for the use of the defendant.

*Atherton*, in support of the motion.—The special count discloses a contract whereby, in consideration of the plaintiff having at the defendant's request contracted to sell to a third party on his own personal credit and responsibility certain shares in a railway company, of which the defendant was the registered holder, the defendant promised the plaintiff to deliver to him all new shares allotted in respect of the said shares, while he was the registered holder thereof, on payment to him of all payments made by him to the company in respect of such new shares; and

to save harmless and indemnify the plaintiff from all loss incurred by him by reason of the non-performance of his, the defendant's, said promise. It then alleges, in substance, the non-delivery to the plaintiff of certain new shares so allotted to the defendant, and that by reason thereof the plaintiff had to expend a large sum of money in the purchase of other shares for the purpose of performing his said contract of sale. The count therefore states circumstances under which the defendant is liable as for money paid. The plaintiff has been deprived of the use of his money, which he was compelled to expend by reason of the defendant having failed to fulfil his engagement, and which he paid under the defendant's promise to indemnify him from any loss. The case of *Bayliffe v. Butterworth* (1) in this court, last term, is an authority for saying, that under the circumstances disclosed in this count the plaintiff may recover on the count for money paid. There the defendant had employed the plaintiff, a sharebroker at Liverpool, to sell twenty railway scrip for him; and the plaintiff sold them to another Liverpool sharebroker. In consequence of the defendant not having delivered the shares to the purchaser at the proper time, the purchaser bought twenty other scrip in the market at an advanced price, and the plaintiff had to pay the difference. By the usage of the Liverpool share-market, brokers were responsible to each other for the fulfilment of such contracts; and it was held that the defendant was liable to the plaintiff for the difference upon the count for money paid.

[PARKE, B.—How is this money paid to the use of the defendant?]

It is money paid by the plaintiff under a contract, with respect to which the defendant has indemnified him from loss. The plaintiff enters into a legal liability, at the request of the defendant, and pays the money under that liability, and in consequence of the defendant's default.

[PARKE, B.—There is no averment here of any custom, as in the case of *Bayliffe v. Butterworth*. The defendant desires the plaintiff to enter into a contract for the sale of certain shares for him, and agrees to indemnify him from any loss he may sustain

(1) *Ante*, p. 78.

by the non-delivery to him of any new shares which may be allotted to the defendant. It would be going a step beyond what we decided last term, if we were to grant this application.]

All that is stated here might be given in evidence under non assumpsit to the second count; and therefore the pleading of these two counts together is in violation of the Pleading Rule of Hilary term, 4 Will. 4. whereby "several counts shall not be allowed unless a distinct subject-matter of complaint is intended to be established in respect of each."

*Per Curiam* (2). — There ought to be no rule.

*Rule refused.*

1847. } BOULCOTT AND ANOTHER v.  
Feb. 15. } GEORGE WOOLCOTT.\*

*Pleading — Replication — Departure — Bill of Exchange.*

*In an action on a bill of exchange the declaration stated that certain persons using the name and style of J. B. & Co., by that name and designation drew a bill of exchange on Messrs. G. & E. W. and indorsed the said bill to the defendant, who indorsed it to the plaintiffs. The defendant pleaded that the plaintiffs were the persons mentioned in the declaration as using the name and style of J. B. & Co. and as so making the bill; that the indorsement of the bill to the defendant was in fact an indorsement by the plaintiffs in the said name and style of J. B. & Co., and that they so indorsed it to him before he indorsed the same to them; and that, at the time of his so indorsing the bill to the plaintiffs, they were liable to pay the amount to him, according to their previous indorsement. The plaintiffs replied, stating an agreement between them and the defendant and G. & E. W. to forbear and give time to the defendant and G. & E. W. for the payment of another bill accepted by G. W. and indorsed by E. W. the maker, to the defendant and by him to the plaintiffs, till the time for payment of the bill declared*

*on had elapsed, and then averred that the plaintiffs had forborne accordingly:—Held, that the replication was bad, as being a departure from the declaration.*

*Assumpsit.* The declaration stated that certain persons using the name and style of Joseph Boulcott & Co., by that name and designation, on the 4th of February 1846, made their bill of exchange, and directed the same to certain persons using the name and style of Messrs. G. & E. Woolcott, by that name and designation, and thereby required the said Messrs. G. & E. Woolcott to pay to the order of them, the said J. Boulcott & Co., 101*l.* 2*s.* 10*d.*, at one month after the date thereof, which period had elapsed before the commencement of the suit; and that the said J. Boulcott & Co., by that name and designation, then indorsed the said bill to the defendant, who then indorsed the same to the plaintiffs. Averment of non-payment by Messrs. G. & E. Woolcott.

Fifth plea, to the first count, that the plaintiffs were and are the said persons in the said count mentioned as using the name and style of J. Boulcott & Co., and as so making the said bill by the said name and style, and that the said indorsement of the said bill to him, the defendant, was, in truth and in fact, an indorsement by the plaintiffs in the said name and style of J. Boulcott & Co.; and that in truth and in fact the plaintiffs did so indorse the said bill to him, the defendant, before he indorsed the same to them, *modo et formá*; that the plaintiffs were, at the time when he so indorsed the said bill to them, liable to pay the amount thereof to him, the defendant, according to the tenour and effect of the same and of their previous indorsement thereof to him; and that they, by reason of their said indorsement of the said bill to him, would be liable to pay him the amount thereof upon his paying the same to them. Verification.

Replication, that before the plaintiffs indorsed the said bill to the defendant, or the defendant indorsed the same to the plaintiffs, as in the plea mentioned, and before the same was made, and before the date thereof, and before the time for the payment thereof had elapsed, to wit, on &c., G. Woolcott the younger, and E. Woolcott, to whom

\* Decided in the sittings after Hilary term, 1847.

(2) Pollock, C.B., Parke, B., Alderson, B., and Rolfe, B.

the said bill of exchange was directed, by the names of Messrs. G. & E. Woolcott, and the defendant were respectively indebted to the plaintiffs in 100*l.* upon a certain bill of exchange, dated the 1st of August 1845, made by the said E. Woolcott, and directed to and accepted by the said G. Woolcott the younger, for the payment to the order of the said E. Woolcott of 146*l.* 3*s.* 2*d.*, at six months after the date thereof, and indorsed by the said E. Woolcott to the defendant, and by the defendant to the plaintiffs; and thereupon it was then agreed between the plaintiffs, the defendant, and the said G. Woolcott the younger and E. Woolcott respectively, that the plaintiffs should forbear and give time for the payment of the said sum of 100*l.* for a certain time, to wit, until the time for the payment of the bill of exchange in the first count mentioned had elapsed, and that in consideration thereof, the said G. Woolcott the younger and E. Woolcott should accept, and the defendant should indorse the bill of exchange in the first count mentioned; that in pursuance of the said agreement they made the said bill of exchange in the first count mentioned, and then indorsed the same to the defendant as in the first count mentioned, for the mere purpose of the defendant indorsing the same to the plaintiffs, in pursuance of the said agreement; and that there never was any value or consideration for the indorsement of the said bill by the plaintiffs to the defendant, or for the payment by the plaintiffs, or any or either of them, to the defendant of the amount thereof, or of any part thereof; and the defendant then indorsed the said bill to the plaintiffs in pursuance of the said agreement, and upon and for value and consideration to the amount of the said bill, to wit, the money so due from the said G. Woolcott the younger, and E. Woolcott and the defendant, respectively, upon the said bill, and the forbearance of the plaintiffs as aforesaid. And the plaintiffs further say that they did forbear and give time for the payment of the said sum of 100*l.* to the said G. Woolcott the younger, and E. Woolcott and the defendant, respectively, until the period for the payment of the bill of exchange in the first count mentioned had elapsed. Verification.

Special demurrer, assigning for causes,

amongst others, that although the plaintiffs in their declaration allege the defendant to have become liable to them solely by reason of his having indorsed to them the said bill, and by the custom of merchants, and according to his indorsement, yet the replication discloses that the defendant's liability upon his indorsement is wholly dependent on a supposed agreement, stated in the replication, as precedent to the making and indorsing of the said bill; and that in so stating the agreement as the ground of the defendant's liability, the replication is a departure from the declaration; and that the agreement ought to have been declared upon specially.

*Peacock*, in support of the demurrer.—The replication contains that which is a departure from the declaration. The declaration states that certain persons, that is, certain persons other than the plaintiffs, made the bill in question, and indorsed it to the plaintiffs. The plea states that the plaintiffs made and indorsed the bill to the defendant, before he indorsed it to them. This is admitted by the replication, which then proceeds to allege that the plaintiffs are entitled to sue the defendant by virtue of a certain contract which they set forth, and which is quite distinct from the custom of merchants on which the declaration is founded. The replication, therefore, shews clearly that the plaintiffs' right to recover is not upon the bill, but upon the new contract set forth in the declaration.

[*PLATT, B.*—Is not circuity of action got rid of by pleading the agreement?]

The defendant's argument is, that the replication discloses that which is a departure. If the persons stated in the declaration to have used the name and style of Joseph Boulcott & Co. had been there alleged to be the plaintiffs, the declaration would have been bad on the face of it.

*PARKE, B.*—The declaration can be good only on the ground of Joseph Boulcott & Co. being other persons than the plaintiffs; if they are the same persons the declaration is bad. The plea alleges that they are the same persons, and the replication, admitting that, states a different cause of action. This mode of replying makes the declaration a bad one, and sets up a new ground for suing the defendant. I think there is a departure in

this case, and that the defendant is entitled to our judgment. The plaintiffs may have leave to amend, and unless they do so, there will be judgment for the defendant.

*Willes*, for the plaintiffs, elected to amend.

*Amendment accordingly.*

1847. }  
June 30. } SOUTHEE v. DENNY.\*

*Slander—Variance—Amendment under 3 & 4 Will. 4. c. 42.—Postponement of Trial.*

*The declaration stated that the plaintiff was a surgeon and accoucheur, and that he had been employed to attend, and had attended one R. in her confinement; that the defendant, in a discourse with the said R. of and concerning the plaintiff in relation to his said profession, falsely &c. spoke and published the following words:—"I wonder you had him to attend you. Do you know him? he is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. There have been many inquests had upon persons who have died because he had attended them." At the trial the words proved, as to the inquests, were "several have died that the plaintiff has attended, and there have been inquests held upon them:"—Held, that the Judge was right in allowing the declaration to be amended, by inserting the words proved.*

*Held, also, that if the amended words could have been answered by a plea of justification, and the words originally inserted could not, the counsel for the defendant should have applied to the Judge to postpone the trial.*

*Held, also, that the words as amended were actionable; and, semble, that the words "he is a bad character; none of the medical men here will meet him," were also actionable.*

This was an action of slander for words spoken of the plaintiff in his profession of a surgeon and accoucheur. The declaration stated, that the plaintiff before and at, &c.

was and still is a surgeon and accoucheur, residing and carrying on his profession and business of a surgeon and accoucheur at Cambridge, in the county of Cambridge; that before the committing of the said grievances by the defendant, one Isabella Reay, being the wife of one Edward Reay, and residing and living at Cambridge aforesaid, had been delivered of a child, and the plaintiff had been employed and retained as such surgeon and accoucheur to attend, and had attended the said Isabella Reay, upon the occasion of her said confinement, and had delivered the said Isabella Reay of the said child, with skill, credit, and reputation; yet the defendant, intending to injure the plaintiff in the way of his said profession and business, heretofore, to wit, on &c. in a certain discourse which the defendant then had with the said Isabella Reay of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said profession and business in the presence and hearing of the said Isabella Reay and of one Isabella Wilkinson, and of divers other persons, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said profession and business of a surgeon and accoucheur, the false, scandalous, malicious, and defamatory words following, that is to say, "I" (meaning the defendant) "wonder that you" (meaning the said Isabella Reay) "had him" (meaning the plaintiff) "to attend you," (meaning the said Isabella Reay, and meaning the attendance on her, the said Isabella Reay, in her said confinement). Do you (meaning the said Isabella Reay) know him (meaning the plaintiff)? he (meaning the plaintiff) is not an apothecary; he (meaning the plaintiff) has not passed any examination; he (meaning the plaintiff) is a bad character; none of the medical men here (meaning the said town of Cambridge) will meet him (meaning the plaintiff); there have been many inquests had upon persons who have died, because he (meaning the plaintiff) had attended them" (meaning the plaintiff's attendance on the said last-mentioned persons in the way of his said profession and business). By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame,

\* Decided in the sittings after Trinity term, 1847.



and credit, and reputation as such surgeon and accoucheur as aforesaid, &c., to the plaintiff's damage of 500*l.*, &c.

At the trial, before Pollock, C.B., at the Spring Assizes for Cambridge, 1847, it appeared that the words used with reference to the inquests were, "several have died that Mr. Southes attended, and there have been inquests held on them." The learned Judge allowed the plaintiff to amend his declaration, and left the amended words to the jury. There was a verdict for the plaintiff, damages 50*l.*

*Andrews* having obtained a rule for a new trial, on the ground of the amendment having been improperly made, and also on the ground of misdirection,—

*Naylor (Byles, Serj. with him)* shewed cause (June 21).—The declaration contains separate and independent slanders. There is enough to support the verdict without the amended portion. It was impossible to think that the bad character referred to anything else than the defendant's profession.

[PARKE, B. referred to *Doyley v. Roberts* (1), and *Ayre v. Craven* (2). The question is, were the words spoken of his professional conduct?]

The words "none of the medical men here will meet him," clearly import that in the opinion of other medical men he was unfit to practise as an accoucheur. The learned Judge told the jury that the question was, whether the words were used, and whether their reasonable meaning was injurious to the plaintiff; and if they were used and were injurious, the question would then be as to the amount of damage. This, it is submitted, was correct.

*Andrews*, in support of the rule.—First, as to the amendment, which is important. The 3 & 4 Will. 4. c. 42. s. 23. only gives power to amend "in a matter not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his defence." Here the matter was material.

[PARKE, B.—The real merit of this case is, whether the defendant has been guilty of slander.]

[ALDERSON, B.—If the other words be

(1) 3 Bing. N.C. 835; s. c. 6 Law J. Rep. (N.S.) C.P. 279.

(2) 2 Ad. & EL 2; s. c. 4 Law J. Rep. (N.S.) B.B. 35.

actionable, the amendment no doubt was reasonable.]

The defendant could not have justified the words originally introduced, but he could have justified the amended words. He was therefore injured in the conduct of his defence.

[PARKE, B.—If so, you should have applied to postpone the trial.]

The words "he is a bad character; no medical man will meet him," do not necessarily refer to his profession of a surgeon. They might have been spoken of a clergyman or any one else. He cited *Lumley v. Allday* (3).

[POLLOCK, C.B.—That case clearly disconnects the charge from the question of the profession.]

At all events the amended words were left to the jury, and may have affected the damages.

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

PARKE, B.—On the trial of this case, which was an action for slander, the Lord Chief Baron directed an amendment; and a rule nisi for a new trial having been granted, the propriety of that decision has been discussed. We think that the amendment was proper under the circumstances, and that the rule must be discharged. The declaration stated that the plaintiff was a surgeon and accoucheur; that in that character he had attended one Mrs. Reay during her confinement, and that the defendant in a discourse which he had with her of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said profession and business, spoke of and concerning, &c. certain false, scandalous and defamatory words, with proper innuendoes, to connect them with the plaintiff, viz. "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character: none of the medical men here will meet him. There have been many inquests held upon persons who have died, because he attended them" (meaning the said plaintiff's attendance in the way of his profession and business). On the trial, the latter words as

(3) 1 Cro. & Jer. 301; s. c. 9 Law J. Rep. (N.S.) Exch. 62.

to the coroner's inquests were not proved, but the words used appeared to be, "Several have died that the plaintiff has attended, and there have been inquests held upon them." The counsel for the plaintiff applied to the Lord Chief Baron to amend. The defendant's counsel objected, on the ground that the variance was not of the description contemplated by the 3 & 4 Will. 4. c. 42, since it was not in a matter not material to the merits of the case, for there was a substantial difference between the words alleged and those proved to have been spoken; and it has been since argued before us, that the defendant might have justified the words as proved, although he could not have justified those contained in the declaration. The amendment being made, Mr. Andrews, on the part of the defendant, contended that the words were still not actionable, and that as the Lord Chief Baron in his summing up had ruled that they were actionable, the defendant was entitled to a new trial. It was doubted whether the Lord Chief Baron had so summed up, but from the notes of counsel it would appear that he was understood to have so done, and that the jury probably gave damages on that supposition. We think, that the Chief Baron was well justified, both in making the amendment and treating the amended words as being actionable. As to the amendment, the variance was *material*, no doubt, in one sense; that is, it prevented the plaintiff from recovering for that part of the words spoken, but it was such as the Judge might properly deem to be immaterial to the merits of the case, that is, to the dispute, whether words had been uttered imputing to the plaintiff the sort of want of skill, care and professional qualities contained in the allegation in the declaration, the *precise* words being immaterial. In this sense, the variance was immaterial to the real question, for the words spoken did really imply the same sort of slander as there alleged and positively expressed; and we also think it was one which the Chief Baron might well decide to be such as could not prejudice the defendant in the conduct of the defence, and therefore could direct to be amended immediately; for as the defendant did not plead a justification to the words alleged, he might be reasonably expected not to be

able to justify the words as amended, for in truth they import, when read in connexion with the others spoken, the same slander, or at least a similar case differing only in degree; and as we are informed by the Lord Chief Baron that no request was made by the defendant's counsel to postpone the cause, to enable him to plead a justification to the words actually used, we think that the Chief Baron was justified in making the amendment instant. The words, as amended, without the aid of any innuendo to explain them by reference to extrinsic circumstances are, in our judgment, actionable, for their plain and obvious meaning, when taken together, imputes to the plaintiff a want of proper qualification for his profession or business of surgeon and accoucheur. The words which are to be assumed for this purpose to be false and malicious begin with an expression of an opinion that the plaintiff was an unfit person to attend Mrs. Reay. The defendant then proceeds to state that the plaintiff is a bad character in such a sense as to render him, in the judgment of his professional brethren, unfit to meet them, so that he is a person who, in a case of necessity requiring a consultation with others, could not obtain the benefit of their assistance for his patient; and we should incline to think that these words alone are actionable, for they do import a want of a necessary qualification for a surgeon in the ordinary discharge of his professional duties. But the remaining words are, in our opinion, actionable; for, according to their ordinary sense, and when meant as a reason for the opinion of the speaker that the plaintiff was unfit to be employed, they do obviously import that the plaintiff was so deficient in skill or care as that he had either caused his patients to die, or, at least, that coroner's inquests had been held, in which the inquiry had been whether he had not been the cause of the death of many persons. We follow the rule laid down by Lord Ellenborough, in *Woolnoth v. Meadows* (4), in which words as little definite, importing a charge of crime, were held actionable, because, without the aid of any innuendo, they did, in their plain and obvious meaning, import it.

*Rule discharged.*

(4) 5 East, 463.

1847. } DOE d. KNIGHT v. CHAFFEY  
April 28. } AND ANOTHER.\*

*Will, Construction of—Executory Devise*  
—“Next Heir.”

*A testatrix, in 1786, devised her real estate to her brother-in-law T. K. and her sister A. K., his wife, for their lives, and from and after their decease to her nephew, J. G. K., son of the said T. K. and A. K., his heirs and assigns for ever. But in case the said J. G. K. should not survive T. K. and A. K., and should die without an heir lawfully begotten, then and in such case the testatrix devised the same to the next heir of the said T. and A. K., their heirs and assigns for ever. J. G. K. died an infant in the lifetime of his parents; but soon after his death, another son of T. and A. K. was born, who was also called J. G. K. A. K. died in 1795. The second J. G. K. married, and had issue a son J. K., and died in 1823. T. K. died in 1842:—Held, that the words “next heir” meant the person who should fill the character of true heir of T. and A. K.; and that, therefore, the executory devise over took effect only on the death of T. K., the surviving devisee for life, when the estate vested in J. K. the lessor of the plaintiff, who then filled the character of heir of T. and A. K.*

This was an ejectment brought on the demise of John Knight, dated the 10th of July 1822, to recover “one undivided moiety or half part of and in a farm and lands in the parish of Martock, in the county of Somerset.” At the trial, before Platt, B., at the Summer Assizes for that county, 1845, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following

CASE.

The lessor of the plaintiff claims to be entitled, under the will of Elizabeth Goodden, hereinafter set out. By indentures of lease and release, bearing date the 15th and 16th of May 1758, the release being made between Edward Damer and Mary his wife of the first part, Richard Maddock of the second part, Thomas Goodden and Ann Damer, spinster, daughter of the said Edward Damer, of the third part, and Edward Patten and Jonathan Warre of the fourth part, certain tenements and lands (including

\* Decided in Easter term, 1847.

the entirety of the lands, one undivided moiety whereof is sought to be recovered in this action) were limited, after the solemnization of a then intended marriage, which afterwards took effect, between the said Thomas Goodden and Ann Damer, to the following uses, that is to say, to the use of the said Thomas Goodden, for his life, without impeachment of waste; remainder to the use of the said Edward Patten and Jonathan Warre, and their heirs, during the life of the said Thomas Goodden, in trust to support the contingent uses therein limited; remainder to the use of such child or children of the body of the said Thomas Goodden on the body of the said Ann to be begotten, his, her, and their heirs, in such shares and proportions, and for such estates and interests, and charged with the payment of such sum or sums of money to any other the child or children of the said then intended marriage, and in such manner as the said Thomas Goodden and Ann his intended wife, or the survivor of them, should, by any deed or deeds in writing, or by his or her last will and testament in writing, under the hands and seals of the survivor of them, attested by two or more credible witnesses, give, grant, limit, direct, or appoint; and in default of such gift, grant, limitation, direction, or appointment, and subject thereto, to various uses which did not take effect. The said Thomas Goodden and Ann Damer were married on the 20th of August 1756. The said Thomas Goodden died before his wife, on the 12th of October 1779. There was issue of Thomas Goodden and Ann Damer five children. Of these children there were two only, viz., Ann and Elizabeth, who became material to the title. Ann was born on the 7th of September 1762, was married to Thomas Knight on the 25th of November 1783, and died on the 9th of January 1796; Elizabeth was born on the 27th of February 1764, and died unmarried on the 24th of February 1787. The said Ann Goodden (formerly Ann Damer), after the death of Thomas Goodden, her husband, by an indenture of appointment, bearing date the 8th of March 1784, and made between the said Ann Goodden of the one part, and the said Thomas Knight and Ann his wife (formerly the said Ann Goodden, spinster), and the

said Elizabeth Goodden of the other part, in pursuance of the power vested in her by the hereinbefore mentioned indentures, duly limited and appointed the lands and tenements included in those indentures, from and after the death of the said Ann Goodden, to the use of the said Ann Knight and Elizabeth Goodden, in fee, as tenants in common. The said Elizabeth Goodden died before her mother, on the 24th of February 1787, seised, by virtue of the before-mentioned appointment, of the reversion in fee, expectant on the death of her mother, of and in one undivided moiety of the said tenements and lands mentioned in the above-mentioned indentures. The said Elizabeth Goodden being so seised made a will, dated the 11th of December 1786, under which the lessor of the plaintiff now claims title. The material parts of this will, which was duly executed and attested to pass real estate, were as follows:—"This is the last will and testament of me, Elizabeth Goodden, of Bower Hinton, in the parish of Martock, in the county of Somerset, spinster. I give and devise all and singular the messuages, tenements, lands, and hereditaments, which I am seised of or entitled unto, either in possession or reversion, remainder or expectancy, situate, lying, and being within the parish of Martock aforesaid, or elsewhere, in the said county of Somerset, unto my brother-in-law and sister Ann Knight, his wife, of Bower Hinton aforesaid, yeoman, for and during the term of their natural lives; and from and after their deceases I give and devise the same unto my nephew, John Goodden Knight, son of my said brother-in-law and sister Ann Knight, his heirs and assigns for ever; but in case the said John Goodden Knight should not survive my said brother-in-law and sister, Thomas and Ann Knight, and should die without an heir lawfully begotten, then and in such case I give and devise the same to the next heir of the said Thomas and Ann Knight, my brother-in-law and sister as aforesaid, their heirs and assigns for ever. I also give and bequeath unto my said brother-in-law and sister Ann Knight, all such lands in Martock aforesaid, as I am entitled unto for any term or number of years, to hold unto my said brother-in-law and sister Ann Knight, and their assigns, for and during the term of

their natural lives; and from and after their decease, I give and bequeath the same unto their son John Goodden Knight, his executors, administrators, and assigns, and his heirs lawfully begotten. And as and for and concerning all and other my personal estate whatsoever, I give and bequeath the same unto my said brother-in-law and my sister Ann Knight, his wife as aforesaid, whom I hereby appoint sole executor and executrix of this my last will and testament."

The said Ann Goodden, the mother of the said testatrix, died in January 1796. John Goodden Knight, mentioned in the said will, died shortly after the testatrix, viz. in June 1787, without issue; in fact, he was then a child not a year old. Soon after the death of this son, another son of the said Thomas and Ann Knight was born, who was also called J. Goodden. This last J. G. Knight was born in November 1787. On the 3rd of November 1811 he married Mary Welch; and he died in June 1823. The lessor of the plaintiff is the eldest son of the marriage of the said last-mentioned J. G. Knight and Mary his wife. The said T. Knight and Ann his wife are both dead. The said Ann, the wife, died in December 1795, and the said T. Knight died in June 1842. [The case then set forth indentures of lease and release of the 1st and 2nd of July 1814, whereby T. Knight, and the last-mentioned J. G. Knight, the latter being stated therein to be entitled to the reversion in fee of the undivided moiety of the lands in question, under the will of Elizabeth Goodden, as surviving son and heir-at-law of A. Knight, conveyed the undivided moiety in fee to parties under whom the defendants claimed title. The case also stated various proceedings under an act, 59 Geo. 3, for inclosing lands within the parishes of Martock and Muchelney, in the county of Somerset, which, on behalf of the defendants, it was contended had the effect of a partition and exchange, whereby the parties entitled to the entirety of the lands of E. Goodden would, after the award made under the act, be entitled to the entirety of the lands awarded, and not to an undivided moiety; and consequently, that even if the lessor of the plaintiff had a good title under the will of E. Goodden, such title would not support the demise in this

ejectment. With respect to this part of the case no report is necessary.] The lessor of the plaintiff claims to be entitled to the undivided moiety sought to be recovered in this action, under the said will of the said E. Goodden, notwithstanding the said indentures of the 1st and 2nd of July 1814, and notwithstanding the said proceedings under the Inclosure Act. The defendants contend that the lessor of the plaintiff is not entitled to recover under the said will, and that even if he shews any title under the said will, he cannot, upon the facts disclosed in the case, maintain an action in the present form for the undivided moiety of the said premises. If the Court should be of opinion that the plaintiff was entitled to recover, the verdict entered for him was to stand, otherwise the verdict was to be entered for the defendants.

The case was argued, on the 25th and 27th of January 1847, by—

*Humphry*, for the lessor of the plaintiff. —The lessor of the plaintiff contends, that under the devise in question, Thomas and Ann Knight took an estate tail, with a remainder in fee to the first John Goodden Knight, and that the plaintiff is entitled to the premises as heir of that party; or if this view be incorrect, then that the lessor of the plaintiff is entitled by purchase as the heir of T. and A. Knight. But for the words “their heirs and assigns,” there could be no doubt that the limitation to the next heir of T. and A. Knight would create an estate tail. In *Nanfan v. Legh* (1) a devise to J. H. “as soon as he should attain twenty-one, and to his heirs lawfully begotten for ever,” was held to give an estate tail. In *Burley's case*, cited in *King v. Melling* (2), “a devise to A. for life, remainder to the next heir male; and for default of such heir male, then to remain,” was held by Hale, C.J. to be an estate tail. In the course of his judgment, the Chief Justice referred to *Bisfield's case* (3), which was the case of a devise to A, and if he dies, not having a son, then to remain to the heirs of the testator. The word “son” was there taken to be used as *nomen collectivum*, and the devise was held to be an entail. *Archer's case* (4) is also in point. In a will, where

the intention of the testator is to be regarded, the words “heir male,” or “heir lawfully begotten,” are words of limitation, and create an estate tail. It is also to be observed that the devise in this case is to the heir of T. and A. Knight. The party must therefore be the heir of both, which implies that he must be the heir of their body—*Roe d. Nightingale v. Quartley* (5). Secondly, if the words “next heir” are regarded as words of purchase, the lessor of the plaintiff answers to the description in the will. The word “heir” does not mean “son” or “daughter,” unless the testator manifestly intended it to have that meaning. Here the testatrix intended survivorship to be essential to the vesting of the estate. If the devisee took an estate tail, and died during the life of his parents, that estate would determine—*Brownsword v. Edwards* (6). The testatrix intended that the party who should take the estate should be the surviving child, or his representative—*Archer's case*, *Willis v. Hiscox* (7), *Attorney General v. Malkin* (8), *Jesson v. Wright* (9), and *Jarman on Wills*, vol. 2, p. 232, are in point.

[He then argued the question arising under the Inclosure Act.]

*Malins*, for the defendants. —All the general doctrines, stated on the other side, may be conceded without affecting the title of the defendants to succeed in this case. The meaning of the testatrix is plain. She gives the estate to her nephew J. G. Knight, his heirs and assigns for ever. Under those words, it is clear he would have taken the fee. Then follow the words—that in case the said J. G. Knight should not survive his parents, and should die without an heir, the estate is devised to the next heir of T. and A. Knight, their heirs and assigns for ever. The meaning of this is, that the estate is to go over by way of executory devise in the event of J. G. Knight dying in the lifetime of his parents, and without heir lawfully begotten. Here the gift did take effect by way of executory devise—*Pells v. Brown* (10), *Doe d. Barnfield v.*

(5) 1 Term Rep. 630.

(6) 2 Ves. sen. 243.

(7) 4 Myl. & Cr. 197.

(8) 2 Phillips, 64; s. c. 16 Law J. Rep. (Chanc. 69).

(9) 2 Bligh, 1.

(10) Cro. Jac. 590.

(1) 7 Taunt. 85.

(2) 1 Ventr. 225, 230.

(3) Ibid. 231.

(4) 1 Rep. 66.

*Wellon* (11). Under these circumstances, J. G. Knight could not have taken an estate tail—*Toovey v. Bassett* (12), *Frogmorton v. Holyday* (13). To whom then did the testatrix intend the estate to pass by the words “next heir”? It is plain she used the word “heir” in its popular sense, and intended the estate to go to the next child or son of A. Knight—to the person who should answer the description of heir apparent; that is the second child, if there were one. In one sense the lessor of the plaintiff fulfils the description of heir of the tenant for life, but he is not the “next heir” within the meaning of the will of the testatrix. All the authorities on the subject are collected in 2 *Jarman on Wills*, p. 13. The following cases are also in point: *James v. Richardson* (14), *Burchett v. Durdant* (15), *Lord Beaulieu v. Earl of Cardigan* (16), *Darbi-son d. Long v. Beaumont* (17), *Goodright v. White* (18), *Chambers v. Taylor* (19), *Carne v. Roch* (20), *Loddington v. Kime* (21), *Carter v. Barnadiston* (22), *Lees v. Mosley* (23), *Doe v. Parratt* (24), *Doe d. Hiscocks v. Hiscocks* (25), and *Doe d. Bosnall v. Harvey* (26).—[He was then about to argue the point relating to the inclosure, when the Court rose.]

On the 29th of January, to which day the case stood adjourned,—

PARKE, B. said,—the Court are all agreed as to that part of the case which relates to the construction of the will. We think that the “next heir” means the person who should fill the character of true heir of T. and A. Knight; and therefore that the executory devise over took effect only on the death of T. Knight, the surviving de-

viser for life, when the estate vested in the lessor of the plaintiff, who then filled the character of heir of T. and A. Knight. With respect to the rest of the case, it is very desirable that it should be inquired into out of court.

The case was, therefore, postponed; but the parties having made no arrangement, the argument was now resumed, and the Court gave—

*Judgment for the lessor of the plaintiff.*

1848. }  
April 29. } *In re GRIMBLY v. AYKROYD.\**

*Prohibition—County Court—Small Debts Act, 9 & 10 Vict. c. 95. ss. 58, 63.—“Cause of Action,” Meaning of—Splitting Demands.*

The 63rd section of the *Small Debts Act, 9 & 10 Vict. c. 95*, enacts, “That it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said courts”:—*Held*, that the term “cause of action” meant cause of one action, and was not limited to an action on one separate contract; that that definition, however, did not embrace all contracts executed, however unconnected and dissimilar in character, which could be included in one indebitatus count; but applied certainly to the cases of tradesmen’s bills, in which one item was connected with another, in the sense that the dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, and form an entire demand.

*Quære—Whether the 63rd section applies to all debts which can be comprised in one description in one count, ex. gr. for “goods sold.”*

*Certain alleged agents of the defendant had given to several persons tickets for goods, which goods were to be supplied by the plaintiff, and the latter had brought 228 actions in the county court against the defendant, in respect thereof, upon claims none of which exceeded 5l., and*

\* Decided in Easter term, but published early on account of its general utility.

- (11) 2 Bos. & Pul. 324.
- (12) 10 East, 460.
- (13) 3 Burr. 1618.
- (14) T. Jones, 99.
- (15) 2 Ventr. 311.
- (16) Ambl. 533.
- (17) 1 P. Wms. 229.
- (18) 2 Wm. Black. 1010.
- (19) 2 Myl. & Cr. 376; s. c. 6 Law J. Rep. (N.S.) Banc. 193.
- (20) 7 Bing. 226; s. c. 9 Law J. Rep. C.P. 19.
- (21) 1 Salk. 224.
- (22) 1 P. Wms. 505.
- (23) 1 You. & Col. 589; s. c. 5 Law J. Rep. (N.S.) Exch. Eq. 78.
- (24) 5 Term Rep. 652.
- (25) 5 Mee. & Wels. 363; s. c. 9 Law J. Rep. (N.S.) Exch. 27.
- (26) 4 B. & C. 610; s. c. 4 Law J. Rep. K.B. 18.

*many fell short of 20s., the whole amounting to 303l. 19s.—The Court granted a prohibition.*

*Quære—Whether a prohibition would have been granted if the whole of the claims had amounted to 20l. only, and the items had been separated and sued for in the county court by separate plaints.*

This was a rule calling upon the Judge of the county court of Worcestershire and Thomas Grimby to shew cause why a writ of prohibition should not issue, to prohibit the said Court from further proceeding in the plaints mentioned in the affidavits.

Simeon Aykroyd, the party making the present application, was a contractor with the Oxford, Worcester, and Wolverhampton Railway Company, for constructing a certain portion of that railway; and in that capacity had engaged one Bugbird and others, as sub-contractors, to make bricks for him, and to do other work upon the railway. The sub-contractors were in the habit of paying their men, from time to time, partly in cash, and partly by means of tickets for goods signed by them, and which goods were to be supplied by T. Grimby, who kept a grocer's shop in the neighbourhood of the railway. The following is the form of one of the tickets, the others being similar in substance:—

"Micheton Hill. July 10, 1847.

"Mr. Grimby.—Let the bearer, Thomas Yeates, have goods to the amount of 20s.

(Signed) "Thomas Bugbird."

Of these tickets 3000 had been presented to Mr. Grimby, and goods supplied in respect of them. On the 17th of September the defendant Aykroyd was served with 228 summonses from the Worcestershire County Court, at the suit of Grimby, in respect of the above-mentioned goods. The aggregate of the sums claimed by the summonses amounted to 303l. 19s., one claim being for a sum amounting to 5l., and many for sums less than 20s. Mr. Aykroyd, in his affidavit, denied his liability to these demands, alleging that he never gave the orders, or authorized any person to give them; or that if he did give them, he was not primarily liable, but only as on a guarantee, and that the order was not in writing.

*Whitehurst and Pigott* shewed cause in

Hilary term (Jan. 29).—The plaintiff in the county court was at liberty to issue the summonses in question, as each summons related to a separate and distinct cause of action within the meaning of the Small Debts Act, 9 & 10 Vict. c. 95. ss. 58, 63. The question turns upon the construction to be given to those sections. Section 58. enacts, "that all pleas of personal actions, where the debt or damage claimed is not more than 20l., whether in balance of account or otherwise, may be holden in the county court without writ." Section 63. enacts, "That it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said courts; but any plaintiff having cause of action for more than 20l., for which a plaint might be entered under this act if not for more than 20l., may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20l.; and the judgment of the Court, upon such plaint, shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." Here the orders were separate and distinct, being in writing, and having been given on various days to different individuals. Each order must, therefore, be considered as constituting a separate cause of action. The case of *The King v. the Sheriff of Herefordshire* (1) is in point. There the defendant became indebted to the plaintiff in a sum not exceeding 40s., for the carriage of a parcel; and in a month afterwards incurred another debt to the same party, not exceeding 40s., for the carriage of a second parcel. The plaintiff brought two actions in the county court. The Court held that the causes of action were distinct, and that the plaintiff was entitled to sue separately for each demand, and a prohibition was refused. [POLLOCK, C.B.—In that case the rule was refused. The decision, therefore, does not seem entitled to the same weight as if it had been fully discussed, and deliberately determined.]

*Girling v. Alders* (2) will be relied on by the other side; it was cited in *The King v. the Sheriff of Herefordshire*, and is to

(1) 1 B. & Ad. 672.

(2) 1 Ventr. 73.

this effect: "In a prohibition to the Court of the honour of Eye, the case was, one contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40s.; and he levied divers plaints thereupon in the said court; wherefore the Court here granted a prohibition, because, though they be several contracts, yet forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued here, and not put the defendant to an unnecessary vexation; no more than he can split an entire debt into divers, to give the inferior Court jurisdiction, *in fraudem legis*." Another case, *Anon.* (3), will also be relied on by the other side. The report is to this effect: "If there be several contracts between A. and B, at several times, for several sums, each sum under 40s., and they do all amount to a sum sufficient to entitle the superior court, they shall be there put in suit, and not in a court which is not of record; and so it was resolved, in the case of *The Savoy Court*, and *Staundforde*, 24 C. 2. Also it was said, that if a man at divers times steals things all which amount to above 12d., it is felony capital."

Suppose Grimbley to have brought an action for a sum under 40s., and Aykroyd to have pleaded to the jurisdiction, in what manner could he have shaped his plea? He must have pleaded that although true it was that he owed Grimbley 40s., yet that in addition he owed him 50l. on other contracts. Surely that would have been a bad plea. In *Bac. Abr.* 'Prohibition,' K, it is said, "If there be one entire contract above 40s., and a man sue for it in a court baron, severing it into divers small sums under 40s., a prohibition shall be granted, because this is done to defraud the Court of the King." In *Fitzher. Nat. Brev.* p. 46, it is said, "If a man sue another in the county court for debt on chattels which do amount to the sum of 40s., then the party shall have a prohibition, &c. \* \* And so if the executor sueth in the county or in a court baron, for a debt of five marks by divers plaints, whereas the debt is upon a contract or upon an obligation, now the defendant may shew the same, and plead unto the jurisdiction of the Court, or he may have a

writ of prohibition directed unto them that they do surcease," &c. Mr. Udall, in his work on the County Court Act, 3rd edition, p. 97, refers to the Irish Civil Bill Act, 36 Geo. 3. c. 25. s. 8, which enacts, that "no cause of action still subsisting, and in the whole amounting to a sum beyond such sum as is made according to the nature of the case recoverable by force of this act, shall be split or divided so as to make the ground of two or more different actions in order to bring such cases within the jurisdiction created by this act." The case of *Hamblin v. Hamblin*, which was decided under that act of parliament, and referred to by Mr. Udall, as being reported in Mr. Napier's *Digest*, was this:—A. had lent B. a sum of money, and some time afterwards another sum, and it was held that A. might sue for them separately. *Neale v. Ellis* (4) is in point. There the Brighton Court of Requests Act provided that it should not be lawful for any plaintiff to divide any cause of action into two or more suits, for the purpose of bringing the same within the jurisdiction of the Court; but that any plaintiff having a cause of action above the value of 15l., might sue for 15l. and abandon the excess. It was held that a plaintiff having demands for the price of a horse, for goods sold and delivered, and for rent, against the defendant, was entitled, after having sued for and recovered 15l., in respect of the horse, by plaint in the county court, to maintain his action in the superior court for the residue of his claim; for that the causes of action were distinct, and that there had been no division of them for the purpose of bringing them within the jurisdiction of the Court, or any abandonment of the excess over the 15l. recovered in that court.

[ALDERSON, B. referred to the interpretation clause, s. 142.]

*Martin* and *H. Hill*, in support of the rule.—The rule must be made absolute. The plaintiff in the county court has been guilty of a gross abuse of the process of the inferior court. As the subject-matters of his claims were capable of being united in one action, he ought to have brought his action in one of the superior courts. It

(3) 1 Ventr. 65.

(4) 1 Dowl. & L. P.C. 163; s.c. 12 Law J. Rep. (N.S.) Q.B. 329.



would be monstrous if a butcher, who is in the habit of supplying meat to his customers daily, were at liberty to issue a separate plaint in the county court in respect of each day's supply. Where articles of a similar description are furnished by a tradesman for a great length of time, his demands in respect thereof are blended into one debt, and constitute one cause of action within the meaning of the statute in question.

[PARKE, B.—There is a distinction between one entire contract and one cause of action—*Hesketh v. Fawcett* (5).]

A debt may consist of more items than one—*Shaddick v. Bennett* (6). This view of the case is supported by the 58th section of the act of parliament, which gives the county court jurisdiction in "all pleas of personal action where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise." It is probable that these latter words were inserted to prevent the recurrence of the questions which were raised by *Clark v. Askew* (7) and *Porter v. Philpot* (8). If the interpretation of the 63rd section, insisted upon by the other side, be correct, that section is unnecessary; for a party who sues for a portion of his demand, and omits to include the whole of it, is not entitled to recover the difference in another action—*Dunn v. Murray* (9). The case of *Hamblin v. Hamblin* is not satisfactory, as the Court appear to have been governed solely by the case of *The King v. the Sheriff of Herefordshire*.—They referred to *Williams v. Lord Bagot* (10).

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

POLLOCK, C.B.—In this case a prohibition to the Judge of the County Court of Worcestershire was moved for; a rule *nisi* granted; and cause shewn in the last term, before my Brothers Parke, Alderson, Platt, and myself. It appeared from the affidavit, that on the 17th of September last, 228

summonses were issued out of the county court, at the suit of the plaintiff Grimby against the defendant, for sums amounting in the aggregate to 303*l.* 19*s.*; one claim only amounting to the sum of 5*l.*, and many to less than 20*s.* These demands arose out of an order alleged to have been given by the defendant, a railway contractor, to the plaintiff, a grocer, to supply with goods the workmen employed by certain persons, who were sub-contractors with the defendant. Tickets appear to have been given by the sub-contractors, and signed by them, each for a certain amount, and those tickets amounted to 3,000; but actions were brought not for each supply, but apparently each for the amount of all the supplies to one workman. The defendant's affidavit denies all liability to these demands, on the ground that he never gave the order, or if he did that he was not primarily liable, but only as on a guarantee, and the order was not in writing. But for the purpose of the present decision, this is wholly immaterial, the question being whether, on the assumption that he was indebted, the county court had jurisdiction. This depends upon the true construction of the Small Debts Act, 9 & 10 Vict. c. 95, particularly section 63, and not upon the old rule of the common law, as to the jurisdiction of the county court. It will be proper, however, to consider what that rule was, in order to give a construction to the County Court Act. At common law, the county court held no plea of debt or damages to the value of 40*s.* or above—4 *Inst.* 266; "Placita de catallis debita, &c., quæ summam 40*s.* attingunt vel eum excedunt, sine brevi regis placitari non debent." 2 *Inst.* 302; and if an entire contract or debt of 40*s.* or upwards was severed into sums below 40*s.*, a prohibition was granted—*Roll. Abr.* 'Prohibition,' 317; and without saying that the debt arose in an entire contract, *Fitzherbert*, in his *Nat. Brev.* 46, lays it down, that if a man *do owe unto another man five marks*, and he sue several plaints for the same in the county court, or any other court (meaning, no doubt, the hundred court or court baron) against the debtor, he shall have prohibition thereof, and reverse the matter; and that it would defraud the King's court of its jurisdiction. This doctrine was applied to contracts made at different times between the same persons, for several sums.

(5) 11 Mee. & Wels. 356; s. c. 12 Law J. Rep. (N.S.) Exch. 326.

(6) 4 B. & C. 769; s. c. 4 Law J. Rep. K.B. 38.

(7) 8 East, 28.

(8) 14 Ibid. 344.

(9) 9 B. & C. 780; s. c. 7 Law J. Rep. K.B. 320.

(10) 3 Ibid. 772; s. c. 2 Law J. Rep. K.B. 152.

each less than 40s., but put together amounting to more, in an *Anon. case*, in 1 *Ventris*, 65, and in *Girling v. Alders*, reported in 2 *Keb.* 617 by the name of *Girling v. Aldas*, which was for the price of different parcels of malt, sold at different times; "because, though they be several contracts, yet forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued in the court above, and not put the defendant to an unnecessary vexation, no more than he can split an entire debt into divers, to give the inferior court jurisdiction in *fraudem legis*." The reason there given is a very satisfactory one, for it would be extremely vexatious if a plaintiff, from whom goods had been purchased in small quantities, at small prices, at different times, and by distinct contracts, either payable immediately or on credit which had expired, instead of uniting all in one action, which he could do after the debts were all due, should divide them into several, and sue for each in a separate action in the county court, which would give no adequate relief by consolidating them, in the exercise of their equitable jurisdiction (if they had any), as a superior court would; for they could not unite them, so as in the aggregate to exceed or be equal to 40s. The extent to which that vexation might be carried, may be illustrated by the present case, in which it is sworn that there were 3,000 different tickets, and consequently 3,000 different items or separate contracts. It is true, indeed, that when each contract was due in cash, the creditor might, in the absence of any express or implied contract to the contrary, immediately sue for it; but when several debts had become due he could unite them in one count in debt, or simple contract in *indebitatus assumpsit*, as one entire debt, and there seems no good reason why he should not. In the subsequent case of *The King v. the Sheriff of Herefordshire*, the judgment of Lord Tenterden, that to bring a case within the rule of law which forbids splitting, the cause of action must be one and entire, is at variance with the law laid down in the above-cited authorities. The case itself may be distinguished, because there the debts were treated as being entirely distinct and separate from each other, the one having no connexion with the other; but in the case of a running

bill with a tradesman, the items are generally connected, the first contract being usually made with the understanding that if not paid for until after others have been made, it is to form part of the same debt, so that several items are to be united into one bill. But the result of the decision altogether is to render it impossible to rely on the authority of the former cases, which otherwise would have disposed of the present question, supposing it to be decided by the rule of the common law. The present case, however, does not depend upon these authorities, but on the construction of the recent act, 9 & 10 Vict. c. 95. By the 58th section the new Court has jurisdiction in all pleas of personal actions when the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise. This clause was probably introduced in consequence of the provisions in some of the Court of Requests Acts, that the act should not extend to any debt for the balance of an account originally exceeding a given sum: see *Porter v. Philpot*. Be that as it may, it cannot be doubted that the clause was meant to give jurisdiction, when the debt claimed consisted of various items, either together originally not exceeding 20*l.* at the time of the suit, or being reduced to that amount by payments, or in allowed set-off of other sums. We are next to consider the 63rd section, and the whole question turns upon the meaning of the term, "cause of action" in that section. It is provided, that it shall not be lawful to divide any cause of action, for the purpose of bringing two or more suits in any of the said courts; but any plaintiff having cause of action for more than 20*l.*, for which a plaint might be entered under this act, if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such causes of action, and entry of the judgment shall be made accordingly.

What then is the construction of the term "cause of action"? The term "debt or damage" is not used as it is in the passage above cited from 4*th Inst.* 266; but the more extensive term adopted is "cause of action." This term does not necessarily mean a cause of action on one single entire

contract, for there may be one cause of action on several debts, contracted at different times, and in by far the greater number of cases a count in *indebitatus assumpsit* or debt is founded on many distinct contracts, as was pointed out in the case of *Hesketh v. Fawcett*, and one count may be considered as one cause of action. To provide that one cause of action on one entire contract should not be divided would be unnecessary and surplusage; and though an argument that a clause in an act of parliament, if understood in one sense would be inoperative, in another operative, is not by any means a conclusive one, because it must be admitted that clauses are often introduced *ex abundanti cautela*; yet it is of some weight, and the probability is that the legislature in enacting that a cause of action should not be divided, meant a cause of action which but for the enactment would be divisible; and when it is considered to what abuses the narrower construction of this term would lead (which is strongly exemplified in the present case, in which 228 actions have been commenced, and 3,000 might have been brought), we think we may safely conclude that the term "cause of action" ought to be interpreted *cause of one action*, and not be limited to an action on one separate contract. But on the other hand, if the term is to comprise all debts that might be included in one count, debts for work and labour, goods sold, use and occupation, though totally unconnected with each other, which might be included in one *indebitatus* count, would be prevented from being divided under this clause; and if *indivisible*, and the creditor brought an action for any part, he would virtually abandon all the remainder by the operation of the latter part of the 63rd section. In such a case Mr. Justice Coleridge held, that a similar clause in the Brighton Court of Requests Act (3 & 4 Vict. c. x. s. 24.) did not apply; the demand there being for three distinct things, a house sold, for rent, and for goods sold, but he made a distinction between that case and one where a debtor has a bill running from day to day—*Neale v. Ellis*. In such a case, though each item of goods supplied or work done constitutes a separate contract, so that after the stipulated price becomes due, the tradesman could sue

for one item, yet the understanding is undoubtedly that it shall be united with other items and form one entire demand; and doubtless, if after several other items were added to the first, the tradesman were to bring separate actions for each as for a distinct debt, any superior court would deal with such a proceeding as vexatious. It appears then, that a great inconvenience would follow if the term "cause of action" were interpreted to mean cause of action on one separate contract, and also if the construction were to be, that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one *indebitatus* count, which, according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction, some restriction must be put on the latter; and we think that we ought to hold that the 63rd clause does apply (whether to all debts which could be comprised in one description in one count, as for "goods sold," or not, we need not now decide), but *at all events* to the case of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one entire demand. If that demand exceed 20*l.* it ceases to be within the jurisdiction of the County Court Act; and therefore, we think that on the facts disclosed in the affidavits before us, all the debts claimed fall within that description, the total greatly exceeding 20*l.*, and consequently they ought not to have been separated into different suits. Whether if the total had only amounted to 20*l.*, and the items then been separated and sued for by separate plaints, the total being within the jurisdiction of the county court, which then could have given adequate relief, the suits could have been prohibited, is a question which need not now be discussed. But when the total exceeds that amount, and justice cannot be done in the county court, we think that that court has no jurisdiction, and a prohibition ought to go.

*Rule absolute.*

1848. }  
May 9. } JONES v. BROWN.\*

*Attorney, Privilege of—County Court—  
9 & 10 Vict. c. 95. ss. 57. and 129.—Costs  
—Suggestion on the Roll.*

*An attorney may sue in the superior courts  
for a debt recoverable in the county court,  
and his right to costs in respect thereof is  
not affected by the 67th and 129th sections  
of the Small Debts Act, 9 & 10 Vict. c. 95.*

This was a rule calling upon the plaintiff to shew cause why a suggestion should not be entered on the roll, for the purpose of depriving him of costs under the provisions of the Small Debts Act, 9 & 10 Vict. c. 95 (1). It appeared from the affidavits,

\* Decided in Easter term, but published early on account of its general utility.

(1) The following sections are material:—

58th sect. "That all pleas of personal actions, where the debt or damage claimed is not more than 20*l*., whether on balance of account or otherwise, may be holden in the county court without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act: Provided always, that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

67th sect. "That no privilege, except as herein-after excepted, shall be allowed to any person to exempt him from the jurisdiction of any court holden under this act."

128th sect. "That all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells, or carries on his business at the time of the action brought, or where any officer of the county court shall be a party except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such superior court at the election of the party suing or proceeding, as if this act had not been passed."

129th sect. "That if any action shall be commenced after the passing of this act in any of Her Majesty's superior courts of record for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any

that the plaintiff was an attorney residing in London, and that the action was brought by him as the indorsee of a bill of exchange for 18*l*. 3*s*. against the defendant as the acceptor.

The defendant at the time of the commencement of the suit resided in the Old Kent Road, within the jurisdiction of the county court of Surrey, and within twenty miles of the plaintiff's residence, and the cause of action arose wholly within the jurisdiction of that court.

G. F. Pollock shewed cause.—There can be no doubt, that the privilege of an attorney *defendant* of being sued in the superior courts only, is taken away by the provisions of the Small Debts Act, 9 & 10 Vict. c. 95, in the cases to which that act applies: but the question here is whether that act has also taken away his privilege of suing as a *plaintiff* in the superior courts, or whether he is *bound* like the rest of the public to sue in the county court in certain

court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l*., if the said action is founded on contract, or less than 5*l*. if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court."

139th sect. "That if any person shall bring any suit in any of Her Majesty's superior courts of record in respect of any grievance committed by any clerk, bailiff, or officer of any court holden under this act, under colour or pretence of the process of the said court, and the jury upon the trial of the action shall not find greater damages for the plaintiff than the sum of 20*l*., no costs shall be awarded to the plaintiff in such action, unless the Judge shall certify in court upon the back of the record, that the action was fit to be brought in such superior court."

140th sect. "That nothing in this act contained shall be construed to alter or affect the rights or privileges of the Chancellor, Masters and Scholars of the Universities of Oxford or Cambridge respectively as by law possessed, or the jurisdiction of the courts of the Chancellors or Vice Chancellors of the said universities, as holden under the respective charters of the said universities, or otherwise."

141st sect. "That nothing in this act contained shall be construed to affect the courts of the lord warden, or of the vice warden of the stannaries of Cornwall; but this provision shall not be deemed to prevent the establishment of any court under this act within the said stannaries, or to limit or affect the jurisdiction of any court so established under this act."

cases, on pain of losing his costs. The point has already been solemnly decided in two cases that were argued in the Queen's Bench in Hilary term last, and determined on the 1st of May. The cases are *Lewis v. Hance* and *Jones v. Savage* (2). The decision in those cases is, that an attorney in a superior court suing for a debt recoverable in the county court is entitled to his full costs, his privilege when plaintiff not having been taken away by the 67th and 129th sections of the 9 & 10 Vict. c. 95. The words in the 67th section, "that no privilege except as hereinafter excepted shall be allowed to any person to exempt him from the jurisdiction of the county court," cannot apply to the case of a plaintiff, who cannot be considered in any sense to be exempt from the jurisdiction of a court, as it depends upon himself whether or not he will come within the jurisdiction of the county court. *Board v. Parker* (3) is in point. There by the 39 & 40 Geo. 3. c. 104. s. 10, (the London Court of Conscience Act,) it was enacted, "that no privilege shall be allowed to exempt any person from the jurisdiction of the said court of requests on account of his being an attorney or solicitor, or any other officer of any of the courts of law or equity at Westminster, or of any other court whatsoever; but that all attorneys, solicitors, and officers shall be subject to the several processes, orders, judgments and executions of the said court of requests, in the same manner as any other persons are subject to the same by the said recited acts and this act or any of them." In the construction of that section it was held that an attorney plaintiff was not compellable to sue in the inferior court on pain of losing his costs. After the passing of the Uniformity of Process Act, 2 Will. 4. c. 39, which enacts, that actions shall be commenced by writ of summons, it was contended that the privilege of the attorney was at an end; but it was held, that his privilege was not abolished, although he was compelled to sue by writ of summons—*Dyer v. Levy* (4). By the 23 Geo. 3. c. 33. s. 19, (the Middlesex County Courts Act), it is enacted, that in case any action of debt, or action upon

assumpsit shall be commenced or prosecuted after, &c. in any of His Majesty's courts of record at Westminster, and the defendant at the time of such action brought be liable to be summoned to the county court, and the jury upon the trial shall find damages under 40s., in such case no costs shall be awarded to the plaintiff, but the defendant shall be entitled to double costs of suit. Upon the construction of that act it was also held, that an attorney was not bound to sue in the county court—*Hussey v. Jordan* (5). The only privileges that are exempted by positive words from the jurisdiction of the county courts are those referred to in the 140th and the 141st sections, relating to the universities and the stanaries courts of Cornwall. He also referred to *Wright v. Skinner* (6), *Armington's case* (7), *Gardner v. Jessop* (8), *Silk v. Rennell* (9).—(He was then stopped by the Court.)

*Pearson*, in support of the rule.—The legislature intended by the County Courts Act to abolish all privilege. With respect to the late cases of *Lewis v. Hance* and *Jones v. Savage*, this Court will not be bound by that judgment, unless it coincides with their own opinion, as the present case cannot be taken to a court of error. The question turns upon the words of the 67th section, which may mean that no person shall be exempt from the jurisdiction of the county courts in respect of costs.

[*PARKE, B.*—That cannot be the meaning of the section. The inferior court has no jurisdiction as to costs. If an action is brought in the superior court, which ought to be brought in the court below, it is the superior and not the inferior court which deprives the party of costs.]

If attorneys are not compelled to sue in the county courts very serious consequences will ensue, as attorneys will be at liberty in such case to buy up small bills of exchange, and sue upon them in the superior courts for the mere purpose of costs.

*POLLOCK, C.B.*—This rule must be discharged. A long series of authorities has

(5) Cited in the note to *Wiltshire v. Lloyd*. 1 Doug. 382.

(6) 1 Mee. & Wels. 144; s. c. 5 Law J. Rep. (N.S.) Exch. 89.

(7) Palm. 403.

(8) 2 Wils. 42.

(9) 3 Burr. 1583.

(2) *Ante*, Q.B.

(3) 7 East. 47.

(4) 4 Dowl. P.C. 630.

decided that the privilege of an attorney to sue in the superior courts is not taken away by words similar to those used in the present case. Now, it is not an inconvenient mode of construing statutes to presume that the legislature were acquainted with the state of the law at the time they passed the present act of parliament; and if the state of the law was such that words similar to those in the present County Courts Act were insufficient to take away the privilege of the attorney, why are we to suppose that more was meant by the legislature by the new than by the old statute? We should not be justified in overruling a long series of cases.

PARKE, B., ROLFE, B. and PLATT, B. concurred.

G. F. Pollock then contended, that the rule having been moved with costs, ought to be discharged with costs, there being a rule of the courts to that effect.

[PARKE, B.—The rule that has been referred to relates to motions for irregularity (10).]

POLLOCK, C.B.—The rule will be discharged with costs, as it has been moved for in the face of direct authorities.

ROLFE, B.—That is a more satisfactory ground for discharging the rule with costs, than that the defendant has asked what he is not entitled to.

*Rule discharged, with costs.*

1847. }  
May 1. } IVIMEY v. MARKS.\*

*Attorney and Solicitor—Bill of Costs, Form of, upon Delivery under 6 & 7 Vict. c. 73. s. 37.—Court in which Business done.*

*In an action for the recovery of fees, &c., for business done by an attorney and solicitor,*

(10) The rule referred to is the 37 Geo. 3. K.B., 7 Term Rep. 82: "It is ordered, that in all cases where a rule is obtained to shew cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally without any special direction upon the matter of costs, it is understood to be discharged with costs; and the latter rule must be drawn up accordingly." And see *Hayward v. Ribbans*, 3 East, 313; *Tilley v. Henly*, 1 Chitt. Rep. 136; *Anonymous*, *ibid.* 398, note; *The King v. the Sheriff of Middlesex*, 1 Cr. & M. 482; s. c. 2 Law J. Rep. (N.S.) Esch. 234.

\* Decided in Easter term, 1847.

*it appeared that the bill of costs delivered under the provisions of the 6 & 7 Vict. c. 73. s. 37, contained charges for business done in a Chancery suit, headed Churchill ats. Marks, and also charges relating to a suit between the defendant and one E, which from the nature of the items must have been in one of the superior courts of law; but in which it did not at all appear. It was, however, proved that for such items as the bill comprised the charges were the same in all the superior courts of law:—Held, that there was no delivery of a sufficient bill of such fees, &c., under the above statute; and the plaintiff was nonsuited. The bill should have stated in what court the common law business was done.*

Debt for work and labour as an attorney and solicitor, and for fees due and payable in respect thereof. There were also counts for money paid, and for money due on an account stated.

The defendant pleaded to the first and second counts, that the plaintiff was an attorney of her Majesty's Court of Exchequer at Westminster, and a solicitor of her Majesty's High Court of Chancery; and that the said work was business done by him as an attorney and solicitor, and the said materials were provided by the plaintiff as aforesaid as an attorney and solicitor, in and about the said work and business, and not otherwise; and that the said money in the said first count mentioned consisted of fees and charges for the said business so done, &c.; and that the said money in the second count mentioned to have been paid was so paid by the plaintiff as an attorney and solicitor in disbursements for, in, and about the said work and business, &c.: that no bill of the said fees, charges, and disbursements, &c., subscribed with the proper hand of the plaintiff, was one calendar month or at any time before the commencement of this suit delivered to the defendant, or sent by the post to or left for the defendant at his counting-house, office of business, dwelling-house, or last-known place of abode; nor was any bill of the said fees, charges, and disbursements, &c., one calendar month or at any other time before the commencement of this suit delivered unto the defendant, inclosed in or accompanied by a letter, subscribed with the proper hand of the plaintiff, referring to

such bill, as required by the statute in such case made and provided, &c.

Replication, that a bill of the said fees, &c. was, one calendar month before the commencement of this suit, to wit, on &c., duly left for the defendant at his office of business, inclosed in a letter, subscribed with the proper hand of the plaintiff, to wit, with the plaintiff's own name, referring to such bill, in manner and form as required by the said statute.

The cause was tried, before Platt, B., when it appeared that the action was brought to recover the sum of 88*l.* 15*s.* 8*d.*, charges, &c. in respect of business done by the plaintiff as an attorney and solicitor for the defendant. A bill thereof, inclosed in a letter, signed by the plaintiff, was delivered at the defendant's residence. It contained charges for business done in a Chancery suit, headed *Churchill ats. Marks* (1), and also charges for business done in a suit between the defendant and one Erskine; but the bill did not specify, nor was there anything in it to shew, in what court. It was, however, manifest from the items charged for (term fees, summonses for time to plead, attending summonses, Judge's clerk's fees, &c.) that it must have been in one of the superior courts of law; and it was proved that the charges for all those items in the bill were the same in each of the superior courts of law. The defendant contended that the plaintiff ought to be nonsuited, inasmuch as he had delivered no such bill of charges as under the 6 & 7 Vict. c. 73. s. 37. was necessary before he was entitled to recover. Under the direction of the learned Judge, the plaintiff had a verdict, with leave reserved to the defendant to move to enter a nonsuit.

*Peacock*, in Michaelmas term, 1846, obtained a rule accordingly.

*Farrer* now shewed cause.—This case depends on the construction of the 6 & 7 Vict. c. 73. s. 37. (2), which was under the consideration of the Court in the case of

*Engleheart v. Moore* (3). There this Court held that an attorney's bill must give, in some part of it, substantial information in what court the business was done; the reason of which is stated by Alderson, B., who says, "With the view to the taxation and payment of the bill, if the client denied it, the legislature intended that the client should be informed when each item of the business was done, and that the attorney should hold his hand for a month after the

such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last-known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor, (or, in the case of a partnership, by any of the partners, either with his own name, or with the name or style of such partnership,) or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter, subscribed in like manner, referring to such bill; and upon the application of the party chargeable by such bill within such month it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor, or the Master of the Rolls, and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any Judge of either of them, and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court." It then provides that no such reference shall be made after verdict obtained, or a writ of inquiry executed, or after the expiration of twelve months after such bill shall have been delivered, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for such reference shall be made; and that if on taxation more than one-sixth of the bill be taken off, the costs of taxation shall be paid by the attorney, and, if less than one-sixth, then by the party chargeable with the bill. It also empowers a "Judge of any of the superior courts of law or equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, &c., although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the Judge that there is probable cause for believing that such party is about to quit England."

(3) 15 Mee. & Wels. 548; s. c. 15 Law J. Rep. (n.s.) Exch. 312.

(1) Erroneously for *Marks ats. Churchill*, and on this point there was leave to reduce the verdict, if the Court should think the description insufficient.

(2) Which enacts, "that from and after the passing of that Act, no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor until the expiration of one month after

delivery of the bill, for the express purpose of giving the client a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable. For this purpose it is very material that the bill should shew in what court the business was done, because the fees are different in different courts." The reason of that case does not apply here, because the charges for all the common law items in this bill would be the same in each of the courts. At all events the plaintiff is entitled to recover for that part of the bill which relates to the Chancery suit. With respect to that portion of the business done the statute has been complied with, and for that the plaintiff may recover—*Drew v. Clifford* (4), and *Waller v. Lacy* (5). Under the 42nd section of the statute of Victoria the defendant might have referred the bill for taxation to the taxing officer of the Court of Chancery, who would have handed it over to an officer of one of the courts of law for the taxation of those charges which were for business done in one of them.

[PARKE, B.—The reason given by my Brother Alderson in *Engleheart v. Moore* is not the only reason for requiring the name of the court in which the business is done to be mentioned. In the case of *Martindale v. Falkner* (6), Tindal, C. J. said, "I agree entirely with the decision of the Court of Queen's Bench in *Lewis v. Primrose* (7), that although the statute (the 2 Geo. 2. c. 23. s. 23.) does not in express terms require the court and cause to be mentioned, yet it follows from the general scope and object of the clause that such information is necessary, in order to enable the client to ascertain to what Court or Judge he is to apply for taxation of the bill." My Brother Maule differed from the other Judges as to the sufficiency of the particular bill delivered in that case; he put a more liberal construction on the statute, on the ground that the delivery of an attorney's bill is required for the information of ignorant persons, and not for those skilled in the law and practice of the courts. I do not see why the same reason which applied to the repealed statute

should not apply to the statute now in force, and certainly the most skilful person could not tell from this bill in which court the business was done.]

*Peacock*, in support of the rule, was directed to argue only the question of the plaintiff's right to recover for that part of the bill which related to the suit in Chancery. —This is an entire bill, and if bad in part it is bad altogether; otherwise how can an attorney advise as to whether the bill should be taxed or not? because unless one-sixth of the whole were taxed off, the party would have to pay the costs of taxation.—(He was then stopped.)

POLLOCK, C.B.—With respect to the plaintiff's right to recover for that portion of the bill which contains charges for business done in Chancery, the case of *Waller v. Lacy*, relied on by the plaintiff's counsel, is not now applicable, for there is this difference between the statute on which that case was decided and the present—that under the present statute every part of an attorney's bill is taxable, whether it be for business done in or out of court. Moreover, the point was not decided in *Waller v. Lacy*; for it was given up by the defendant's counsel on the case of *Drew v. Clifford* being cited. In that case Lord Tenterden did not decide the point, but only directed the jury to find for the plaintiff, and gave the defendant leave to move upon it. In the case of *Hill v. Humphreys* (8), it was held, that if an attorney introduce into his bill certain items connected with his professional capacity, though not immediately within the words of the 2 Geo. 2. c. 23, and in an action on the bill fail because it was not properly delivered according to the statute, he must fail altogether. I think that case was correctly decided, and for good reasons. If an attorney in his bill charges for business done in a court of law, and does not distinctly state in what court, it is the same as if no court at all were stated and he cannot recover, although the bill with respect to charges therein for business done in Chancery is sufficient. The whole is to be taxed. The present bill is not such a bill as an attorney could properly advise his client upon as to the propriety of having it taxed; and therefore I think that under the provision of this statute

(4) 2 Car. & Pay. 69.

(5) 1 Man. & Gr. 54; s. c. 9 Law J. Rep. (n.s.) C.P. 217.

(6) 15 Law J. Rep. (n.s.) C.P. 91.

(7) 6 Q.B. Rep. 265; s. c. 13 Law J. Rep. (n.s.) Q.B. 269.

(8) 2 Bos. & Pul. 348.



it is not sufficient, and the rule must be absolute.

PARKE, B., ROLFE, B. and PLATT, B. concurred.

*Rule absolute.*

1848. }  
Jan. 31. } *In re GWYNNE v. KNIGHT.*

*Prohibition—County Court—Small Debts Act, 9 & 10 Vict. c. 95. s. 58.—Corporeal or Incorporeal Hereditament—Local Act, Construction of.*

*A local act of parliament empowered trustees to build a church and to make rates on all houses in the parish, one half on the landlords, the other half on the tenants. It was also enacted, that the tenants should first pay the whole rate and deduct a moiety out of the rent, and that every landlord should allow of such deduction "notwithstanding any agreement to the contrary." After the passing of this act certain premises in the parish were leased, the tenant covenanting to pay all rates and taxes. The landlord having refused to deduct half the church-rate from the rent, on the ground that the act extended only to agreements in existence at the time of its passing, the plaintiff served him with a plaint from the county court. The Court refused a writ of prohibition, "the title to any corporeal or incorporeal hereditaments" within the Small Debts Act, 9 & 10 Vict. c. 95. s. 58, not being in question; and semble, per Parke, B.,—that the local act did not apply to agreements entered into subsequently to the time of its passing.*

*H. Hill* moved for a prohibition to be directed to a Judge of a county court, established by the 9 & 10 Vict. c. 95, to restrain him from proceeding further in a suit of *Gwynne v. Knight*, which had been brought in that court.—The question turns upon the construction of the 39th and 40th sections of a local and personal act, 57 Geo. 3. c. lxxii. for rebuilding, &c. the church and churchyard of St. Paul's, Shadwell; and also upon the meaning of the 58th section of the Small Debts Act. The 39th section of the local act empowers certain trustees to make rates on all houses, &c. in the parish rateable to the poor, one half on the landlords, and the other half on the tenants. By the 40th section, every tenant shall first

pay the whole rate, and then be entitled to deduct from his rent one moiety of such rate, and every landlord shall allow of such deduction accordingly, *notwithstanding any agreement to the contrary.* Subsequently to the passing of this statute a lease of premises within the parish was granted, the tenant covenanting to pay all parliamentary and other taxes and rates. The tenant paid the full amount of rent, and also church-rates for a year and a half; but the landlord, contending that the clause in the statute, "notwithstanding any agreement to the contrary," applied only to agreements made before the passing of the act, refused to deduct the amount of church-rates from the rent. The tenant thereupon issued a plaint in the county court against the landlord for the recovery of 7l. 10s., being half the amount of the church-rate. On the case being called on for hearing, the Judge of the county court expressed a doubt whether the matter came within his jurisdiction, and desired the parties to take the opinion of one of the superior courts upon the point. The question arises on the 58th section of the Small Debts Act, "Provided always, that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments" shall be in question. The Judge doubted whether under these words the landlord's title to his rent did not come in question.

[PARKE, B.—The reasonable construction of the local act is, that it refers to agreements subsisting at the time when it passed. Occupiers of houses and landlords could not foresee that an act of parliament would impose upon the parish the expense of building a church. But what is there in the act to prevent a tenant after the passing of the act from agreeing with his landlord to pay church-rates?]

POLLOCK, C.B.—I think the defendant in this case is not entitled to a prohibition.

PARKE, B.—The title to any corporeal or incorporeal hereditament cannot come in question in this case. The only point is how the landlord's rent is to be paid? His right to it is admitted. There is no ground for a prohibition.

ALDERSON, B. and PLATT, B. concurred.  
*Rule refused.*

1847. }  
June 8. } ROUSFIELD v. EDGE.\*

*Pleading—Issuable Plea—Irregularity—Judgment.*

*Declaration containing a count by indorsee against indorser of a bill of exchange and a count on an account stated. Plea, that the defendant did not indorse the said bill in the said first count mentioned, in manner and form as in the said first count mentioned. The defendant being under terms to plead issuably, the plaintiff signed judgment on the ground that the plea being pleaded to the whole declaration, and containing no answer to the last count, it was not an issuable plea:—Held, that the judgment was irregular.*

*A plea is not non-issuable which is only bad on special demurrer.*

**Assumpsit.** The first count of the declaration was by an indorsee against the indorser of a bill of exchange. There was also a count on an account stated.

**Plea—**And the said defendant by his attorney says that he did not indorse the said bill in the said first count mentioned, in manner and form as in the said first count mentioned. And as to the last count of the said declaration, the defendant says that he did not promise in manner and form as in that count alleged, &c.

The defendant being under terms to plead issuably, the plaintiff signed judgment on the ground that the first plea being pleaded to the whole declaration, and containing no answer to the second count, it was not issuable. A rule having been obtained to set aside the judgment for irregularity,—

**Prentice** now shewed cause.—The first plea should have been confined in terms to the first count; and not being so, it must be taken as pleaded to the whole. In *Putney v. Swan* (1), the declaration contained two counts, one on a bill, and the other on an account stated. The defendant pleaded that he did not accept the bill, but took no notice of the account stated. Parke, B. there says, “as this plea does not profess to be confined to one particular count, it must therefore be taken to be intended as an answer to the whole declaration.”

\* Decided in Trinity term.

(1) 2 Mee. & Wels. 72; s.c. 6 Law J. Rep. (N.S.) Exch. 20.

tion.” Then the first plea, being no answer to the last count, is bad on special demurrer—*Parratt v. Goddard* (2). When a defendant is under terms to plead issuably, he is bound not to invite a demurrer—*Hughes v. Poole* (3). Where a defendant, being under terms of pleading issuably, pleaded *nunquam indebitatus* to a declaration containing counts on bills of exchange, as well as for goods sold and delivered, it was held that the plaintiff might treat the plea as a nullity and sign judgment—*Sewell v. Dale* (4).

*The Attorney General and Thompson*, in support of the rule.—The conclusion of the first plea, “in manner and form as in the first count mentioned,” sufficiently shews that it is confined to the first count. *Vere v. Goldsborough* (5) is an express authority to shew that the plaintiff was not entitled to sign judgment; and that his course was to demur specially, if he did not join issue—*Worley v. Harrison* (6).

**POLLOCK, C.B.**—How can it be said that a plea which is only bad on special demurrer, is not an issuable plea? The rule must be made absolute.

*Rule absolute.*

1847. }  
July 3. } WALLIS v. SWINBURNE.\*

*Bankruptcy—Co-surety—6 Geo. 4. c. 16. s. 52.—Contribution.*

*The plaintiff, the defendant and another party were co-sureties for one A, by a joint and several promissory note payable on demand. The defendant afterwards became a bankrupt, at which time the plaintiff had not paid his share of the debt, but subsequently he had paid more than his proportion:—Held, in an action for contribution, that the bankruptcy of the defendant was no answer, as the case was not within the 52nd section of 6 Geo. 4. c. 16, the plaintiff not being a “person liable for” the bankrupt’s debt within the meaning of that section.*

(2) 9 Mee. & Wels. 458; s.c. 11 Law J. Rep. (N.S.) Exch. 217.

(3) 6 Moo. N.R. 959.

(4) 8 Dowl. P.C. 309.

(5) 1 Bing. N.C. 353; s.c. 4 Law J. Rep. (N.S.) C.P. 65.

(6) 3 Ad. & El. 669; s.c. 5 Law J. Rep. (N.S.) K.B. 17.

\* Decided in Trinity term.

Debt, for money paid, interest, and on an account stated.

Pleas — First, never indebted; second, the defendant's bankruptcy.

At the trial, before Parke, B., at the Warwickshire Spring Assizes, 1847, the facts were admitted to be, that the plaintiff, the defendant, and one Joseph Baker, had signed, as co-sureties for one John Antrobus, the promissory note following :—

" Birmingham, April 13, 1841.

" £200.—On demand we severally and jointly promise to pay to Mr. Charles Truman, or order, the sum of 200*l.* for value received.

(Signed) " John Antrobus.  
" Edward Swinburne.  
" William Wallis.  
" Joseph Baker."

Antrobus, the principal, became bankrupt on the 26th of November 1842, and the defendant Swinburne was bankrupt in August 1842, and obtained his certificate on the 12th of April 1843. In discharge of the note the plaintiff had paid, previously to the bankruptcy, the sum of 20*l.*, being less than his share of the debt; and subsequently to his bankruptcy had paid sums amounting, with his previous payments, to more than his proportion. The action was brought by him to recover one-third of the amount so paid.

It was contended, on the part of the defendant, that he was, under these circumstances, discharged by the 6 Geo. 4. c. 16. s. 52. That section enacts that "any person who, at the issuing of the commission, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof, in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission, which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former

dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed." The learned Judge was of opinion that the plaintiff was entitled to recover, and accordingly directed the jury to find a verdict for him, reserving leave to the defendant to move to enter a nonsuit.

A rule having been obtained by *Waddington*,—

*Mellor* shewed cause (June 18).—This case is not within the 6 Geo. 4. c. 16. s. 52. Here the plaintiff, not having paid more than his share before the bankruptcy of the defendant, could have no cause of action against him at the time of the bankruptcy, as no liability arises between co-sureties till one has paid more than his share—*Davies v. Humphreys* (1). In *Clements v. Langley* (2) Lord Denman says, "To graft upon the 52nd clause the liability of one co-surety for another, on default made by the principal, which is attempted in the present case, would be going a length which is, in my opinion, not warranted." And Littledale, J. says, "I cannot see how the plaintiff here could be considered a surety, or liable for the debt of the bankrupt. The co-sureties were not so for each other, but for the principal: and I think the statute contemplates the case where the bankrupt is the principal debtor." In that case *Patteson, J.* seems to consider *Wood v. Dodgson* (3) as analogous; but it really is not so: that was a case of partners, and there may be a great distinction between partners and co-sureties. With co-sureties the claim of one against the other arises only when one has paid more than his proportion, and this is not so with partners. The other side will rely on *Aflalo v. Fourdrinier* (4), which was a case of partners. *Ex parte Porter* (5) is expressly

(1) 6 Moo. & Wels. 153; a. c. 9 Law J. Rep. (n.s.) Exch. 263.

(2) 5 B. & Ad. 372; a. c. 2 Law J. Rep. (n.s.) K.B. 173.

(3) 2 Man. & Selw. 195.

(4) 6 Bing. 309; a. c. 8 Law J. Rep. C.P. 32.

(5) 2 Mont. & Ayr. 281; a. c. 4 Law J. Rep. (n.s.) Bankr. 86.

in point. The whole machinery of the 52nd section is inapplicable altogether to a case of co-suretyship; that section only contemplates the case of direct liability. The case turns on the meaning of the words "liable for."

*Waddington*, contra.—It is necessary to look very closely into the words of the act; and it is submitted that the plaintiff comes within the meaning of a "person liable" at the time of the bankruptcy for a debt of the bankrupt. No difficulty can arise in applying this section to the case of a co-surety, as he could not come in till he had paid the debt. A party who pays a debt which could be proved against the estate protects the estate to that amount. If there be a debt due at the time of the bankruptcy for which another party is surety or liable, such party is within the meaning of the 52nd section. In *Ex parte Porter*, it does not appear that the note was due before the bankruptcy.

[PARKE, B.—It may be that the statute only applies to the case of sureties as between them and the principal debtor, and not as between themselves as co-sureties.]

There must be a debt at the time of the bankruptcy, and if the note was not due at the time, the case would not apply. *Clements v. Langley* does not decide the question as to whether the act applies to co-sureties.

[ALDERSON, B.—It is a *casus omissus* in the act. Suppose there were twenty sureties, they might prove the debt twenty times over. In the case of partners each is liable for the debt of the other. Here there is merely a contingent liability.]

It is not easy to distinguish the difference between the case of co-sureties and partners. Each is liable for the whole, and is surety for the shares of the others. *Affalo v. Fourdrinier* was a case of partners. *Wright v. Hunter* (6), *Bassett v. Doggin* (7), *Ex parte Young* (8), *Ex parte Lloyd* (9), *Filbey v. Lawford* (10), and *Ex parte Watson* (11).

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

PARKE, B. — My Brothers Alderson, Platt, and myself, before whom this case was argued, are of opinion that the rule to enter a nonsuit must be discharged. The plaintiff sued the defendant for money paid, to which the defendant pleaded bankruptcy. At the trial, before me, at Warwick, all the facts were admitted. The plaintiff and defendant were co-sureties with another, for one Antrobus, by a joint and several note for 200*l*. The defendant became bankrupt on the 8th of August 1842, and the note was then due; before the bankruptcy, the plaintiff paid 20*l*., not being his share of the debt; after it, he paid sums amounting with the previous payment to more than his proportion, and sought to recover one-third in this action. I was of opinion that he was entitled to recover, thinking that the case of co-sureties is not within the meaning of the 6 Geo. 4. c. 16. s. 52, but reserved the question, which has been since fully argued; and we all, after considering the arguments and referring to the authorities, concur in that opinion. The words of the section in question, which, with the addition of "bail," is copied from the 49 Geo. 3. c. 121. s. 8, apply to any person who is surety or liable *for the debt* of the bankrupt. It was properly admitted on the argument, that the plaintiff in this case was not a *surety* for the debt of the bankrupt; but it was contended that he was a person liable for the bankrupt's debt, by reason of the promissory note, on which he, as well as the bankrupt, was indebted to the creditors, having become due before the bankruptcy. But the cases decided on the former statute have given a construction to these latter words, and shew that they were meant to apply to those cases in which there subsisted at the time of the bankruptcy a relation analogous to that of surety and principal between the person who is to prove and the bankrupt, and which as between themselves made the former liable for the debts of the latter. If a surety only had been mentioned, it might have been held that the statute applied only to those cases where the person was a surety by express contract with the creditor; but the words "liable for" were added to embrace those cases where a per-

(6) 1 East, 20.

(7) 9 Bing. 653; s. c. 2 Law J. Rep. (N.S.) C.P. 84.

(8) 2 Rose, 40.

(9) 1 Ibid. 6.

(10) 3 Man. & Gr. 468; s. c. 11 Law J. Rep. (N.S.) C.P. 24;

(11) 4 Mad. 477.

son was the principal debtor with respect to the creditor, but by agreement with the bankrupt, the latter was to pay the debt, and so with respect to him he became a surety. This appears to be the explanation given by Lord Eldon of the intention of the framer of the act, from his observations in *Ex parte Young* and *Ex parte Lobbon* (12), and the cases in which proof has been admitted by persons liable; and, consequently, such persons barred have been all of that description:—in *Stedman v. Martinant* (13), *the acceptor*, for the accommodation of the drawer, who became a bankrupt; in *Wood v. Dodgson* (14), a retiring partner, with whom his co-partner, the bankrupt, had contracted to pay *all* the partnership debts; in *Ex parte Young*, a partner who used his partner's name fraudulently for his own purposes; in *Ex parte Watson*, a solvent partner paying the whole of the partnership debts,—fall under the description of persons “liable for” the bankrupt's debts: the bankrupt being the principal debtor in the two first cases by his express contract, in the third by his implied one for the whole amount of the debt, and in the last for the bankrupt's share; for, as the Vice Chancellor Leach said, “each partner is a principal debtor for his own share, and they are mutual sureties to the creditors for the shares of each other.” In *Ex parte Watson, re Sheath* (15) the Vice Chancellor lays down the same doctrine, that one partner is a surety for another; and he says that the principle is, that the surety may prove for such sum as the principal debtor ought at the time of the bankruptcy to provide; and therefore one partner may prove for the amount of the aliquot share of another; and upon the ground of each partner being surety for the other rested the opinion of Lord Chief Justice Tindal, in *Astle v. Fourdrinier*. In all these cases the party is liable in the nature of a surety for what is, as between himself and the bankrupt, the bankrupt's debt, and for which he at the time of the bankruptcy ought to provide by express or implied contract. But no case has gone beyond these, and extended the construction of the statute so as to in-

clude persons who are co-sureties for a debt due, not from the bankrupt, but from a third person. It is not correct to say, that one co-surety is liable for the debt of another *inter se at the time of the bankruptcy*: the bankrupt at that time has not engaged with his co-surety to provide any part of the money; but the third party, the principal, has engaged with both to do so; and it is then quite a contingency whether the co-surety will be called on by the creditor to pay, or will pay more than his own share, and until then he has no claim on the bankrupt; and, accordingly, it has been so held by Mr. Justice Erskine and the other members of the Court of Review, in the case of *Ex parte Porter*, in which case the note in which all joined was clearly due before the bankruptcy: but if it was not, it makes no difference, as where one person is really a surety for another for his debt, it has been held that he is within the clause, though the debt is not due, if it be *debitum in presenti solvendum in futuro*—*Ex parte Lobbon*. In the previous case of *Clements v. Langley* there are strong dicta to the same effect, though the case itself did not decide that a co-surety was not within the meaning of the clause in question.

*Rule discharged.*

1847. }  
June 2. } JUDSON v. BOWDEN.\*

*Covenant—Condition Precedent—Independent Covenant—Pleading.*

*A declaration in covenant stated that the plaintiff and the defendant had agreed to enter into partnership as surgeons, &c. until January 1, 1846, for certain considerations therein mentioned; and that it was further agreed that the plaintiff should, after the 1st of January 1846, introduce the defendant to his patients as his successor in business, and use his best endeavours to establish him in it; in consideration whereof the defendant covenanted to pay a further sum of 50l. on the 25th of March, 1846, in addition to another sum covenanted to be paid. Breach, non-payment of the said sum of 50l. &c. that after the 1st of January 1846, and before the 25th of March 1846, the plaintiff refused to introduce the defendant as “*

(12) 1 Rose, 219; s. c. 17 Ves. 334.

(13) 13 East, 427.

(14) 2 Mau. & Selw. 195.

(15) Buck. 455.

\* Decided in Trinity term.

*plaintiff's successor to, &c., wherefore the defendant refused to pay the said sum of 50l. Verification:—Held, that the plea was bad, as the introduction to the patients was an independent covenant, and not a condition precedent to the payment of the 50l.*

**Covenant.** The declaration stated that by indenture, made &c., between the plaintiff and the defendant, (profert) the plaintiff and the defendant did covenant and agree with each other in manner following, that is to say, that the plaintiff and the defendant would be and become partners in the profession and business of surgeons and apothecaries, for the term of one year, to be commenced and be computed from the 1st day of January 1845, if the plaintiff and the defendant should so long live; that the partnership should be carried on at the house, situate, &c., and upon, under, and subject to the terms, conditions, and agreements following, that is to say, that the defendant should pay, and he did thereby covenant to pay, to the plaintiff the sum of 800l., at the times and in manner therein-after mentioned, viz. the sum of 400l. upon the execution of the said indenture, and the several sums of 100l. on the 25th of March in the years 1846, 1847, 1848, and 1849 respectively, the said sums making together the sum of 800l.; that the defendant should, in consideration of such payment, be entitled to the entire profits of the said business, from the 1st day of January 1845, the defendant paying all the expenses of carrying on the said business from the said last-mentioned date; that the plaintiff should introduce the defendant to the patients and friends of the plaintiff, at first as a partner and ultimately as his successor, with the view and for the express purpose of securing to the defendant the confidence of the said patients and friends, and of obtaining for the defendant their future employment in the said business; that the business of the said partnership should be carried on at the then residence of the plaintiff at Ware, and that the plaintiff should continue to reside and to practise as a surgeon and apothecary in the same residence, till the 25th of June 1845, and should at all reasonable times be ready and willing to attend and advise and prescribe for patients, and to assist the defendant in carrying on the said business of a surgeon and apothecary, till the 1st of

January 1846, and at all subsequent times when the plaintiff should be at the said town of Ware, or in its immediate vicinity; that the plaintiff should from and after the 1st of January 1846, introduce the defendant as his successor in the said business, and should use his best endeavours to establish him in his practice as a surgeon and apothecary in the said town of Ware; in consideration whereof the defendant thereby covenanted and agreed to pay to the plaintiff the further sum of 50l. on the 25th of March 1846, in addition to and beyond the said sum of 800l.; that the defendant should purchase of the plaintiff all the medical fixtures, drugs, and instruments then belonging to and used in the surgery of the plaintiff, at Ware aforesaid, at a valuation to be made in the usual manner, the amount of such valuation to be paid within two months of the date of the said indenture. Averment of due performance on the part of the plaintiff. Second breach, non-payment of the sum of 50l., due March 25, 1846.

Plea, that after the said 1st day of January 1846, to wit, on &c., and on divers other days and times between that day and the 26th of March 1846, being proper and reasonable times in that behalf, he, the defendant, requested the plaintiff to introduce him, the defendant, as his, the plaintiff's, successor in the said business to divers persons, to wit, &c., and which said persons had been, and at the time of the execution of the said indenture, and up to the time when the plaintiff was requested by the defendant as aforesaid to introduce him, were respectively patients of the plaintiff, yet that the plaintiff did not nor would at those several days and times when he was so requested as aforesaid, or at any or either of them, or at any other time hitherto, introduce the defendant to the said persons, or any or either of them, but, on the contrary, the plaintiff then wholly refused and neglected, and from thence hitherto hath refused and neglected, to introduce the defendant to any of the said persons, nor has the plaintiff, from the said 1st of January 1846, hitherto introduced the defendant at all to any person whomsoever as his, the plaintiff's, successor in the said business, nor has the plaintiff at any time since the said 1st of January 1846, used any endeavour whatever to establish the defendant in the practice of a surgeon

and apothecary in the said town of Ware, but the plaintiff has wholly neglected and refused so to do; and the defendant, in fact, saith that the plaintiff hath not at any time hitherto performed any part whatever of the said alleged consideration for his, the defendant's, said covenant to pay the plaintiff the said sum of 50*l.*, wherefore, &c.

Special demurrer, on the ground, amongst others, that the covenant to introduce the defendant to the plaintiff's patients was not a condition precedent to the payment of 50*l.* in the declaration mentioned, but that the same was a distinct and independent covenant. Joinder in demurrer.

*Willes*, in support of the demurrer.—The introduction to the patients is not a condition precedent to the payment of the 50*l.* It would be unjust if it were so, as a slight accident might in that case absolve the defendant from the payment of the money, as the omission to introduce one patient would be enough. It might also be unjust to the defendant, as he might wish one to be introduced after the time. The case, however, falls clearly within the rule laid down in *Fordage v. Cole* (1), that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy, and did not intend to make his performance a condition precedent; and so it is where no time is fixed for the performance of that which is the consideration of the money or other act." The case of *Sir R. Pool*, from the *Year Book*, is also stated in the note, 48 Edw. 3. The Court then called on—

*Hawkins*, in support of the plea.—This plea is good. In *Collins v. Gibbs* (2) the action was for the recovery of certain costs, and the declaration stated, in consideration that the plaintiff, at the special instance and request of the defendant, would execute to the defendant a general release, to bear date on the 27th of July 1758, he, the defendant, undertook to pay certain costs, as soon as a bill of such costs could

be prepared. Averment, that the costs amounted to 21*l.* 3*s.* 7*d.*, and that a bill of such costs was prepared and produced to the defendant. It was then urged that the plaintiff should have averred that he had given or tendered to the defendant a general release, and it was held that the declaration was bad for want of such averment.

*Per Curiam*.—You cannot get over the rule as stated by the plaintiff's counsel. The introduction of his patients by the plaintiff is clearly not a condition precedent to the payment of the 50*l.*

*Judgment for the plaintiff.*

1848. }  
May 6. } *In re* ROBINSON *v.* LENAGHAN.\*

*Prohibition—County Court—Small Debts Act, 9 & 10 Vict. c. 95. s. 80—Jurisdiction of Judge.*

*The defendant having been sued in the county court, without any notice of the proceedings, judgment was given against him and his goods seized in execution. He then applied to the Judge under the 80th section of the Small Debts Act, 9 & 10 Vict. c. 95. to set aside the judgment and execution; but the Judge having imposed certain terms to which the defendant declined to accede, the latter paid the debt and costs under protest, and moved this Court for a prohibition:—Held, that the Judge had jurisdiction over the matter, and that no prohibition ought to issue.*

This was a rule calling upon the Judge of one of the Middlesex County Courts, and Robinson, the plaintiff, to shew cause why a writ of prohibition should not issue, prohibiting the said Court from proceeding further in the said cause, and why a sum of money paid by the defendant Lenaghan, as debt and costs, under protest, should not be returned to him under the following circumstances.

It appeared from the affidavits, that the defendant on returning to his lodgings at No. 8, Highbury Villa, found a person in possession of his goods, under an execution from the county court. The defendant had

(1) 1 Saund. 320, b, n. 1.

(2) 2 Burr. 899.

\* Decided in Easter term, but published here on account of its general utility.

received no notice whatever of any proceedings against him in the county court until the execution in question was put in; but the process had been served at No. 8, Paul's Villa, at which place he had never resided; and the officer on leaving the summons there was informed that Mr. Lenaghan did not reside and was not known at that place. On the following day, the 14th of January, the defendant attended at the county court and stated the above facts, whereupon the Judge made the following order:—"It is ordered that on the defendant's undertaking to appear and defend this case on the merits, and also undertaking to bring no action against the plaintiff or any officer of the court, the judgment be set aside, and in default of giving such undertaking on Saturday next, it is ordered that the said judgment and execution be confirmed." The defendant refused to accede to these terms, and paid the debt and costs under protest.

*Willes* having obtained a rule to set aside this judgment and execution, on the authority of *Ferguson v. Mahon* (1),

*J. Brown* shewed cause.—The defendant in this case comes too late for a prohibition after the sentence of the Court below has been fully carried into effect. This was decided in the case *In the matter of Poe* (2), where it was held, that a prohibition could not issue to a court-martial after its sentence had been ratified by the king, and carried into execution. The case of *Ferguson v. Mahon* will be relied on by the defendant, but is not in point. That was the case of an action against the defendant upon a judgment of the Common Pleas in Ireland, and the point decided was, that although the defendant could not contest the merits of the action, nor the propriety of the decision, yet that he might shew that the Court had not properly jurisdiction over him; and that it was a good defence to such action that he was not aware of any process of the court in respect of the judgment, nor had ever appeared to the action. In the present case it cannot be contended that the Judge of the county court had no jurisdiction in the matter. That he had jurisdiction is clear from the 50th section of the Small Debts Act, 9 & 10 Vict. c. 95. That section is in these terms:

(1) 11 Ad. & EL 179; s. c. 9 Law J. Rep. (n.s.) Q.B. 146.

(2) 5 B. & Ad. 681; s. c. 3 Law J. Rep. (n.s.) K.B. 33.

"That if on the day so named in the summons, or at any continuation or adjournment of the court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in court, the Judge, upon due proof of service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended. Provided always, that the Judge in any such case, at the same or any subsequent court, may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the cause upon such terms, if any, as to payment of costs, giving security for debt or costs, or such other terms as he may think fit, on sufficient cause shewn to him for that purpose." Here the Judge of the county court took the course he was bound to take, for upon the defendant not appearing, it was his duty to proceed to the hearing, and pronounce judgment; and the proceeding would be the same, although it might afterwards turn out that the bailiff had sworn falsely to the service of the summons. Again, the case *In the matter of the Dean of York* (3) shews that whilst a sentence continues in operation a prohibition will lie; and it would seem to follow from that case that after the sentence has been executed and is at an end, it is too late to move for a prohibition. He referred to the 79th section of the 9 & 10 Vict. c. 95.

*Willes*, in support of the rule.—The case of *Ex parte the Dean of York* is a conclusive authority to shew that if judgment has been given by an inferior court against the defendant, without process having been served upon him, a superior court will interfere by way of prohibition.

[*PARKE, B.*—Remove the 80th section of the act, and then this Court would have ample jurisdiction to interfere.]

Would the judgment be good, then, if the defendant had no notice whatever? Formerly, unless the defendant actually appeared in person, the Court had no power to proceed. The provisions of the 80th section are to be read as a waiver of this requisite, but not so as to give jurisdiction

(3) 2 Q.B. Rep. 1; s. c. 10 Law J. Rep. (n.s.) Q.B. 306.



to the Court when no notice has in fact been given. The greatest inconvenience would follow from holding that mere proof of notice is sufficient to give validity to the proceedings of the county court taken in the absence of the defendant.

[PARKE, B.—But look at the inconvenience on the other side. Were we to interfere by way of prohibition in this case, we should make ourselves Judges of a fact which it was entirely for the Judge of the county court to decide upon.]

As to the second point. It appears in *Coke's Artic. Cler.* that prohibition may issue after judgment. In *Buggin v. Bennett* (4) Lord Mansfield says, "If it appears upon the face of the proceedings that the Court below have no jurisdiction, a prohibition may be issued at any time either before or after sentence, because all is a nullity; it is *coram non judice*." So in *Fits. Nat. Brev.* 46, a, it is said, "So after judgment given and execution awarded in the county or in other court baron, which hath not power to hold plea of debt of the sum of 40s. &c., or of damages in trespass amounting to such sum or more, the party defendant shall have a writ of prohibition unto the bailiffs or unto the sheriff or officer of the Court, that they do not execution; and if they have distrained the party to make satisfaction, that then they release the distress, and that they revoke what they have done therein." He referred also to *Roberts v. Humby* (5).

POLLOCK, C.B.—I entertain no doubt but that this rule ought to be discharged. The natural and plain construction of the 80th section is that the county court has jurisdiction to hear and determine a cause *ex parte*, upon due proof of the service of the summons upon the defendant. When the Judge is satisfied that such service has been made, he has at once jurisdiction.

PARKE, B.—I am of the same opinion. By the 80th section the legislature gives the same power to the county court as is possessed by the superior courts. A defendant may apply to the Judge to set aside the judgment which has been obtained in his absence, if no summons has in fact been served upon him.

(4) 4 Burr. 2037.

(5) 3 Mee. & Wels. 120; s. c. 7 Law J. Rep. (N.S.) Exch. 45.

ROLFE, B.—Mr. Willes reads the 80th section as if a summons must in point of fact have been served upon the defendant before the Judge of the county court has jurisdiction to try. But, by the words of the statute, all that is required is "due proof" of such service, that is to say, such proof as may satisfy the Judge that service has been made.

PLATT, B.—It appears to me that this rule is subject to two infirmities. In the first place, the question as to whether a summons was served upon the defendant is one entirely within the jurisdiction of the Judge of the county court to determine. The other infirmity is that as in this case the judgment has been executed, there is nothing to which the writ of prohibition can attach. In the case cited from *Fits. Nat. Brev.* there was something to be done which might ultimately produce the fruits of execution.

*Rule discharged, with costs.*

1848. }  
Jan. 28. } DOE v. ROE.

*Ejectment—Judgment against the Casual Ejector—Service of Declaration.*

*On a motion for judgment against the casual ejector, a statement in the affidavit that the deponent served the wife of the tenant in possession, by delivering a copy of the declaration and notice to her, and reading the same over to her, is sufficient.*

*Hayes moved for judgment against the casual ejector.—The affidavit stated that the deponent served the wife of the tenant in possession, by delivering a copy of the declaration and notice to the wife of the said J. Davis, and reading the same over to the wife. The objection suggested was, that the affidavit ought to state that the deponent served the tenant, by delivering a copy to the wife. He contended that the statement in the affidavit was sufficient.*

*Per Curiam.—The affidavit is sufficient; it states a mode of service on the tenant of the premises. The rule will be absolute.*

*Rule absolute.*

1847. } CUTBILL AND OTHERS v.  
Nov. 10. } KINGDOM.\*

*Building Society—Construction of Rules—Special Meeting—Mortgage—Arbitration—6 & 7 Will. 4. c. 32.*

*The Metropolitan Building Association is a society established to enable parties to purchase freehold or leasehold property within twenty-five miles of London; and by rule 3. actions and suits are to be brought and defended in the names of the trustees, but no such proceedings are to be taken or defended until "the approbation of a majority of the members present at a special meeting of the association shall have been obtained." The president has power to call a "special meeting" of the committee; and on receiving a written request, signed by twelve of the members, to convene a "special general meeting," he is within three days after to convene such meeting:—Held, that an action brought with the approbation of the majority of the members present at a special general meeting was well brought within the meaning of the rule.*

*By the 28th rule, the committee are to determine "all disputes which may arise respecting the construction of these rules or any of the clauses, matters, or things herein contained," the decision to be conclusive if satisfactory, but if not satisfactory reference is to be made to arbitration, pursuant to the 10 Geo. 4. c. 56. s. 27:—Held, that this rule referred only to disputes respecting the construction of the rules, and did not prevent the trustees suing for the recovery of subscriptions and fines.*

*By the 11th rule, if the committee are satisfied that the premises offered by any member to whom shares have been awarded are a sufficient security, they are to direct the trustees to pay to such member the money he is entitled to receive, on his executing a deed in trust to sell, or other valid conveyance, mortgage, or assurance:—Held, that the society might lend money on mortgage to its own members as well as to strangers.*

*By the 8th rule, as often as the funds amounted to a share or sum of 120l., the share is to be awarded to the highest bidder, the purchaser to have the privilege of taking as many additional shares at the same rate as he might choose. Quære—Whether, as the*

\* Decided in the previous term.

*society enabled its members to hold an unlimited number of shares, each of which might be the maximum share, it was within the act 6 & 7 Will. 4. c. 32. s. 2.*

*Covenant.* The declaration stated that the plaintiffs, before and at the time of the making of the indenture hereinafter mentioned, were and from thence hitherto have been and still are the trustees of a benefit building society, to wit, "The Metropolitan Building Association," established according to the statute in such case made and provided; that the said society, at the time of the making of the indenture hereinafter mentioned, was and hitherto hath been and still is a society established under and by virtue, and according to a certain act of parliament, made in the seventh year of the reign of his late Majesty King William the Fourth, intituled, 'An Act for the regulation of Benefit Building Societies;' that at the time of the making of the said indenture all the rules, orders, and regulations, under which the society was then thereafter to be governed, had been and were duly and according to the statute certified, inrolled, exhibited, and filed, and the society then was and hitherto hath been and still is in every respect entitled to the benefit of the said statute; that the defendant, before and at the time of the making of the said indenture, was a member of the society, and the holder of eight shares and three-quarters of another share of and in the funds of the said society; that heretofore, to wit, on the 16th of January, A.D. 1844, by a certain indenture then made between the defendant of the one part, and the plaintiffs of the other part, after reciting that by indenture of lease, bearing date the 6th of December then last past, and made between T. Thistlethwayte, T. S. Cocke, and C. Hodgson, trustees of an act of the 35 Geo. 3, for enabling the Lord Bishop of London to grant a lease, with powers of renewal of lands in the parish of Haddington, &c., for the purpose of building upon, and of certain acts since passed for amending and enlarging the same, of the first part, Charles James Lord Bishop of London of the second part, and the defendant of the third part, certain premises, particularly mentioned and described, were for the consideration in the said indenture mentioned,

demised by the said T. Thistlethwayte, T. S. Cocks, C. Hodgson, and Charles James Lord Bishop of London, to the defendant, his executors, &c.: also reciting that a building society, called the Metropolitan Building Association, had been established in the city of London, and that rules and regulations had been made for the government and guidance thereof, and had been duly certified, allowed, and inrolled, &c.: also reciting that defendant was a shareholder in the society: also reciting that the monies to be contributed in respect of each share in the funds of the society amounted to 120*l.*, and that the defendant was then entitled to receive out of the funds of the society eight shares and three-quarters of another share, being equal to 550*l.* 7*s.* 6*d.*; and that for securing the due and regular payment of the subscriptions, fines, and other monies which should become payable by the defendant in respect of his said shares, &c., and which might become payable by him in respect of any other share or shares which he might at any time thereafter, before a sale of the said premises in the said indenture particularly mentioned and described under certain trusts created by the said indenture, acquire in the funds of the said society, it had been agreed that the premises, in the said indenture particularly mentioned and described, should be assigned to the plaintiffs upon the trusts and in manner in the said indenture thereinafter declared, the defendant did, for himself, his heirs, &c., covenant, promise, and agree to and with the plaintiffs, their executors, &c., that he, the defendant, his heirs, &c., should and would well and truly pay unto the plaintiffs, their executors, &c., all the subscriptions, fines, and other monies which should become payable by the defendant in respect of the shares then held by him, &c., as and when the same should become payable under the rules and regulations of the said society. The declaration then alleged, that after the making of the said indenture, and before any sale of the premises thereby assigned, and before the commencement of the suit, the defendant became and was the holder of a large number of other shares of and in the funds of the said society, to wit, twenty shares and one quarter of another share. Averment, that there was due and payable

by the defendant, under the rules and regulations of the said society, for subscriptions, fines, and other monies, in respect of the said twenty-nine shares of and in the funds of the said society, so held by the defendant, a large sum, to wit, 320*l.* 14*s.* 9*d.*; that the shares of the defendant do not exceed in value 150*l.* for each share, and that the subscriptions as aforesaid do not exceed in the whole 20*s.* for one month for each share. Breach, that the defendant did not nor would pay or cause to be paid to the plaintiffs the said subscriptions, fines, and other monies payable as aforesaid, for and in respect of the said shares, &c.

The defendant pleaded, first, *non est factum*, after setting out on oyer the indenture declared on, by which it appeared that the premises demised to the defendant by the recited indenture of the 6th of December 1843, were mortgaged by him to the plaintiffs, in consideration of 550*l.* 7*s.* 6*d.* paid by them to him out of the funds of the society.

Third plea, that the said society was not nor is a society established under or by virtue of or according to the said act of parliament for the regulation of benefit building societies, *modo et formâ*.

Thirteenth plea, that by the said rules and regulations of the society, certified, inrolled, &c., and which were in force at the time of the making of the said indenture in the declaration mentioned, and from thence hitherto have been and still are in force, it was ordered and declared, that in case it should be necessary to bring or defend any action, suit, or prosecution, criminal as well as civil, in law or in equity, touching or concerning the property or assets, rights, or claim of the said society, or touching or concerning the breach or non-performance of any of the articles, matters, or things contained in the same rules, the same should be brought or defended by or in the name or names of the trustee or trustees of the said society for the time being, on behalf of the said society, and he or they should be indemnified from all losses or damages by him or them sustained in consequence of being a party or parties to such proceedings; but that no such proceedings should be taken or defended until the approbation of the majority of the members present at a special meeting of the society should have been

obtained; that the claims or demands of the plaintiffs in the declaration mentioned were and are rights or claims of the said society, within the meaning of the said rules; and that this action was and is brought and prosecuted by the plaintiffs, as the trustees of the society, on behalf of the society, for the breach by the defendant of divers articles contained in the rules of the said society; and that the approbation of a majority of the members of the said society present at a special meeting thereof, had not been obtained before or at the time of the commencement of this suit, nor has it ever been obtained as required by the said rules. Verification.

Fourteenth plea,—that by the said rules of the society, certified, inrolled, &c., and which were in force at the time of the making of the indentures in the declaration mentioned, and thence hitherto have been and still are in force, it was ordered and declared, that there should be elected by the members of the said society present at the first general meeting, and at every meeting on the first Wednesday in September during the continuance of the society, a president, vice-president, and other officers; that the president, vice-president, and other officers to be elected at the same time should compose the committee for the ensuing year; and in case of the death, resignation or removal of any such members of the committee or officers, the vacancy should be supplied by the election of some other member or members of the said society or association, at the next meeting of the association, and the member or members so added should continue in office till the next general meeting appointed for the election of officers and committee. That the committee of the said society for the time being, or the major part of them, should determine all disputes which might arise respecting the construction of the rules of the said society, or any of the clauses, matters, or things therein contained, and also of any additions, alterations, or amendments which should or might thereafter arise between the trustees, officers, or other members of the said society, and that the decision of the committee, if satisfactory, should be conclusive, but if not satisfactory reference should be made to arbitration, pursuant to the 27th section of the statute made in the

10th year of the reign of King George IV. for consolidating and amending the laws relating to friendly societies; and that at the first meeting of that society after the inrolment of the said rules, five arbitrators should be elected, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of the said society, and in each case of dispute the names of the arbitrators should be written on pieces of paper, and placed in a box or glass, and the three whose names were first drawn by the complaining party, or some one appointed by him or her, should be the arbitrators to decide the matters in dispute, whose decision should be final; that the claims and demands of the plaintiffs in the declaration mentioned were before and at the time of the commencement of this suit and still are matters in dispute between the plaintiffs as trustees of the society and the defendant, within the meaning of the said rules, and that the defendant has always been and still is ready and willing to refer the same to the arbitration and determination of the committee for the time being of the society, or the major part of them, or to arbitrators to be chosen in manner as directed by the said rules, according to the true intent and meaning of the said rules, of which the plaintiffs have always had notice. Verification.

The plaintiffs joined issue on the first and third pleas, and to the thirteenth and fourteenth replied *de injuriâ*.

At the trial, before Coltman, J., at the Surrey Summer Assizes, 1847, it appeared that the plaintiffs were the trustees of a building society called "The Metropolitan Building Association," and that the defendant was a member, and the holder of twenty-nine shares in the society. The certified rules and regulations of the society (1) were given in evidence, and it ap-

(1) The amended rules of the society were prefaced by the following, amongst other statements:—"This association is established for the purpose of enabling parties to purchase freehold or leasehold property in or within twenty-five miles of London. It is proposed to raise by monthly subscriptions from each member or shareholder a fund, out of which to assist subscribers in their endeavours to become possessors of such property as may be best suited to their own interest or advantage. Each shareholder must contribute to the association 10s. per month for each share, of which he is the possessor, until

peared that the present action was brought with the approbation of the majority of members present at a "special general meeting" of the society. On the part of the defendant, it was submitted that the issues on the first, third, thirteenth, and

fourteenth pleas ought to be found for him; first, because the objects of the society were not confined to the purposes mentioned in the act for the regulation of benefit building societies, the 6 & 7 Will. 4. c. 82 (2), but extended to loans to members on mortgage

these monthly payments shall, with the profits, amount to 120*l.* per share. The operations of the association will extend over a space of about ten years and then cease altogether. When the funds have become sufficiently large to make advances to the subscribers, due notice will be given, and that member who will submit to the *largest* deduction of discount from the amount of his share of 120*l.*, for priority of advance, will be the one to whom the loan will be *immediately* granted;—the property purchased with the association's funds to be mortgaged to the association as security for the continuation of his monthly instalments, until the termination of the association. The subscriptions of those who do not draw their shares are invested on mortgage of freehold or leasehold property; on the termination of the association they will be entitled not only to compound interest on the money they have paid, but also to participate in the profits arising from premiums, fines, &c. To mortgagors this association will be of great advantage. In the event of the money being required by the lender, the same may be discharged by a loan from this association."

Rule 3. "That in case it shall be necessary to bring or defend any action, suit, or prosecution, criminal as well as civil, in law or in equity, touching or concerning the property or assets, right or claim of this association, or touching or concerning the breach or non-performance of any of the articles, matters, and things herein contained, the same shall be brought or defended by or in the name or names of the trustee or trustees of this association for the time being, on behalf of the said association, and he or they shall be indemnified from all losses or damages by him or them sustained in consequence of being a party or parties to such proceedings; but no such proceedings shall be taken or defended until the *approbation of a majority of the members present at a special meeting* of the association shall have been obtained."

"That the president of the committee shall have power to call a *special meeting* of the committee at any time; and the committee shall have power to call a special meeting of the members at any time, by giving three clear days' notice thereof to such members, and specifying the cause of the meeting."

"That the president, on receiving a written request signed by twelve of the members to convene a *special general meeting* of the association, shall within three days after receiving such request convene such meeting by letter," &c.

Rule 8. "That so often as the funds of the association shall amount to a share or sum of 120*l.*, (or by an anticipation, that is, before the funds actually amount to that sum, if the committee shall so determine,) the share shall be awarded to the highest bidder by ticket or premium for the preference; but no member shall be allowed to advance less than 10*s.* on each bidding, and the purchaser shall have

the privilege of taking as many additional shares at the same rate as he may choose, on giving notice of such an intention to the president at the time of sale; and the committee shall have the power to sell an additional quarter, half, or three-quarter share at the same premium as the last purchase, if required."

Rule 11. "That when any member shall have been awarded his or her share or shares pursuant to Article 8, he or she shall give notice of the situation of the premises intended to be offered for the security thereof to the secretary, and he shall forthwith transmit a copy of the same to the surveyor, and the surveyor shall within seven days after the receipt thereof examine the premises mentioned in such notice, and make his report in writing to the committee."

"That when the committee shall be satisfied that the premises so to be offered as aforesaid are a sufficient security to the association, they shall direct the trustees to pay to such member the sum or sums of money which he or she shall be entitled to receive, on such member executing a deed in trust to sell, or such other valid conveyance, mortgage, or assurance of such premises as the solicitors to the association shall require, and depositing the same and all other necessary title-deeds relating thereto with the trustees as a security to the said association for so much money as shall therein be expressed to be secured, and the trustees shall make such payment accordingly."

Rule 28. "That the committee for the time being, or the major part of them, shall determine all disputes which may arise respecting the construction of these rules or any of the clauses, matters, or things herein contained, and also of any additions, alterations, or amendments which shall or may hereafter arise between the trustees, officers, or other members of this association, and the decision of the committee, if satisfactory, shall be conclusive; but if not satisfactory, reference shall be made to arbitration pursuant to 10 Geo. 4. c. 56. s. 27; and at the first meeting of this association after the involvement of these rules five arbitrators shall be elected, none of the said arbitrators being beneficially interested directly or indirectly in the funds of this association, and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box or glass, and the three whose names are first drawn by the complaining party, or some one appointed by him or her, shall be the arbitrators to decide the matter in dispute, whose decision shall be final."

(2) Sect. 1. "Whereas certain societies commonly called building societies have been established in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising by small periodical subscriptions a fund to purchase the members thereof in obtaining a small freehold or leasehold property, and it is expedient to amend

securities; secondly, that the action was not brought with the approbation of the majority of members present at a "special meeting," as required by the third rule; and thirdly, that the proper mode of proceeding was by reference to arbitration under the twenty-eighth rule. The learned Judge overruled the objections, and directed a verdict for the plaintiffs.

*J. Brown* now moved for a rule to shew cause why the verdict should not be set aside, and for a new trial on the ground of misdirection.—The certified rules and regulations shew that the purposes of the society are not limited to those mentioned in the 6 & 7 Will. 4. c. 32, for the regulation of benefit building societies. Though one of the objects of the association

encouragement and protection to such societies, and the property obtained therewith: be it enacted, &c. that it shall and may be lawful for any number of persons in Great Britain and Ireland to form themselves into and establish societies for the purpose of raising by the monthly or other subscriptions of the several members of such societies, shares not exceeding the value of 150*l.* for each share, such subscriptions not to exceed in the whole 20*s.* per month for each share, a stock or fund for the purpose of enabling each member thereof to receive out of the funds of such society the amount or value of his or her share or shares therein to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to such society until the amount or value of his or her shares shall have been fully repaid to such society, with the interest thereon, and all fines or other payments incurred in respect thereof, and to and for the several members of such society from time to time to assemble together, and to make, ordain, and constitute such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members of such society so assembled together shall seem meet, so as such rules shall not be repugnant to the express provisions of this act, and to the general laws of the realm, and to impose and inflict such reasonable fines, penalties, and forfeitures upon the several members of any such society who shall offend against any such rules, as the members may think fit, to be respectively paid to such uses for the benefit of such society as such society by such rules shall direct, and also from time to time to alter and amend such rules as occasion shall require, or annul or repeal the same, and to make new rules in lieu thereof, under such restrictions as are in this act contained; provided that no member shall receive or be entitled to receive from the funds of such society any interest or dividend by way of annual or other periodical profit upon any shares in such society until the amount or value of his or her share shall have been realized, except on the withdrawal of such member, according to the rules of such society then in force."

is to enable members to receive out of the funds of the society the amount of his shares to erect or purchase houses or land, yet another object is to lend money to members on mortgage, without regard to the purpose to which it may be applied. Such an object was never contemplated by the statute. The eighth rule provides, that so often as the funds of the association shall amount to a share of 120*l.* the share shall be awarded to the highest bidder, who shall have the privilege of taking as many additional shares at the same rate as he may choose.

[*PARKE, B.*—It may be that the intention of the legislature was not to allow any one member to acquire a larger interest than 150*l.* in respect of his share or shares; but that objection does not seem to have been taken at the trial.]

By the eleventh rule, when any member shall have been awarded his share, he is to give notice to the secretary of the situation of the premises intended to be offered for security, and when the committee shall be satisfied that the premises so to be offered are a sufficient security to the association, they shall direct the trustees to pay to such member the sum of money which he shall be entitled to receive on executing a mortgage of the premises. These societies are exempt from the penalties of usury, and also from the charges of stamp duty; but the legislature could never have intended that those exemptions should apply to loans to members at usurious interest. If so, a person who wished to borrow money on mortgage might avoid the payment of stamp duty by becoming a member of one of these societies.

[*PARKE, B.*—There is no usury in benefit societies lending to their members money at more than 5*l.* per cent. They are both lenders and borrowers—*Silver v. Barnes* (3).]

The defendant is entitled to a verdict on the issue raised by the thirteenth plea; for though a meeting was held, and the approbation of the majority of the members then present obtained before the action was commenced, yet the meeting was not a "special meeting," as required by the rule, but a "special general meeting."

(3) 6 Bing. N.C. 180; s.c. 9 Law J. Rep. (N.S.) C.P. 118.

[ALDERSON, B.—The meaning of a “special meeting” is, that the meeting shall not be convened unless the parties have notice of the purpose of the meeting. A meeting may be both general and special—general for the purpose of doing general business, and special for a particular purpose: then it becomes a special general meeting.]

[ROLFE, B.—A special general meeting is both special and general.]

The issue raised by the fourteenth plea ought also to have been found for the defendant. *Crisp v. Bunbury* (4) decided that since the 9 Geo. 4. c. 92, an action will not lie against the trustees of a benefit society, and that in the case of disputes the only mode of proceeding is by arbitration. This case differs from that of a private agreement to refer, since these rules are made under and have the force of an act of parliament. The 6 & 7 Will. 4. c. 32. incorporates the provisions of the Friendly Societies Act, 10 Geo. 4. c. 56, the 27th section of which requires the rules of every such society to provide for reference of disputes to arbitration.

[PARKE, B.—This rule contains no provision for enforcing the award in case of non-payment of the money.]

POLLOCK, C.B.—There ought to be no rule. If at the trial it had been objected that the society was not within the act, because it enabled members to hold an unlimited number of shares, each of which might be the maximum share, and consequently one member might have in himself the whole interest in the society—if that objection had been raised, the Court would probably have taken time to consider the construction of the act. But the objection taken was, that the society could not lend money on mortgage to its own members. It is conceded, that the society might lend money to persons not members; and I have looked into the act of parliament to see whether it contains any exclusion of loans to members, but I find none. If then the society may lend to strangers, I see no reason why they should not lend to any of their own body: on the contrary, it is quite within the scope of the society. With respect to the second objection, the answer

(4) 8 Bing. 394; s.c. 1 Law J. Rep. (N.S.) C.P. 112.

has been already given by my Brother Alderson. By a “special meeting” is meant a meeting for those matters of which the parties have had special notice. Here they had notice of the purpose of the meeting, which was held for that and also for other purposes. As to the last objection, the 28th rule does not make it imperative to refer a matter of this kind to arbitration. That rule applies only to differences in respect of the construction of the rule, or any additions, alterations, or amendments therein.

PARKE, B.—I agree with the Lord Chief Baron. There is nothing in the act of parliament to prevent the society from purchasing from its members the fee simple of an estate, then why may they not take a mortgage of the estate? With respect to the question as to the number of shares that any one member may hold, that point does not appear to have been taken at the trial, and therefore does not arise now. As to the second objection, the answer has been already given. With respect to the last, the 28th rule applies only to disputes respecting the construction of the rules, and an action on a covenant is not a matter in dispute to be referred in pursuance of that rule.

ALDERSON, B.—I am of the same opinion. The point as to the number of shares which one member may hold was not taken: if it had been, I should have desired time to consider whether the meaning of the act is not that each member is to have an interest to the extent of 150*l.*, and no more, whether in one or more shares. With respect to the other objection, there is no ground for saying that this is a matter to be referred to arbitration.

ROLFE, B. concurred.

*Rule refused.*

1847. { MASSEY, SURVIVING EXECUTOR  
July 8. { OF AMES, DECEASED, v. JOHN-  
SON AND ANOTHER, EXECUTORS OF FOYSON, DECEASED.\*

*Pleading—Accord and Satisfaction—Executors.*

*Debt upon two indentures, whereby the defendants' testator covenanted to pay the*

\* Decided in the Sittings after Trinity Term.

plaintiff the respective sums of 1,300*l.* and 700*l.*, with interest. *Plea*, in substance, that the plaintiff was a mortgagee, by two mortgages, of an estate which was insufficient, upon an estimate of its value, to pay the mortgage money due from the testator; that three other mortgagees were in the same situation, the estate realized to each being less in estimated value than the charge upon it; that the defendants were devisees of the real estate, and executors of the deceased mortgagor; that they had received assets, which, after deducting the costs and expenses payable by them in the first instance, and in preference to the debts due from the testator, and also excepting some furniture, amounted to the deficiency on each mortgage; and thereupon it was agreed between the plaintiff and the defendant, and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the said balance of the assets, after deducting the furniture which should be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all the respective rights and equities of redemption, or other rights of the defendants, as executors and trustees to the mortgaged property, should thenceforth be wholly barred, extinguished, satisfied, and discharged, and the mortgagees should thenceforth become absolute owners, both at law and in equity, of the mortgaged estates, and that the covenants in the declaration should be satisfied and discharged, in consideration of the premises. *The plea then averred payment to each of his share of the assets, and that the several rights and equities of redemption were barred and extinguished. Replication, that it was not agreed, nor did the defendants pay to the plaintiff the sum of money in the plea mentioned, upon which issue was joined. The Judge, at the trial, having ruled that the plea could not be proved, except by an agreement in writing,—Held, that although an agreement to convey an equity of redemption must be in writing, this plea would have been good on demurrer, even though it had expressly stated the contract to have been by parol, inasmuch as the agreement by the plaintiff to forego the balance of his mort-*

*gage beyond the value of the estate upon receiving his share of the assets, was binding on him, and the receipt of his share of the assets was a satisfaction for the estate; because the agreement of the other mortgagees to take their shares of the assets also was a good consideration for giving up the claim for the residue of the debt against the defendants.*

*Quære, whether the plea, if proved, would be a good bar.*

**Debt.** The first count of the declaration was on an indenture of the 14th of February 1823 made between Ames and Foyson, whereby Foyson covenanted to pay to Ames 1,300*l.*, with interest at 5*l.* per cent, on the 27th of August 1823. The second count was on an indenture of the 9th of April 1825, made between Foyson of the first part, E. Lawes, S. Parkinson and the plaintiff, as executors of Ames, deceased, of the second part, and one J. R. Staff of the third part, whereby Foyson covenanted to pay to the said Lawes, Parkinson and the plaintiff 700*l.*, with interest at 4*l.* per cent. on the 9th day of October 1825.

**Plea**—That before the making of the indenture in the first count mentioned, the said Foyson had a certain interest in certain hereditaments, that is to say, a certain power of appointment of the said hereditaments, and the fee simple thereof was vested in the said Foyson, and the said hereditaments and the fee simple thereof were limited and assured to such uses as the said Foyson should, at any time or times, and from time to time thereafter, by any deed or deeds to be by him duly executed, direct, limit or appoint; and in default of such direction, limitation, or appointment, and subject thereto, to the ultimate use of the said Foyson and his heirs and assigns for ever. And the defendants further say, that the said indenture in the first count mentioned was an indenture of mortgage, whereby in consideration of the said sum of 1,300*l.*, in the first count mentioned, lent by the said Ames to the said Foyson, at or before the making of the same indenture, the said Foyson, by virtue and in exercise and execution of the powers then vested in him in that behalf as aforesaid, did by the said indenture by him duly executed as aforesaid, direct, limit and



appoint, that the said hereditaments should thenceforth go, remain, continue and be unto the said Ames, his executors, administrators and assigns for the term of 1,000 years, to be computed from the day next before the day of the date of the same indenture, and fully to be complete and ended, subject nevertheless to a certain proviso or condition, in the same indenture contained, whereby it was provided, that if the said Foyson, his heirs, executors, administrators, appointees, or assigns, some or one of them, should and did pay, or cause to be paid unto the said Ames, his executors, administrators, or assigns, at or in his or their dwelling-house for the time being, the said sum of 1,300*l.*, together with interest for the same, at the rate of 5*l.* per cent. per annum, on the 27th of August then next, without any deduction or abatement whatsoever, then and in such case the said term of 1,000 years and the said appointment thereof should cease and determine. And the said covenant in the said first count mentioned was a covenant in the same indenture contained, to secure the payment to the said Ames, his executors, administrators, or assigns, by the said Foyson, his executors, administrators, appointees, or assigns of the said sum of 1,300*l.* so lent on the said mortgage security as aforesaid. And the defendants further say, that the said Foyson made default in the payment of the said sum of 1,300*l.* and interest on the said 27th of August then next, according to the said proviso, and omitted to pay the said sum of 1,300*l.* and interest on the said 27th of August then next, according to his said covenant in that behalf as in the first count mentioned. And the defendants further say, that afterwards and after the death of the said Ames, and at the time of the making of the said indenture in the last count mentioned, the said Foyson continued to have such interest as aforesaid, in the said hereditaments and such power of appointment as aforesaid, subject to the said term of 1,000 years, and had a certain interest in the equity of redemption of the said hereditaments from the said mortgage. And the defendants further say, that the said indenture in the last count mentioned was an indenture of further mortgage, whereby in consideration of the further sum of 700*l.*, being the sum of 700*l.* in

the said last count mentioned, also lent by the said Lawes, and J. S. Parkinson, and the plaintiff, as such executors as aforesaid, to the said Foyson, at or before the making of the last-mentioned indenture, and also in consideration of the sum of 10*s.* paid by the said J. R. Staff to the said Foyson, before the making of the last-mentioned indenture, the said Foyson, by virtue and in exercise and execution of the power therein then vested in him in that behalf, and at the request and by the direction of the said Lawes, Parkinson, and the plaintiff, as such executors as aforesaid, did, by the last-mentioned indenture by him duly executed as aforesaid, direct, limit, and appoint that the said hereditaments, and the reversion thereof expectant on the determination of the said term of 1,000 years, should thenceforth go, remain, continue, and be to the use of the said J. R. Staff, his heirs and assigns, upon certain trusts in the last-mentioned indenture contained, and did bargain, sell, assign, transfer, and set over unto the said J. R. Staff, his executors, administrators, and assigns, certain goods, chattels, fixtures, and effects of the said Foyson, and all the rights, title, and interest, property, claim, and demand, both legal and equitable, of him, the said Foyson, therein and thereto, to have, hold, receive, take, and enjoy the said goods, chattels, fixtures, and effects unto the said J. R. Staff, his executors and administrators, (with power of sale, fully set out in the plea), and should stand and be possessed of the money arising by and from such sale or sales upon certain trusts, that is to say, upon trust, amongst others, to pay and discharge the principal money and interest which should be then due and owing upon or by virtue of any mortgage affecting the said hereditaments and premises, or any part of the same at the date of the said last-mentioned indenture, and to pay to the said Lawes, Parkinson, and the plaintiff, their executors, administrators and assigns, the said sum of 700*l.* and the interest then due for the same, at and after the rate of 4*l.* per cent. per annum, and after payment thereof respectively, should pay the then surplus, if any, of the money arising from such sale or sales as aforesaid, unto the said Foyson, his executors, administrators, or assigns, and which said covenant in the last count mentioned was

a covenant in the said last-mentioned indenture contained, to secure the payment to the said Lawes, Parkinson, and the plaintiff, as such executors as aforesaid, their heirs, executors, administrators, or assigns, by the said Foyson, his heirs, executors, and administrators, of the said sum of 700*l.* and interest, so lent on the said last-mentioned mortgage security as aforesaid, on the said 9th of October then next. And the defendants further say, that from the time of the making of the said last-mentioned indenture until and at the time of the making of the accord and satisfaction hereinafter mentioned, the said Foyson, during his lifetime, and the defendants after his death, had a certain equitable interest in the equity of redemption of the said hereditaments, and of the said goods, chattels, fixtures, and effects, subject to the said two several mortgage securities, and in any such surplus monies (if any) as aforesaid, as might arise from the sale, by the said J. R. Staff, of the said hereditaments, and of the said goods, chattels, fixtures, and effects. (The plea then went on to aver that Foyson in his lifetime was possessed of an interest in certain other hereditaments, and then set out several mortgages, that is to say, a mortgage to one Aufrere for 900*l.*, with covenant to pay; a mortgage to one Wiley for 400*l.*, with covenant to pay; a mortgage to one Lawes for 200*l.*, with a covenant to pay.) That Foyson at the time of his decease was indebted to certain other persons in certain simple contract debts; and the defendants, as such executors, had incurred certain necessary and unavoidable debts and expenses in and about obtaining probate of the said will, and in and about the funeral of the said Foyson; which said last-mentioned debts and expenses the defendants, as such executors, were lawfully entitled and bound to satisfy and discharge, out of the goods, chattels, and effects of Foyson at the time of his death, in the hands of the defendants, as such executors, to be administered before the said mortgage debts, and before any other debts of the said Foyson, and after setting apart a sufficient sum out of the goods, chattels, and effects of Foyson, at the time of his death, in the hands of the defendants, as such executors, to be administered, and applying the same in payment and satisfaction of the said necessary and

unavoidable debts and expenses, there remained in the hands of the defendants, as such executors, at the time of the making of the accord and satisfaction hereinafter mentioned, goods, chattels, and effects, which were of the said Foyson deceased at the time of his death of such a value as was sufficient to satisfy and discharge the said several mortgage debts, due in respect of the said several covenants and indentures, to wit, of the value of 1,042*l.*, and no more; and there were no other goods, chattels, and effects of Foyson at the time of his decease whatever, except the household furniture herein mentioned. That after the death of Foyson and Ames, and in the lifetime of Lawes, it was estimated, as the truth and fact was, that the said hereditaments so conveyed and assured by way of mortgage to Aufrere, and the said equitable interest in the same, so vested in the defendants, were of less value than the said sum, to wit, 900*l.*, so secured by the said mortgage, to be paid to Aufrere, and all interest due thereon, by the sum of 300*l.*; that the said hereditaments, goods, chattels, fixtures, and effects, mentioned in the said first and second indentures, and mortgaged as aforesaid to Ames, Lawes, Parkinson, and the plaintiff, and the said equitable interest in the same so vested in the defendants, were of less value than the said two sums of 1,300*l.* and 700*l.*, so secured by the said firstly and secondly-mentioned indentures to be paid to Ames, Lawes, Parkinson, and the plaintiff, and all interest due thereon by the sum of 500*l.* (The plea then stated that the hereditaments mortgaged to Wiley, and the equitable interest in the same, were of less value than 400*l.*, and all interest then due thereon, by the sum of 133*l.*; that the hereditaments mortgaged to Lawes, and the equitable interest in the same were of less value than 200*l.*, by the sum of 109*l.*, of which the plaintiff, Staff, Aufrere, &c. had notice.) And thereupon the defendants, as such executors as aforesaid, agreed with one another, and the plaintiff and Lawes, as such executors as aforesaid, and with Staff, and with Aufrere, and with Wiley, respectively, with the full knowledge and consent and at the request of each and every of them respectively, that the said several debts and covenants, and all damages accrued

in respect thereof, respectively, including the said debts and causes of action in the declaration, should be respectively satisfied and discharged by the arrangement, on the terms and in the manner following, (that is to say) that no suit should be instituted by the plaintiff and Lawes, as such executors, or as such creditors as aforesaid, or by Staff or by Lawes as such mortgagee or covenantee, or by Aufrere or by Wiley, or by all or any of them, for causing the goods, chattels and effects which were of Foyson at the time of his death, in the hands of the defendants, as such executors as aforesaid, to be administered, but that the household furniture, parcel of the said goods, chattels, and effects, which were of Foyson deceased, at the time of his death, should thenceforth be taken, had, possessed, and enjoyed by the widow of Foyson, for her own use and benefit; that a sufficient part of the residue of the said goods, chattels, and effects which were of Foyson deceased at the time of his death, in the hands of the defendants, as such executors, to be administered, should be set apart and applied by the defendants as such executors for and in the payment and satisfaction of the said necessary and unavoidable debts and expenses, and the residue of the said goods, chattels, and effects which then were estimated and admitted by the defendants, the plaintiff, Lawes, Staff, Aufrere and Wiley, as the fact was, to be of the value of 1,042*l.*, and no more, should be divided and distributed by the defendants as such executors as aforesaid, between and amongst the plaintiff and Lawes, as such executors as aforesaid, the said Lawes, as such mortgagee and covenantee, the said Aufrere and Wiley, in proportion to the respective amounts remaining due to each of them respectively, in respect of their said respective debts, securities, and covenants, after deducting from the amount due for debts and damages, in respect of each of the said respective debts and covenants respectively, the estimated value, estimated as aforesaid, of the respective hereditaments and premises so mortgaged as aforesaid to each of them respectively, for securing the payment of the said respective debts as aforesaid, (that is to say) that 500*l.*, parcel of the said 1,042*l.*, should be paid by the defendants as such executors as aforesaid, to the plaintiff and Lawes, as

such executors as aforesaid, and that 300*l.*, other parcel of the said sum of 1,042*l.*, should be paid by the defendants as such executors, to Aufrere, as such mortgagee and covenantee as aforesaid, and that 133*l.*, other part of the said sum of 1,042*l.*, should be paid to Wiley as such mortgagee and covenantee as aforesaid; and that 109*l.*, residue of the said sum of 1,042*l.*, should be paid to Lawes as such mortgagee and covenantee as aforesaid; and that all the respective rights and *equities of redemption*, or other right of the defendants as such executors and trustees, or otherwise, of and in the said first-mentioned hereditaments, and of and in the said goods, chattels, fixtures, and effects, and of and in the said surplus money, if any, to arise from such sale as aforesaid of the said first-mentioned hereditaments, goods, chattels, fixtures, and effects, or any of them, by the said Staff as aforesaid, and also of and in the said secondly-mentioned hereditaments, so conveyed and assured to Aufrere as aforesaid, and also of and in the said thirdly-mentioned hereditaments, so conveyed and assured to Wiley as aforesaid, and also of and in the fourthly-mentioned hereditaments, so conveyed and assured to Lawes as aforesaid, respectively, should be thenceforth respectively wholly barred, extinguished, satisfied and discharged, and that the plaintiff and Lawes, or Staff as their trustee, should *thenceforth become and be the absolute owner both at law and in equity* of the said first-mentioned hereditaments, goods, chattels, fixtures, and effects, and that Aufrere should thenceforth become and be the absolute owner, both at law and in equity of the said secondly-mentioned hereditaments, and that Wiley should thenceforth become and be the absolute owner both at law and in equity of the said thirdly-mentioned hereditaments, and that Lawes should thenceforth become and be the absolute owner both at law and in equity of the said fourthly-mentioned hereditaments, and that the said *two covenants in the declaration mentioned*, and all debts and damages in respect thereof, and the said covenant for payment to Aufrere of the said sum of 900*l.* and interest, and all debts and damages accrued in respect thereof, and the said covenant for the payment to Wiley of the said sum of 400*l.* and interest, and all

debts and damages accrued in respect thereof, and the said covenant for payment to Lawes of the said sum of 200*l.* and interest, and all debts and damages accrued in respect thereof, should, in consideration of the premises, be respectively satisfied and discharged. That in pursuance and performance, and according to the true intent and meaning of the said arrangement and agreement, no such suit in equity as aforesaid was instituted, and that the said household furniture was taken, had, possessed and enjoyed by the said widow of the said Foyson, for her own use and benefit. (The plea then averred payment to the plaintiff and Lawes, as such executors, and acceptance by them of the sum of 500*l.* upon the terms aforesaid, also payment to Aufreze of 300*l.*, payment to Wiley of 133*l.*, and payment to Lawes of 109*l.*.) That the several rights and equities of redemption, and other rights of the defendants, as such executors and trustees as aforesaid, of and in the said several hereditaments firstly, secondly, thirdly, and fourthly above mentioned, and of and in the said goods, chattels, and effects, and of and in the said surplus, if any, to arise by sale thereof as aforesaid, became and were barred and extinguished; and in consideration thereof, and of other the premises aforesaid, each of the said several covenants and all debts and damages accrued due in respect thereof, respectively became and were, by and with the said agreement and consent and at the request of the plaintiff and Lawes, as such executors and creditors as aforesaid, and of Lawes as such mortgagee and covenantee, and of Aufreze and Wiley, as such mortgagees and covenantees respectively, wholly satisfied and discharged, according to the true intent and meaning of the said arrangement and agreement. Verification.

Replication, that it was not agreed, nor did the defendants pay to the plaintiff and Lawes, nor did the plaintiff and Lawes accept or receive of or from the defendants the said sum of money in the first plea mentioned *modo et forma*; upon which issue was joined.

The cause came on to be tried, before Pollock, C.B., at the Norfolk Spring Assizes for 1847.

*Andrews*, for the defendants, began, and said he could prove the plea only by parol.

*Byles, Serj.*, for the plaintiff, objected that it could not be proved without a memorandum in writing. On the other hand it was contended, that a memorandum in writing was unnecessary, and that, at all events, enough of the plea could be proved by parol to make it an answer to the action. The learned Judge was of opinion that the plea could not be proved without a memorandum in writing, and directed the jury to find a verdict for the plaintiff.

*Andrews* having obtained a rule, in the following term, to set aside the verdict, and for a new trial on the ground of misdirection,—

*Fitzpatrick (Byles, Serj. with him)* shewed cause (June 21).—Upon the issue joined, the agreement is one which ought to be in writing under the Statute of Frauds, 29 Car. 2. c. 3. s. 4. It is for an interest in land: it provides that all interest in the said hereditaments is to become the property of the mortgagees. The issue is taken on the agreement. There is no authority to shew that an equitable interest is not within the Statute of Frauds. In *Hodgkinson v. Wyatt* (1), a loan was secured by the deposit of title-deeds, and it was held, that this was an interest in land within the meaning of the 2 & 3 Vict. c. 37. s. 1. The words in the last-mentioned statute, "security of any lands, tenements, or hereditaments, or any estate or interest therein," are not so strong as the words "lands, tenements, or hereditaments, or any interest in or concerning them," in the Statute of Frauds. The question is, is an equitable interest within the Statute of Frauds?

[PARKE, B.—There seems no doubt about that.]

*Carrington v. Roots* (2) decides that it is not necessary, in order that the statute should apply, that the action should be brought on the agreement; but it is enough if the effect of the action is to charge the party by means of the agreement. Lord Abinger there says, "The meaning of the statute is not that the statute shall stand for all purposes, except that of being enforced by action, but it means that the contract shall be altogether void."

(1) 4 Q.B. Rep. 749; a.c. 13 Law J. Rep. (n.s.) Q.B. 54.

(2) 2 Mee. & Wels. 248; a.c. 6 Law J. Rep. (n.s.) Exch. 95.

[PARKE, B.—The question is, could this plea, or so much of it as is an answer to the action, be proved by parol?]

They contend that part performance can take the case out of the Statute of Frauds. That is not so in the case of an interest in land. It would certainly seem, from the cases of *Lord Guernsey v. Rodbridges* (3) and *Lester v. Foxcroft* (4), that the courts of equity have held that doctrine; but it does not appear in those cases whether there was any plea of the statute. There is, however, no such doctrine at law. *Whitbread v. Brockhurst* (5) and *Brodie v. St. Paul* (6) are the only two cases which at all throw out such a notion.

[POLLOCK, C.B.—I think you need not give yourself any more trouble about that. There is no such doctrine at law.]

The Court then called on—

*Palmer*, in support of the rule.—The ground on which the doctrine of part performance rests is stated in 1 *Sugden's Vendors and Purchasers*, p. 140, "Where agreements have been carried partly into execution, the Court will decree performance of them, in order that one side may not take advantage of the statute to be guilty of fraud." The circumstances stated in this plea are sufficient to entitle the defendants to aid from a court of equity. It is not necessary to say there has been a conveyance of land, but that the parties have got all they bargained for, and that they have got it without a note in writing. The executors might have preferred any creditors in equal degree. A mortgage without a covenant is a simple contract debt; with a covenant it becomes a specialty. In *Powell on Mortgages*, citing *Martin v. Mowlin* (7), it is laid down that the words "lands, tenements, and hereditaments" in a devise do not include mortgages. *Ancaster v. Mayer* (8) shews that a mortgage is a simple debt, and the land is only an accessory as a security, and if the principal is gone the accessory goes with it. Debt does not lie against the heir if there are assets—3 *Lev.* 3.

(3) *Gilbert's Ca.* in *Eq.* 3.

(4) *Colles' P.C.* 108; s. c. 5 *Vin.* 526.

(5) 1 *Bro. C.C.* 413, 417.

(6) 3 *Ves.* 332, a.

(7) 2 *Burr.* 969.

(8) 1 *Bro. C.C.* 464.

The plea alleges that A. B. and C. were mortgagees of different estates of Foyson, and there were other simple contract creditors: they all meet together, they value the different securities, and in order to prevent legal proceedings, they then distribute all the estate, except the furniture, *pro rata*. This need not be in writing. There was here a sufficient consideration for the subsequent contract—*Good v. Cheeseman* (9), *Alchin v. Hopkins* (10).

[PARKE, B.—Can you support your plea on the ground of the composition? Must you not shew that the plaintiff became the absolute owner at law and in equity of the estate? He was not bound by his agreement unless he got the equity of redemption. If this is a bad plea, you must prove the whole of it.]

It is submitted, that the equity was barred by the arrangement. We say you have a trust in our favour, we will not attempt to redeem it. We do not transfer the equity of redemption; we only consent to its being extinguished. It is admitted, on the pleadings, that the plaintiff has received his share of the assets; there is, therefore, a valid accord.

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

ROLFE, B.—The only question in this case is, whether the plea, which is a very special one, could be proved without a note in writing. The defendant was stopped in the case by my Lord Chief Baron, upon the statement by the defendant's counsel that he had not any such proof. Upon attentively considering the allegations in the plea, we think that it might be proved by parol. It is unnecessary to say, in this stage of the proceedings, whether the plea if proved would be a good bar. Accord and satisfaction is no bar to an action for a debt certain covenanted to be paid; but this plea is not meant to be one simply of accord and satisfaction; being in an action against executors, it is a sort of special plea of *plene administravit*, by an even division of assets, a part being given up for good consideration. We assume the plea to be

(9) 2 *B. & Ad.* 328; s. c. 9 *Law J. Rep.* K.B. 234.

(10) 1 *Bing. N.C.* 99; s. c. 3 *Law J. Rep.* (N.C.) C.P. 272.

good, for the purpose of disposing of the question, whether there should be a new trial. The substance of the plea is this: that the plaintiff was a mortgagee by two mortgages of an estate which was insufficient, upon an estimate of its value, to pay the mortgage money due from the testator; that three other mortgagees were in the same situation, the estate realized to each being less in estimated value than the charge upon it; that the defendants were devisees of the real estate and executors of the deceased mortgagor; that they had received assets, which, after deducting the costs and expenses payable by them in the first instance, and in preference to the debts due from the testator, and also excepting some furniture, amounted to the deficiency on each mortgage, and thereupon it was agreed between the plaintiff and defendant and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the said balance of the assets, after deducting the furniture, which should be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all the respective rights and equities of redemption, or other rights of the defendants, as executors and trustees to the mortgaged property, should thenceforth be wholly barred, extinguished, satisfied and discharged, and the mortgagees should thenceforth become absolute owners both at law and in equity of the mortgaged estates, and that the covenants in the declaration should be satisfied and discharged in consideration of the premises. The plea then avers the payment to each of his share of the assets, and that the several rights and equities of redemption of the defendants were barred and extinguished. The issue raised by the replication was, that it was not agreed, nor did the defendants pay to the plaintiff the sum of money in the plea mentioned. The averment that the equities were barred and extinguished was not in issue; and the question is, whether on the traverse of the agreement it was necessary to prove an agreement in writing by the defendants to convey or release their equity of redemption.

It must be admitted that no agreement to convey an equity of redemption would be binding unless in writing, because a court of equity treats the equity of redemption as the land itself,—at all events, as an interest in land; and if in this case it were essential to support the plea that a binding agreement to convey the equity of redemption should be proved, the plea would have been held bad on demurrer, for not stating the contract to be in writing, and to make it good a contract in writing must have been proved. But this plea would have been held good on demurrer, even if it had been expressly stated that the contract was by parol, for the agreement by the plaintiff to forego the balance of his mortgage debt above the value of the estate on receiving his share of the assets would be obligatory on him, and the receipt of that share a satisfaction for the estate, though there was no binding agreement on the defendants to convey the equity of redemption; for the agreement of the other mortgagees to take their share also, is a good consideration for giving up the claim for the residue of the debt against the defendants. Without such an agreement by all, the plaintiff and each of the other mortgagees would have had a right to sue the defendants to recover all the assets, which, in the proper course of administration, ought to have been paid to the specialty creditors. Each would have had his chance of recovering so much as would satisfy his debt, but the chance only, for the defendants might have paid one, or confessed judgment to one, and left the others totally or partially unpaid, according as the debt paid absorbed the whole or only a part of the assets. The giving up this chance by each of getting the whole is a good consideration for each agreeing to take less than the whole of the assets, and such a binding agreement of all and actual payment of the share is a good satisfaction of the whole. It would be so without any stipulation as to barring or extinguishing the equity of redemption, and it is not the less so with the addition of that stipulation, though it was not obligatory on the defendants. Indeed, in a plea of accord and satisfaction, the accord, generally speaking, is not obligatory. Here, the accord is composed partly of the obligatory agreement of each not to

claim the whole of the assets, and partly of the non-obligatory agreement by the defendants to pay the debts, and yield up the equity of redemption. The effect of it is this: the creditors bind themselves to take their share and give up the residue, if the defendants will pay the rateable share of each and give up the equity of redemption; and the plea avers this to have been done; and the replication denies only the agreement of all, and the fact of payment. We think, therefore, that in this case there was no necessity to prove an agreement in writing; and certainly from the form of the allegations in the plea the pleader never meant to aver that there was one. The rule must, therefore, be absolute.

*Rule absolute.*

1847. }  
April 21.\* } BURNBY v. BOLLITT.

*Vendor and Purchaser—Sale of Unwholesome Food—Implied Warranty.*

*The defendant, a farmer, purchased of a butcher the carcase of a pig which was exposed for sale in the public shambles, and left it there. Subsequently, the plaintiff offered for the carcase, and was told by the butcher he had already sold it to the defendant. The plaintiff afterwards met the defendant in the town, and for a trifling consideration the defendant transferred his bargain to the plaintiff. The carcase turned out to be measly and unfit for human food. There was no evidence that the defendant knew when he bought or sold the pig that it was diseased, but there was reasonable evidence that he knew it was intended for human food.*

*In an action on the case to recover the price of the pig as damages for the breach of an implied warranty,—Held, that the defendant not having dealt in the way of a common trader, and there being no evidence of a warranty or of fraud on his part, was not liable; and the plaintiff was nonsuited.*

This was an action on the case. The declaration stated that the defendant, on &c., at Lincoln, publicly offered for sale the carcase of a pig, for the food of man, and thereby then and there falsely and frau-

duently undertook and warranted that the said carcase was in a sound and wholesome condition, and fit for human consumption; whereby the plaintiff was induced to buy the said carcase at the sum of 6*l.* 18*s.* 6*d.*: whereas, in truth and in fact, the said carcase was not in a sound and wholesome condition and fit for human consumption, but, on the contrary thereof, was unsound, unwholesome, and unfit for human consumption; whereby, &c.

Plea—Not guilty; and issue thereon.

At the trial, before Patteson, J., at the Lincolnshire Summer Assizes, 1847, the following facts were proved. The plaintiff and the defendant were farmers. The latter had bought the carcase of the pig in question at the stall of a butcher named Penrose, in the public shambles in Lincoln market. He did not take away the carcase, but left it there until he should have transacted other business he had in Lincoln. Before he returned for the carcase, the defendant came to the stall and offered to buy the pig, but Penrose told him he had already sold it to the defendant, but that perhaps he might be induced to part with it for a trifling profit. The plaintiff afterwards meeting with the defendant, bought the pig of him at a trifling advance in the price, but without any warranty of its soundness. The plaintiff took it home, and the next day it was found to be measly and shortly afterwards became wholly unfit for human food.

It did not appear that the defendant had any knowledge of the unsoundness of the meat either when he bought it or sold it to the plaintiff; but there was reasonable evidence that he knew it was to be used for human food. This action was brought to recover from the defendant the price of the pig as damages for the breach of the implied warranty stated in the declaration.

The learned Judge thought the plaintiff was entitled to recover, and the jury found a verdict for him for the price of the pig.

Leave was reserved for the defendant to move to enter a nonsuit if the Court should think the plaintiff was not on the above facts entitled to recover.

In Michaelmas term (Nov. 4),

Whitehurst obtained a rule accordingly, citing *Shepherd v. Pybus* (1) *Kilroy*,

(1) 3 Man. & Gr. 868; s. c. 11 Law J. Rep. (2*a*) C.P. 101.

\* Decided in Easter term, 1847.

p. 91. pl. 16, *Jones v. Bright* (2), *Brown v. Edgington* (3), *Parkinson v. Lee* (4), *The King v. Waddington* (5), and *Sutton v. Temple* (6).

In the sittings after Hilary term (Feb. 11),

*Humfrey and Hildyard* shewed cause.—The question which the learned Judge intended to reserve at the trial is, whether a person who sells food for human consumption, which is unsound and unfit for the use of man, is liable to the vendee, though at the time of the sale he was not aware of its unsoundness, and gave no warranty of its fitness for human food. It is submitted, that in every case of the sale of food for the use of man, the law implies a warranty of its fitness, whether the sale be by a private individual or by a dealer in victuals in the course of his trade. The vendor, if he sell unwholesome food, is not only liable to the vendee, but may be indicted for a misdemeanour; and hence the universal practice of never asking for a warranty of soundness upon the sale of provisions. No express decision is to be found on the point; but this view of the law on the subject is supported by a series of *dicta* from the earliest times. In *Keilway's Reports*, 91. pl. 16, "Nota, per Frowike, que nul home poit justifier le vender de vitaille corrupt, mes action sur le case gist vers le vendor le quel le vitaille soit garrant destre bien ou nient garrant. Mes si home vend a moy drape, ou auter chose, le quel drape il est sciens que est malueys, ore jeo suy disceiue per son notice demesne, et en cest case pur cause *quod ipse fuit sciens* et vende, tout soit le vend sans son garrant, uncore il serra punie per brief sur mon case: mes sil ne soit sciens il ne serra punie sans garranter le chose destre bon, &c. Et en cest case le briefe sur le case, et touts briefes sur le case queux ne pursuont aucun course mes sont faits sur le case, le brief conient este auxy certaine come le count, sauant en le lieu et temps. Et pur ceo 9 Hen. 6,

Rolfe challenge le briefe en le case de corrupt wyne pur ce que un parcel auer un lettre en surplusage," &c.

The case referred to in *Keilway* is the 9 Hen. 6. 53 B., pl. 37. It was a writ of deceit upon the case by A. against B. and C, alleging that whereas the aforesaid A. bargained for a certain butt of wine from the said B. and C, the said C. knowing it to be corrupt and unfit to use (*corruptam et inhabilem*), warranted it fit for use and not corrupt, and sold it for a certain sum of money. *Rolf*. Judgment of the writ: for the writ is *habilem* with an *h*, whereas it should be *abilem* without an *h*, and thus false Latin or no Latin.—*Babing*. Some of the Chancery say that it should be written with an *h*, and some the contrary: you are therefore safe.—*Rolf*. Still judgment of the writ: for he does not allege that we warranted this to be good, and therefore it shall be adjudged his own folly.—*Martin*. The warranty is not to the purpose: for it is ordained that no one shall sell corrupt victuals.—*Cottes*. This is *actio popularis*.—*Babing*. The warranty, as *Martin* has said, is not to the purpose: for if I come into a tavern to eat, and he gives and sells me beer or flesh corrupt, whereby I am brought into great infirmity, I shall have an action against him on my case, clearly; and yet he made me no warranty.—*Godred*. It has been adjudged in the King's Bench, where one sold a piece *de panno laneo sciens ipsam esse rancam* and not well fulled, and this was adjudged good without warranty. And then *West* said that the writ alleged a warranty. And *sic fuit*.—*Rolf*.—*ridendo et protestando*, that the plaintiff is a wine drawer and knowing nothing of wines; and for plea we say for B, that at the time of the sale of the wine, the wine was sufficient and able.—*Prest*. *Tota Curia*. You ought to traverse the plea. And then he said, and not corrupt: and *alii à contra*: and for C. we say that he sold to the plaintiff by the aforesaid B. as his servant, without this, that he sold to him in any other manner.—*Martin*. Of your own knowledge you have deceived him.—*Rolf*. If I have a servant who is my merchant, and goes to a fair with a false horse or other merchandise and sells it, shall the party have an action of deceit upon this against me? Who said, no.—*Martin*.

(2) 5 Bing. 533; s. c. 7 Law J. Rep. C.P. 213.

(3) 2 Man. & Gr. 279; s. c. 10 Law J. Rep. (N.S.) C.P. 66.

(4) 2 East, 314.

(5) 1 Ibid. 143.

(6) 12 Mee. & Wels. 52; s. c. 13 Law J. Rep. (N.S.) Exch. 17.



You say true: for you do not command him to sell the thing to him nor to any person in particular; but if your servant, by your covin and commandment, sells any corrupt wine, he shall have an action against you; for it is your own sale: and if the case be so, that you did not command your servant to sell to that same person, then you may say that you did not sell to the plaintiff.—(*Prest.*)—*Rolf*. It would be a great pity to put this matter in the mouth of lay people, which is a matter in law, &c. In the 1 *Roll. Abr.* 90, pl. 30, it is said, "If a vintner sells wine, knowing it to be corrupt, to another as sound, good, and not corrupt, without any express warranty, still an action of deceit lies against him; for this is a warranty in law." And at pl. 31. it is said, "So if I come into a tavern to eat, and the taverner gives and sells me drink and flesh corrupt, whereby I am put in great infirmity, an action lies against him without express warranty, for it is a warranty in law." In the case of *Southerne v. Howe* (7), it is put thus—"If a man knowing his wines to be corrupt sells them, an action lies against him, although he did not warrant them;" and 42 Ass. 8. and 9 Hen. 6. are cited for that position. In *Roswell v. Vaughan* (8), the opinion of Tanfield, C.B. and Altham, B. is thus stated: "If a man sells victuals which are corrupt, without warranty, an action lies; because it is against the commonwealth, as 9 Hen. 6, 53, 7 Hen. 4, 15, and 11 Edw. 4, 6." In *Fitz. Nat. Brev.* it is said, "If a man do sell unto another man a horse, and warrant him to be sound and good, &c., if the horse be lame or diseased that he cannot work, he shall have an action upon the case against him. So if a man bargain and sell unto another certain pipes of wine, and warrants them to be good, &c., and they are corrupted, he shall have an action upon the case against him. But it is to be noted that he warrant it to be a horse to be sound, otherwise it will not lie. For if he sells the wine without such warranty, it is no peril, and his eyes and his ears are the judges in that case." And by Lord Hale, it is said, "There is a great difference between selling corrupt

(7) 2 Roll. Rep. 5.

(8) Cro. Jac. 196.

wines or merchandise, for there an action on the case does not lie without warranty; otherwise, if it be by a taverner or victualler, if it prejudice any." There is a passage in 3 *Black. Com.* 166, to the same effect, viz.—"In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him, to exact damages for the deceit. In contracts for provisions it is always implied that they are wholesome; and if they be not, the same remedy may be had." With respect to indictments for selling unwholesome provisions, the law is thus laid down in *Russell on Crimes and Misdemeanors*, "The public health may be injured by selling unwholesome food, and it is an indictable offence to mix unwholesome ingredients in anything made and supplied for the food of man. And if a master knows that his servant puts into bread what the law has prohibited, and the servant from the quantity he puts in makes the bread unwholesome, the master is indictable criminally, for he should have taken care that more than is wholesome was not inserted."

[*ALDERSON, B.*—In the case in 11 Edw. 4, 6, pl. 10. there is a material distinction taken in the case of a man who sells a horse, and warrants that he has two eyes; if he has not, he shall not have an action of deceit, for he might have had consensence of that at the beginning.]

[*PARKER, B.*—In the 7 Hen. 4, 14, 15, pl. 19, the gist of the action is said to be the selling the wine knowing it to be corrupt.]

The case of a taverner who sells wine as merchandise (a pipe of wine, for instance) may be different from a sale in the regular way of his trade; but as a general rule, a person who manufactures a thing and sells it for a particular purpose, is understood to warrant that it is fit for that purpose—Lord *Tenterden* in *Goss v. Cox* (9). *Sutton v.*

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If a contract for the sale of unwholesome provisions be illegal, how can it be said that the law attaches an implied warranty to such a contract? In *Chanter v. Hopkins* (11), Lord Abinger says, "A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract, yet collateral to the express object of it." The law implies no warranty on the sale of any specific chattel that it is fit for any particular purpose; but if a party agrees to manufacture, or perhaps even to supply, an article for a particular purpose, it is otherwise, and the vendee may return the article if it is unfit for the purpose—*Shepherd v. Pybus*, *Brown v. Edgington*.

[PARKE, B.—Those were cases of executory contracts, where no property was transferred by the bargain: in such the expression "implied warranty" is not correct; the bargain being, that if a man makes the thing you will pay him, and if he accepts that order, it is evidence of a contract on his part to perform it. In the present case we have the sale of a specific chattel; and there can be no doubt that on such a sale there is in general no implied warranty by the common law, although in the civil law it is otherwise—*Co. Lit.* 102, a; *Noy's Max.* c. 42; and the only question is, whether there is an exception to this rule, where the subject-matter of the sale is provisions to be eaten by man.]

The selling of unwholesome food is not illegal *per se*. If it were illegal the law would often be infringed, for sales are constantly made of venison and other articles of food which medical men would pronounce unwholesome. This is not the case of a trader in provisions, who perhaps may stand in the same situation as a manufacturer. But even in the case of a trader in provisions, there is no liability if due and reasonable care is exercised to ascertain that the provisions he sells are wholesome. The defendant was a mere private person transferring his bargain to the plaintiff at his own request. He had no knowledge of the unwholesome state of the carcase; and fraud, on his part, was negatived. All the

cases cited on the other side proceed on the *scienter* of the seller; and, according to Lord Hale's note in *Fitz. N.B.* 94 b. a vintner is not liable for selling bad wine, unless it prejudice any.

[PARKE, B.—The strongest case in favour of the plaintiff is the 11 Edw. 4. 6, pl. 10. There *Brian* draws a distinction between selling sheep and selling mutton. "Si jeo vende a un home 20 berbits purtuer, s'ils sont corrupts, uncore si jeo garrante eux, il n'avera action de deceit sur le garrantie, et ne serra travers, car *quant* ils sont morts jeo ne puisse conustre que ils sont corruptes, quant jeo done trust et confidence à vous, si jeo suy disceive jeo averai action de disceit, &c., mes si je vende mutton pur manger quel est corrupt, il avera action de disceit, comment si je ne garrante cell." It is not, however, easy to see what is the distinction he means to take. Then some one (whether Judge or counsel I cannot collect from the report) says, "En vostre cas le cause est pur ce que il est prohibite per le leys que home vende vitaille corrupted," &c.]

That case is very obscure; but there are authorities in favour of the defendant. In 2 *Black. Com.* 451, it is said, "By the civil law an implied warranty was annexed to every sale in respect of the title of the vendor; and so, too, in our law a purchaser of goods and chattels may have a satisfaction from the seller if he sells them as his own, and the title proves deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer it, unless he knew them to be otherwise, and hath used any art to disguise them, unless they turn out to be different from what he represented them to the buyer." No exception is made of a vintner or dealer in provisions. In *Com. Dig.* 'Action upon the Case for a Deceit,' (A, 8): "So if a man by false affirmation of a thing within his knowledge deceive in the sale of goods: as if a taverner sell wine for sound and good, which he knows to be corrupt. Or give any one to eat corrupt meat or drink; for it is ordained that no one shall sell corrupt victuals, *if he knows it*." In this case fraud is altogether negatived, and the defendant is not liable.

*Cur. adv. vult.*

(11) 4 *Mee. & Wels.* 399; s. c. 8 *Law J. Rep.* (n.s.) *Exch.* 14.



other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, and if any corrupted wine be in the town, or such is not wholesome for man's body; and if any butcher sell contagious flesh, or that died of the murrain, or cooks that seethe the unwholesome flesh. Lord Coke then goes on to say, that "Britton, who wrote after the statute 51 Hen. 3, and following the same, saith thus: 'Puis soit inquis de ceux queux achatent per un manner de mesure et vendent per meinder mesure faux, et ceux sont punies come vendors des vines, et auxi ceux que serront atteints de faux aunes et faux poys, et auxi les macegrievés\* et les gents que de usage vendent a trespassants mauvasse viands corrupus et wacrus et autrement perillous a la sauntie de home.' Et, fo. 33, he doth conclude the like passage with these words: 'Enconter le forme de nous statutes.'"

This view of the case explains what is said in the *Year Book*, 9 Hen. 6. 53, that "the warranty is not to the purpose;

\* *Macellarius*, a butcher or victualler.

for it is ordained that none shall sell corrupt victuals;" and in *Roswell v. Vaughan*, where Tanfield, C.B. and Altham, B. say, "that if a man sells victuals which is corrupt without warranty, an action lies, because it is against the commonwealth." That also explains the note of Lord Hale, in *1st Fitzherbert's N.B.* p. 94, that there is "diversity between selling corrupt wines and merchandise; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, *if it prejudice any*." The defendant in this case was not dealing in the way of a common trader, and was not punishable by indictment for what he did; he merely transferred his bargain to the plaintiff, and at his own request. He therefore falls within the reason of the former part of Lord Hale's distinction; and there being no evidence of a warranty or of any fraud he is not liable. The plaintiff ought, therefore, to have been nonsuited at the trial, and this rule must be made absolute.

*Rule absolute.*

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END OF HILARY TERM, 1848.

# CASES ARGUED AND DETERMINED

IN THE

## Court of Exchequer of Pleas.

EASTER TERM, 11 VICTORIÆ.

1848. }  
April 19. } WILLIAMS v. FIGOTT.

*Railway Company—Contract—Committee of Management—Provisional Committee-man.*

*In an action brought against a member of the provisional committee of a proposed railway company, upon a contract entered into by the committee of management appointed by such provisional committee, it is a question of fact for the jury to determine from all the evidence in the cause whether the defendant had made the committee of management his agents for the purpose of pledging his individual credit.*

Assumpsit for work and labour and materials; money lent; money paid; and on an account stated.

Pleas—Non assumpsit, and payment.

At the trial, before Patteson, J., at the last assizes for the county of Gloucester, it appeared that the action was brought to recover the amount of an attorney's bill, for business done by the plaintiff as the solicitor to "The Wolverhampton, Bridgnorth and Ludlow Railway Company." The defendant was a member of the provisional committee. On the 8th of November 1845 a meeting of the members of the provisional committee took place, which was attended both by the plaintiff and the

defendant, and the prospectus of the company was then adopted, in which the defendant's name appeared as one of the provisional committee, and that of the plaintiff as the solicitor to the company. That prospectus contained the following clause: "Until an act of parliament shall be obtained, the affairs of the company will be under the direction and controul of the committee of management, who are hereby empowered to enter into such arrangements as shall best serve the interests of this company and the public, with existing or projected companies, and also to nominate the first directors of the company." At that meeting the committee of management was appointed, the defendant being present and taking a part in the proceedings. In the first instance, however, he was not proposed as one of the committee of management; but after he had left the room, his name was substituted in lieu of one of those previously appointed. The evidence relied on as shewing that although the appointment was made in the defendant's absence, it was done with his knowledge and sanction, was, that all the circulars afterwards issued to the members of the committee of management were sent to him and none of them returned; that he had promised to attend the meetings of such committee, although in point of fact he had never done so; and that advertisements had been inserted in newspapers which he was in the habit of

reading, and in which his name appeared as one of the committee of management. In January 1846, in answer to an application made to the defendant as one of the provisional committee to take up the shares allotted to him, in order that a fund might be raised, out of which the expenses of the company might be paid, he wrote, that "after the best consideration which he had been able to give the subject, he thought it desirable to decline the shares which it was proposed to allot to him as one of the members of the provisional committee." It appeared further, that no fraud in any way attached to any of the proceedings of the company, but that it failed for lack of funds. In summing up the evidence, the learned Judge left it to the jury to say whether, in the first place, they were satisfied that the defendant was a member of the committee of management, in which case he would be liable; secondly, that if they were not so satisfied, then that the fact of the defendant being a member of the provisional committee did not make him personally liable, nor the fact that he assisted in the appointment of the committee of management; but that they must be satisfied under all the circumstances of the case that the defendant, as one of the provisional committee, appointed the committee of management his agents for the purpose of pledging his credit. The jury returned a verdict for the defendant.

*Whately* now moved for a rule calling on the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection.—The jury must be taken to have found by their verdict that the defendant was not a member of the committee of management; but the Judge ought to have directed them to find a verdict for the plaintiff upon the ground that by the appointment of the committee of management, the provisional committee made them their agents to pledge their credit for the necessary expenses attending the formation of the company. In a case of *Wood v. Harding*, Wilde, C.J. is said to have directed the jury, "that a shareholder who was present at a meeting at which the committee of management was appointed, was personally liable for all the orders subsequently given of such committee."

[PARKE, B.—All depends upon the question adverted to in *Reynell v. Lewis* and

*Wylde v. Hopkins* (1), as to what is intended by appointing an acting committee: "Is the meaning that the acting committee is to take the whole management to the exclusion of the provisional committee, their provisional character having ceased, in which case the provisional committee would not be liable? or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents; in which case they would be liable for the contracts of the acting committee, or the majority, made as such agents?" This is a question of fact to be determined by the jury in each particular case.]

By the prospectus in this case, it is clear that the managing committee had power given to them by the provisional committee to enter into contracts on their behalf.

[PARKE, B.—The prospectus proves nothing. It is quite consistent with its terms, that the contracts entered into by the managing committee were as principals not agents. Generally speaking, a provisional committee after having once appointed an acting committee, think they have no further concern in the affairs or management of the company.]

He cited *Barnett v. Lambert* (2), and *Pitchford v. Davis* (3).

POLLOCK, C.B.—I am of opinion that no rule ought to be granted in this case. It is impossible for this Court to lay it down as a rule of law, that if the provisional committee of a railway company appoint a committee of management, they make them their agents to pledge their credit. It is in every case a question for the jury. As to the case of *Wood v. Harding*, we have not any report of it before us, and we cannot, therefore, express any opinion as to the law there laid down; but I dare say, that under the circumstances of that case, the direction was perfectly correct.

PARKE, B.—I also think that there should be no rule. It was a question of fact for the jury to determine in this case,

(1) 15 Mee. & Wels. 530; s. c. 16 Law J. Rep. (N.S.) Exch. 31.

(2) 15 Ibid. 489; s. c. 15 Law J. Rep. (N.S.) Exch. 305.

(3) 5 Ibid. 2; s. c. 8 Law J. Rep. (N.S.) Exch. 157.

whether the managing committee had been made by the defendant his agents to pledge his credit. All the difficulty which has arisen in cases of this nature has been from forgetting that you cannot make a party liable upon a contract which he has never entered into. In the present case, the summing up of my Brother Patteson was perfectly correct, and there ought, therefore, to be no rule.

ROLFE, B. and PLATT, B. concurred.

*Rule refused.*

1848. } SMITH v. TATEHAM AND  
May 5. } ANOTHER.

*Pleading—Executor—Judgment of Assets quando.*

*A judgment of assets quando acciderint affects all assets which at the time of such judgment are in the hands of the executor not administered, as well as those which may come into his hands subsequently.*

*Where, therefore, in an action against an executor, the defendant pleaded plene administravit præter, and the plaintiff replied that assets had come to the defendants' hands since plea pleaded,—Held, that such replication was unnecessary and bad.*

Debt by the plaintiff against the defendants, as executors of W. G. deceased.

Plea, *plene administravit præter* 10l., which amount was insufficient to satisfy a specialty debt due by the testator to one J. S.

Replication, that this action was commenced on the 5th day of January A.D. 1847, and that after the commencement of this suit and after the pleading of the said plea by the defendants, and before this day, to wit, on the 15th day of May, A.D. 1847, and on divers other days and times since the said plea was pleaded, and before this day, divers goods and chattels and monies which were of the said W. G. at the time of his death, of great value, to wit, to the amount of the causes of action in the declaration mentioned, and over and above the value and amount of the said causes of action so confessed in the said plea to be due to the said J. S. and over and above the value and amount of the said debt of

110l. in the said plea mentioned, came to and were in the hands of the defendants, as executors aforesaid, to be administered, and wherewith the defendants could and ought to have satisfied the causes of action in the declaration mentioned. Verification.

Demurrer, assigning for cause, that the fact of assets having come to the hands of the executors, after the plea and before the replication, could not form the subject-matter of a good replication in law to the defendants' plea of *plene administravit præter*; and also that the matters set forth in the replication were not an avoidance of and afforded no answer to the defendants' said plea.

The plaintiff's points for argument were:—That the replication shewed facts which avoided the plea; and that the plaintiff could not pray judgment of assets *quando*, inasmuch as the plaintiff in order to recover such assets must shew that they came to the defendants' hands after the judgment, whereas the assets were here received by the defendants after plea and before replication; therefore, a judgment of assets *quando* would be of no avail to the plaintiff as far as those assets were concerned.

*Needham*, in support of the demurrer.—There is no necessity for such a replication as has been pleaded in this case; and it is contrary to precedent. The proper course for the plaintiff to have adopted was to have taken judgment of assets *quando acciderint*, and under such a judgment he would have been entitled to those assets which he seeks to affect by this replication—*Chitty's Forms*, p. 496, form 7; 1 *W. Savd.* 336, a; *Mara v. Quin* (1). The only precedent to be found in the books of such a replication is one in 3 *Wentworth*, 224; but from the opinion of Mr. Barrow, the pleader, there given, he himself seems to entertain great doubt as to its validity.

[ROLFE, B.—If you rejoined to this replication, *plene administravit*, there might be a surrejoinder similar to the replication, and so the pleadings might be indefinitely prolonged.]

[PARKE, B.—So, if the defendants allowed judgment to go by default, the effect would be to strike out all the pleadings, except the declaration, from the record, and there would be judgment of *nil dicit* against

the defendants, which would make them liable to pay costs *de bonis propriis*, whereas upon a judgment of assets *quando acciderint*, the costs to be paid to the plaintiff are *de bonis testatoris*. That would be a great hardship.]

The COURT then called on—

*Montague Smith* to support the replication.—Where assets have come into the hands of an executor since plea pleaded, the proper course is to reply that fact. It is the only mode by which the plaintiff can reach those assets; for from the earliest times the form of judgment of assets *quando acciderint* has been that the plaintiff “do recover his debt, &c., to be levied of the goods and chattels which were of the testator at the time of his death, and which should *thereafter* come to the hands of the executor to be administered”—*Noell v. Nelson* (2); and in Serj. Williams’s note to that case he says, “It seems necessary to state that the assets came to the executor’s hands *after* the judgment.” In *Mara v. Quin*, as in the present case, assets had come to the defendant’s hands between the time of pleading and entering up judgment; and the Court, on motion, ordered the judgment to be amended by being antedated to a time anterior to that at which these assets had come into the hands of the executor. That amendment was unnecessary if the judgment had a retrospective effect, and embraced assets which had come into the executor’s hands in the interval between the plea and judgment. The judgments both of Lord Kenyon and Mr. Justice Ashurst in that case, suggest this mode of replication.—[He referred also to *Taylor v. Holman* (3), 1 *Wms. Saund.* 336, *a*, *Williams’s Executors*, 1534, note 1.]—With respect to the question of costs no serious difficulty would arise. If the replication is true, and the defendants allow judgment to go by default, all the pleadings might nevertheless remain upon the record, and the costs of the judgment would be costs *de bonis testatoris*. It is clear that by some means or another the plaintiff ought to be allowed his debt out of these assets. An interval must always elapse between the time of pleading and entering up judgment:

it would be unjust, therefore, to confine him to those assets only which had come into the hands of the executors since the judgment. The only other course is to alter the form of the ordinary judgment to that which is to be found in *Mr. Chitty’s forms*.

*Needham* replied.

POLLOCK, C.B.—We are all of opinion that this replication is bad. The whole question turns upon what is the effect of a judgment of assets *quando acciderint*. It appears to us that such a judgment embraces not only those assets which may have actually come into the hands of the executors since judgment was signed, but all assets which may then exist in the hands of the executors, although received by them before. By giving such an effect to this judgment, we reconcile all the former cases and precedents. The plaintiff’s counsel was not correct when he stated that assets which come into the hands of the executors between writ and judgment of assets *quando* would not be reached by such judgment. In point of fact they will, unless in the meanwhile they have been properly disposed of by the executors.

PARKE, B.—I think that this is a bad replication. It is entirely without precedent, except that of Mr. Barrow’s, in 3 *Wentworth*, p. 224, and which, he says, “he fears is unprecedented; and, therefore, perhaps, not to be preferred,” and it would be productive also of the greatest inconvenience. There would, then, be no limit to the pleadings in actions of this nature; for if the defendants had in the meanwhile duly administered the assets which had come into their hands since plea pleaded, they would so rejoin; if further assets came into their hands there would be a surrejoinder by the plaintiff in like form to the present replication; and thus the pleadings might be protracted indefinitely. If, on the other hand, the defendants did not rejoin, but allowed judgment to go by default, there would also be a difficulty; for when judgment is allowed to go by default, the course is for all the intermediate pleadings to be struck out, the declaration alone remaining upon the record. Now, upon judgment of *nil dicit* in actions against executors, they are liable to costs *de bonis propriis*. This clearly ought not to be the result where

(2) 2 *Wms. Saund.* 219, *a*.

(3) *Buller’s N.P.* 169.



the executors have placed upon the record what was a good defence to the action. We should, therefore, as the plaintiff's counsel admits, have to introduce a new practice, allowing in cases of this nature all the pleadings to remain upon the record, with a judgment of costs *de bonis testatoris*. There appears to me, however, to be no necessity for any such course, for, in my opinion, a judgment of assets *quando acciderint* has all the effect which could result from allowing this replication to stand. This matter was first discussed in the case of *Mara v. Quin*. In that case Lord Kenyon gave it as his opinion "that the ordinary mode of entering up a judgment of assets *quando acciderint* was not correct; for as on the issue of *plene administravit*, no evidence could be given of assets after the writ sued out, if the judgment were to affect assets received after the judgment, there was an interval between the commencement of the action and the judgment, in which, if the executor received any assets, they could not be taken at all." Upon which Mr. Justice Ashurst suggested that the plaintiff might reply to the plea of *plene administravit* "that the executor had assets since," &c.; and this form of replication has, within my own recollection, been adopted (4). I much doubt, however, whether there is any necessity for it; and, certainly, I think that there is no ground whatever for Lord Kenyon's observations as to the form of judgment of assets *quando acciderint*. That judgment binds assets which may then or thereafter be in the hands of the executors to be administered, irrespective of the fact whether they may have been received by the executor before or after the signing of such judgment. If that is so, it would reach assets which have been received by the executor between the writ and judgment; in the event of such assets not having been administered when the judgment was signed. In other words, the true meaning of the judgment is, that the amount recovered shall be satisfied out of any assets which may thereafter be in the hands of the executors applicable to the payment of the debt. There seems no occasion, therefore, for introducing the form of pleading suggested by Mr. Justice Ashurst, still less the

mode of replication which has been made use of here. It appears to me that the difficulty raised by Lord Kenyon is no difficulty at all; that a judgment of assets *quando* would reach those assets to which this replication has been pleaded; and that the replication is, therefore, bad.

ROLF, B.—I am entirely of the same opinion. It is gratifying to see that the principles of the common law are of sufficient strength to grapple successfully with the difficulties of the present case. I concur with all that has fallen from the Court, in deciding that the judgment of assets *quando acciderint* embraces all that is sought for by the present replication. I concur also with the remarks of my Brother Parke, with reference to the observations of Lord Kenyon and Mr. Justice Ashurst, in the case of *Mara v. Quin*. The plaintiff's counsel in his argument, relied upon the case of *Taylor v. Holman*, for the purpose of shewing that a judgment of assets *quando acciderint* would not affect assets which had come into the hands of the executors between the time of plea pleaded and of signing judgment. That was an action in *scire facias* upon a judgment of assets *quando*, and the declaration stated that divers goods, &c. of the testator, sufficient to pay, &c., had come to and were in the defendant's hands to be administered, &c., without stating that those goods had come to the defendant's hands since the judgment, and prayed execution against the defendant to be levied of those goods according to the form and effect of his said recovery, &c.; the defendant pleaded that after the plaintiff's judgment no goods, &c. of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied that divers goods had come to the defendant's hands, without adding "since the judgment"; and on demurrer it was adjudged that the *scire facias* was wrong for want of the words, "after the judgment." In the note of Mr. Serj. Williams, in which he cites this case, he says, "It seems necessary to state that the assets came to the executor's hands after the judgment; for the *scire facias* must pursue the terms of the judgment, which in this case are that the plaintiff do recover his debt to be levied of the goods of the testator which shall thereafter come to the hands of the executor." Now, all the

(4) See the form 3, Chitty on Pleading, 447.

difficulty upon this subject arises from misunderstanding these latter words of the judgment of assets *quando*. The case of *Taylor v. Holman* was rightly decided, because it was quite consistent with the declaration in that case, that assets were sought to be affected by the declaration, which had not only come into the hands of the executor, but had been duly administered by him, before the judgment of assets *quando* had been signed. But it is no authority to shew that the first perception of the assets by the executor must have been at a time posterior to the judgment. All assets, which at the time of the judgment are in the hands of the executor unadministered are liable equally with those which may subsequently come there. If the Court therefore in *Mara v. Quin* had not yielded too readily to the difficulty suggested, and instead of allowing the judgment to be antedated, had allowed it to stand as of Michaelmas term, 1793, the common law would have done for the plaintiff all that the complicated machinery introduced into the case could effect. For these reasons I think that the present replication is unnecessary, unwarranted, and bad.

PLATT, B. concurred.

*Leave to amend, otherwise judgment for the defendants.*

1848. }  
May 2. } M'GREGOR v. FISKEN.

*Arrest, under 1 & 2 Vict. c. 110. s. 3—  
Warrant of Protection, under 2 & 3 Vict.  
c. 41. (Scotch Sequestration Act).*

*A warrant of protection from arrest, granted by the Lord Ordinary to a bankrupt, under the 13th section of the Scotch Sequestration Act, 2 & 3 Vict. c. 41, is inoperative if the bankrupt is already in custody.*

*In such case the proper course is to apply for a warrant of liberation under section 17. of that statute.*

The defendant in this action being about to leave this country for Scotland, was arrested on the 17th of March last, under the 1 & 2 Vict. c. 110. s. 3. At that

time and previously he had been carrying on business with a Mr. James Mitchell, as merchants, under the firm of Ross, Mitchell, & Co., at Glasgow and at Toronto, in Upper Canada. The Scotch house having become bankrupt, and the defendant and James Mitchell having duly filed their petition, on the 20th the Lord Ordinary made the following order:—

“Edinburgh, 20th March 1848.

“The Lord Ordinary having considered this petition, with the writs produced, sequestrates the estates now belonging or which shall hereafter belong to the petitioners, John Fiskien and James Mitchell, individual partners of the firm of Ross, Mitchell, & Co., merchants, carrying on business in Glasgow and at Toronto, in Upper Canada, as partners of the said firm, and as individuals, before the date of their discharge, in terms of the act 2 & 3 Vict. c. 41, and declares the same to belong to their respective creditors, for the purposes of the said act; appoints the creditors to hold two meetings at the times and place mentioned in the petition, for the purpose of electing one interim factor or separate interim factors, and one trustee or separate trustees, or trustees in succession, and commissioners, as directed by the statute; remits to the sheriff of the county, where the said meetings are to be held, to proceed in manner mentioned in the said statute; and grants warrant of protection to the said John Fiskien and James Mitchell respectively, against arrest or imprisonment for civil debt, until the meeting of the creditors for the election of a trustee.

(Signed) “John A. Murray.”

Parke, B. having declined, at chambers, to make any order, on the 22nd of March the sum of 1,329*l.* 19*s.* 1*d.* was paid into court, by a Mr. Alexander Mitchell, in lieu of special bail, and the defendant was thereupon discharged out of custody. In the course of the present term a rule having been obtained calling upon the plaintiff to shew cause why the said sum of money should not be repaid out of court to the defendant, or to Mr. Alexander Mitchell,—

*Willes* now shewed cause.—The defendant having been arrested on the 17th of March, the warrant of protection from arrest, granted by the Lord Ordinary on the 20th of March, is inoperative to discharge him.

The statute of the 2 & 3 Vict. c. 41. contemplates two sorts of warrants: the one under the 13th section, by which a debtor, who is still at large, is protected from arrest; the other, under the 17th section, which enacts, "That the Lord Ordinary may, on application made either in the petition for sequestration, or by a separate petition by the debtor, grant a warrant for liberating the debtor if in prison, after such intimation to the incarcerating creditor or his known agent, as the Lord Ordinary shall deem to be just, and after hearing any objection to the granting of such warrant." The defendant should have obtained a warrant for liberation under this section, instead of the warrant under the 13th section, which that before the Court is. This latter warrant is a mere temporary benefit conferred upon the bankrupt, until the meeting of the creditors takes place; and by the 58th section the personal protection of the bankrupt may be renewed for such time as the creditors may think fit. No difficulty will be thrown in the way of the proceedings in Scotland, by holding that the effect of a warrant of protection from arrest will not discharge a person already arrested; for the 67th section of the statute provides for the case of a bankrupt being in custody in England, by authorizing the Lord Ordinary to grant a warrant for his transmission to Scotland for the purpose of being examined, and for his re-transmission after examination to his former custody. Secondly, if the Court should think that this was a warrant liberating the bankrupt from arrest, still it would be inoperative under the 18th section, which provides that a "warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment *in meditatione fugæ*. In the case of *M'Gregor v. Fiske* (1), which was argued before Wightman, J., in the Bail Court, that learned Judge certainly decided that a contemplated departure from England to Scotland was not a *meditatio fugæ* within the meaning of that section; but it is submitted, that that decision cannot be supported.

*Aspland*, contra. — The warrant of the Lord Ordinary in this case was sufficient to authorize the discharge of the defendant from

custody. Although the word "liberate" is not used, the warrant expressly protects the defendant not only against arrest, but against "imprisonment for civil debt;" its effect, therefore, the bankrupt being in custody at the time, was, by the 18th section of the statute, to discharge him. This Court will not require the authority of the Lord Ordinary to appear upon the face of the warrant — *Marsh v. Woolley* (2); and they should also leave it to the Lord Ordinary to say whether the warrant is sufficient or not. Neither was there any *meditatio fugæ* in this case; that point has been expressly decided by Wightman, J. in the case referred to.

POLLOCK, C.B. — I am of opinion that this rule should be discharged. The defendant having been arrested on the 17th of March, the warrant of protection granted by the Lord Ordinary was not obtained until three days afterwards. The defendant being at that time in custody the warrant was inoperative.

PARKE, B. — I am of the same opinion. Under the 2 & 3 Vict. c. 41, the Lord Ordinary has power to grant two distinct kinds of warrants: one protecting the bankrupt from arrest; the other liberating him if already arrested. If a warrant of liberation had been obtained in this case, or if the bankrupt had not been arrested until after the warrant of protection against arrest had been granted, then the question as to the *meditatio fugæ*, which at chambers I thought was the point in the case, would have arisen. But it does not; for I am clearly of opinion that the present warrant is only a warrant of protection made under the 13th section of the act, and is altogether inoperative in the present case, inasmuch as the defendant was in custody at the time it was obtained. The 18th section does not help the defendant. That should be read *reddendo singula singulis*, and means that a warrant of protection shall protect the debtor from arrest, and a warrant of liberation shall liberate him from imprisonment if already arrested.

ROLFE, B. and PLATT, B. concurred.

*Rule discharged.*

(2) 1 Dowl. & L. P.C. 84; a.c. 12 Law J. Rep. (N.S.) C.P. 247.

(1) *Ante*, Q.B. p. 186.

1848. } KERFOOT, EXECUTOR, ETC. v.  
May 10. } EDWARDS.

*Practice—Plea—Time for Pleading—  
Abatement—Oyer.*

*The rule that where oyer has been demanded, the defendant has as much time for pleading after it is granted as he had when he demanded it, is applicable as well to a plea in abatement as to a plea in bar.*

This was an action brought by the plaintiff, as executor of one James Kerfoot, deceased. The declaration was in debt, and contained a profert of the letters testamentary in the usual form. The declaration was delivered on the 7th of April last. On the 8th of April the defendant demanded oyer and a copy of the letters testamentary. This was granted on the 11th of April. On the 13th, the defendant delivered a plea in abatement. A summons was thereupon taken out and attended before Alderson, B., calling upon the defendant to shew cause why the plea in abatement should not be set aside, on the ground that it had been pleaded more than four days after the delivery of the declaration, but the learned Judge refused to make any order. Notice was then given by the plaintiff to the defendant, that he should treat the plea in abatement as a nullity, and sign judgment for want of a plea, after the time for pleading in bar should have expired. Final judgment was accordingly signed on the 20th of April. A rule having been obtained calling on the plaintiff to shew cause why that judgment should not be set aside,—

*Crompton* now shewed cause.—It is submitted that the time for pleading in abatement had expired before the plea was delivered in this case. Although the rule with respect to pleading in bar is, that the defendant has as many pleading days after oyer is granted as he had at the time he demanded it, that is not the case with respect to a plea in abatement. A defendant cannot plead in abatement after the four days from the delivery of the declaration has expired.

[PARKE, B.—Have you any authority on the point?]

In the case of *Barrow v. Bell* (1), the

facts were these :—It was an action by an executor, and the declaration was delivered on the 30th of May 1846. At seven P.M. on the 3rd of June, there was a demand of oyer of the letters testamentary, which was given at five minutes before nine P.M. on the 6th of June, but it being impossible to deliver a plea that night within office hours, a plea in abatement was delivered on Monday, the 8th of June, before eleven o'clock. Judgment as for want of a plea having been signed on the 12th, this Court refused a rule to set it aside. The defendant would have been in time with his plea in that case, if he had had as much pleading time after oyer was granted as he had when he demanded it.

*Welsby*, who appeared in support of the rule, was not called upon by the Court.

[PARKE, B.—The decision in *Barrow v. Bell* probably proceeded upon the ground that for a plea in abatement to be in time, it must be pleaded within the four days, including both the first and last. That was the old rule; but by the rule of Hilary term, 2 Will. 4. r. 8, which provides, "that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day and inclusively of the last day," the old rule was changed; and, accordingly, in *Ryland v. Wormald* (2), we decided, that since that rule the four days for pleading in abatement are to be computed exclusively of the day of delivering the declaration and inclusively of the last day. The Court were probably unmindful of this rule and case when they refused to set aside the judgment in *Barrow v. Bell*, and not because they thought that when oyer has been demanded there was any different rule prevailing in respect to pleading in bar and pleading in abatement.]

*Per Curiam*.—This rule must be made absolute.

*Rule absolute.*

cause, and now stated the facts from his brief, and its indorsement.

(2) 2 Mee. & Wels. 393; s. c. 6 Law J. Rep. (N.S.) Exch. 119.

(1) This case was decided in Trinity term, 1846, but is not reported; *Crompton* was counsel in the

1848. }  
May 10. } THE QUEEN v. RENTON.

*Prisoner—Writ of Extent—Escape—Recapture and Detainer.*

*A writ of extent may be made returnable in vacation.*

*If a defendant in prison under a writ of extent be taken out of the precincts of the prison for a time, by order of the Commissioners of Excise, but without a writ, for the purpose of giving evidence, and be afterwards brought back and detained in the same custody, such custody is lawful.*

Upon the 31st of January last, the defendant was taken into custody and conveyed to the county gaol, by the sheriff of Surrey, under a writ of extent, issued at the suit of the Crown, for certain penalties incurred by the defendant for a breach of the Excise laws. The writ was made returnable in vacation. On the 12th of February, and whilst he was in such custody, the defendant was taken out of the precincts of the gaol, by order of the Commissioners of Excise, for the purpose of giving evidence before a jury in the matter of such extent. But no writ of *habeas corpus* or any other legal process had been obtained for that purpose. After having given evidence the defendant was taken back to gaol, where he had ever since been detained.

Upon affidavits stating these facts, a rule had been obtained, calling upon the Attorney General or the Commissioners of Excise, and the sheriff of the county of Surrey, to shew cause why the writ of extent should not be quashed and the defendant discharged out of custody. The rule was obtained upon two grounds: first, that the writ of extent was bad because made returnable in vacation; secondly, that the defendant having been removed from the gaol without a *habeas corpus ad testificandum* having been obtained, that amounted in law to an escape, and that he could not be retaken.

*The Attorney General (Sir J. Jervis), (Watson and Wilde with him), now shewed cause on behalf of the Crown. — As to the first point, the 8th section of the 5 & 6 Vict. c. 86. expressly authorizes the making of writs of extent returnable in vacation. As to the second point, although as between subject and subject the*

*facts of the present case may, in point of law, amount to a voluntary escape; and, therefore, if the defendant were detained at the suit of a private individual, he would be entitled to his discharge, that is not the case where a defendant is in custody at the suit of the Crown. The Crown is not affected by the laches of its officers, and as against the Crown, therefore, there is no such thing as a voluntary escape—Sheffield v. Ratchife (1), where it is said, "It is no reason that the negligence of his officers, and perhaps their compact and combination with the adverse party, should defeat the king"—The Attorney General v. Chitty (2), and The Attorney General v. Walmsley (3). But even if there was a voluntary escape, the Crown had power to retake the defendant and detain him in custody under the original writ of extent. That was expressly decided in an Anonymous case in Savile (4), as follows:—"It was said by Fanshawe, remembrancer of the Queen, that if one should be in execution at the suit of the Queen in the Fleet, the guardian of the Fleet could suffer him to go to his counsel with his keeper; but it is otherwise if one is in execution at the suit of a common person. And the reason is, for this, that if he who is in prison in execution for the Queen should happen to escape, the guardian for the Queen can retake him; it is otherwise in the case of a common person." Although the Court differed in opinion upon another point in this case, upon this they were unanimous. He referred also to Dyer (5), Manning's Ex. Prac. 32, Sir E. Coke's case (6).*

*Lush and J. W. Rogers, contra. — As to the first point it is admitted that the rule cannot be sustained; but as to the second, the case stands upon a different footing from that upon which it was put by the Attorney General, and the rule ought to be made absolute. This is not a question whether the Crown was bound by the act of its officer, for the Crown itself was in this case a party to the removal of the defendant out of his then custody; and the simple question is, whether*

- (1) Hob. 347.
- (2) Parker, 48.
- (3) 12 Mee. & Wels. 179; s. c. 13 Law J. Rep. (N.S.), Exch. 66.
- (4) Savile, 29.
- (5) 3 Dyer, 365, a.
- (6) Godbold, 298.

the Crown has any power so to do without the leave of a court of law. In *Dyer* (7) it is expressly laid down, that "the command of the Treasurer and Chancellor are not sufficient warrant to license one condemned in execution to go with a keeper or otherwise at large, for the Queen herself could not do that; as was holden by the opinion of all the Justices of both benches, in the time of Queen Mary"—*Thurland's case* (8), and 2 *Coke's Inst.* 187. Even if this were to be treated as the act not of the Crown itself, but of its officers, the authorities cited on the other side only apply to cases where the property of the debtor is concerned. The maxim that the Crown is not bound by the negligence or misconduct of its officers, has never been pushed so far as to affect the person of a subject. With respect to the authority cited from *Savile*, that was a proceeding *ex gratia* to the debtor; here, the proceedings were clearly adverse. The rule is otherwise clear, that if there has ever been a voluntary escape a prisoner can never be retaken upon the same writ—*Filewood v. Clement* (9).

The Attorney General replied.

POLLOCK, C.B.—I am of opinion that this rule must be discharged. There are several points connected with the matter in discussion before us, which might have called for a more solemn and deliberate judgment, inasmuch as the authorities with reference to them are conflicting. But the simple question before us now is, whether a defendant in execution under a writ of extent, who has been taken from prison for a time by the order of the Commissioners of Excise, for the purpose of giving evidence, but who has afterwards been brought back in the same custody, is entitled to his discharge. I do not wish to throw any doubt upon the right of the Crown to remove him for the purpose of giving evidence without any writ issuing for that purpose; but that question need not be decided now. In order to establish the proposition for which the Attorney General has contended, I think the case in *Savile* furnishes sufficient authority. There is no doubt or conflict of opinion upon that case so far as it decides

that if a person who is in prison at the suit of the Queen should happen to escape, the guardian for the Queen can retake him. For these reasons, I think that the present rule should be discharged.

PARKE, B.—I entirely concur in opinion with the Lord Chief Baron. For the purpose of deciding the present case, I will assume that by removing the defendant out of the precincts of the prison, there has been a voluntary escape. Still he is at present in custody; and then the case in *Savile* shews that such custody is legal, for it decides that he may be retaken under the original writ; and a clear distinction is there taken between the rights of the Crown in this respect and the rights of the subject. In the one case the execution is not satisfied by the escape; in the other it is. This being so, it becomes unnecessary to give any opinion upon the other points which have been raised in the case.

ROLFE, B. and PLATT, B. concurred.

Rule discharged.

1848. }  
May 11. } SANSON v. PRICE.

Costs—Suggestion on the Roll; Traverse of—Payment of Costs by Rule.

The plaintiff having obtained a verdict in this court for 30s. in a case within the jurisdiction of the Middlesex County Court, a rule was made absolute for entering a suggestion on the roll depriving him of costs, and for his paying the defendant his costs of suit. This suggestion was traversed by the plaintiff:—Held, that as the costs of suit depended upon the trial of the suggestion, the Court had no power by rule to compel the plaintiff to pay them.

This was a rule calling upon the defendant to shew cause why the taxation of the plaintiff's costs should not be stayed until after the trial of the issue raised on the traverse of the suggestion.

The case having been tried, before the sheriff, on a writ of trial, and the plaintiff having obtained a verdict for 30s., a rule was made absolute in this court for entering a suggestion on the roll to deprive the plaintiff of costs, and for the plaintiff to pay the

(7) 3 *Dyer*, 297, a.

(8) 2 *Ibid.* 162, b.

(9) 6 *Dowl. P.C.* 508.

defendant his costs of suit, pursuant to the statutes 23 Geo. 3. c. 33. and 5 & 6 Vict. c. 97.

*T. Jones* shewed cause.—The plaintiff is too late in his application, the rule for a suggestion having been made absolute on the 24th of November last, and the plaintiff's affidavit in support of the present rule being sworn on the 28th of April. Besides, it is not pretended that the term as to payment of costs has crept into the rule by mistake. (He was then stopped by the Court.)

*Lush*, in support of the rule.—The Court has exceeded its power in ordering the plaintiff to pay the costs, for the costs depend upon the suggestion, which being traversed is a matter to be tried, and according to the result of the trial the plaintiff may receive costs instead of having to pay them. If this rule were discharged, the Court could not enforce the terms of the former rule, and compel the plaintiff to pay the defendant's costs of suit. Take the case of an ordinary action; the Court could not by rule order the plaintiff to pay the debt and costs, and in the event of his refusal enforce payment by attachment. As long as the traverse remains on the record there is an inconsistency in directing the plaintiff to pay the defendant's costs. The truth is, that this term has found its way into the rule by mistake of the officer of the court, and ought not to have been introduced into any rule after the decision of this Court in *Watson v. Quilley* (1), that a suggestion similar to the present might be traversed. All that the plaintiff requires is, that costs may not be taxed until after the trial of the suggestion.

[*PARKE, B.*—This term ought not to have been introduced into the rule.]

*T. Jones*.—The Court has the power of doing what is right between the parties, and in this case justice has been done. This is, in fact, an application to this Court to rehear a question which has been decided in a previous term, and is contrary to the established practice of the courts—*Todd v. Jeffery* (2). Besides, the plaintiff has no merits in this case; if he could have shewn to the Court either that the cause of action did not accrue in Middlesex, or that he would

have been successful on the traverse, the rule for entering a suggestion would not have been made absolute.

[*PLATT, B.*—The plaintiff contends that the rule *improvide emanavit*; that it ought not to have been made absolute in its present terms.]

[*PARKE, B.*—There is a contradiction in the present state of things which ought not to be allowed to remain. A rule compelling the plaintiff to pay the defendant's costs of suit, and a suggestion on the record which has been traversed, are inconsistent.]

[*PLATT, B.*—The rule has not been drawn up in the proper form.]

*PARKE, B.*—The Court had no power to make the rule complained of. The taxation of costs must be suspended until the trial of the issue. The present rule will, therefore, be absolute to strike out of the former rule so much as orders the plaintiff to pay the defendant his costs.

*POLLOCK, C.B., ROLFE, B. and PLATT, B.* concurred.

*Rule absolute, on payment of costs.*

1848. }  
May 4. } *HILLS AND OTHERS v. WATKIN.*

*Practice—Rule to plead several Matters—Variance between Rule and Plea—Signing Judgment.*

*The defendant obtained a rule to plead four pleas, describing the last plea in the rule thus: "that as to the sum of 100*l.*, parcel &c. the defendant, before the commencement of the action, indorsed and delivered to the plaintiffs a certain bill of exchange for 100*l.*, which the plaintiffs received in satisfaction of the said sum of 100*l.*." The plea pleaded was: "as to the said sum of 100*l.*, parcel &c., that before the commencement of the suit, the defendant for and on account of the said sum of 100*l.*, indorsed and delivered to the plaintiffs a certain bill of exchange for 100*l.*, drawn by the defendant and accepted by one T. J., and the said plaintiffs took and received the said bill of exchange for and on account of the said sum, parcel," &c. Averment, that the defendant had not due notice of the non-payment*

(1) 11 Mee. & Wels. 760; s. c. 12 Law J. Rep. (N.S.) Exch. 405.

(2) 2 Nev. & Per. 443; s. c. 7 Law J. Rep. (N.S.) Q.B. 1.

of the said bill of exchange :—*Held, that the plaintiffs were entitled to sign judgment, on account of the variance between the rule to plead and the plea pleaded.*

This was a rule calling upon the defendant to shew cause why an order of Alderson, B., setting aside a judgment, should not be rescinded.

An action having been brought by the plaintiffs, as indorsees, against the defendant, as the drawer of a bill of exchange for 100*l.*, with counts for money paid, and on an account stated, the defendant obtained a rule to plead several matters : viz. first, a traverse of the making of the bill ; secondly, no notice of dishonour ; thirdly, as to the second and third counts, never indebted ; and fourthly, as to 100*l.*, parcel, &c., that before the commencement of the action the defendant indorsed and delivered to the plaintiffs a bill of exchange for 100*l.*, which the plaintiffs received in satisfaction of the said sum of 100*l.* Under this rule, the defendant pleaded, fourthly, that, as to the said sum of 100*l.*, parcel of the monies in the second and third counts, he, the defendant, for and on account of the said sum of 100*l.*, indorsed and delivered to the plaintiffs a certain bill of exchange for 100*l.*, drawn by the defendant and accepted by one T. Jackson, and the said plaintiffs took and received the said bill of exchange for and on account of the said sum, parcel, &c. Averment, that the defendant had not due notice of the non-payment of the said bill of exchange, so taken by the plaintiffs, as in this plea mentioned. The plaintiffs thereupon signed judgment, which was set aside by Alderson, B., at chambers, on the authority of *Holliday v. Bohn* (1). The above rule having been obtained,—

*Horn* now shewed cause.—The judgment was irregular, and was properly set aside by the learned Judge ; for the plaintiffs were not justified in signing judgment, on the ground of a slight variance between the description of one of the pleas in the rule to plead and the plea itself. In truth, the plea pleaded is substantially in accordance with the rule to plead. It states that the plaintiffs received the bill for and on account of the sum of 100*l.*, which is in effect a statement that the

bill was received by the plaintiffs in satisfaction, because it is a statement that the plaintiffs, by their laches, caused it to operate by way of satisfaction. But admitting that a variance exists between the rule to plead and the plea itself, there is no case which shews that the plaintiffs were authorized to sign judgment on account of such variance. The case does not stand on the same footing as where a non-issuable plea is pleaded, when the defendant is under terms of pleading issuably. In that case the defendant is properly punished by having judgment signed against him, because his improper pleading is in clear violation of his engagement, and tends to delay and embarrass the plaintiff ; but that is not so here. In the present case there has been nothing more than a slight unintentional misdescription in the rule of the plea intended to be pleaded, and no inconvenience or injury to the plaintiffs has been suggested. *Holliday v. Bohn* is in point : that was an action of debt on a promissory note, and upon an account stated ; and the defendant having obtained a rule to plead, to the first count *non fecit* and payment, and to the second count *nunquam indebitatus*, by mistake delivered with pleas to the first count a plea of *non assumpsit* to the second count, whereupon the plaintiff signed judgment. The Court set aside the judgment, saying “that the present case differed from that of a defendant who delivers several pleas without having obtained a rule to plead several matters ; in which case the plaintiff may properly sign judgment.” The proper course for the plaintiffs to pursue was to procure the rule to plead to be amended at the expense of the defendant, or to move the Court or a Judge to strike out the last plea, as not being pleaded conformably with the rule to plead. He cited *Badman v. Pugh* (2) and *Baily v. Baker* (3).

[*ROLFE, B.*—In *Holliday v. Bohn* there were two counts : the defendant pleaded properly to the first count ; and the question is, whether he required any rule to enable him to plead to the second count on the account stated.]

[*PARKE, B.*—In this case there is no rule

(2) 6 Scott, N.R. 150 ; s.c. 12 Law J. Rep. (N.S.) C.P. 126.

(3) 9 Mee. & Wels. 769 ; s.c. 11 Law J. Rep. (N.S.) Exch. 312.

(1) 3 Man. & Gr. 115 ; s.c. 3 Scott, N.R. 496.



to plead that the bill was delivered for and on account of the sum of 100*l*.]

[PLATT, B.—Suppose the defendant had received leave to plead three several matters, and had pleaded three matters totally different, could not the plaintiff in that case have signed judgment?]

Undoubtedly he might. The defendant would then be in the same situation as if he had pleaded several matters without any rule whatever.

*Bramwell*, contra, was not called upon.

*Per Curiam*.—The order of the Judge must be rescinded. The present case is distinguishable from *Holliday v. Bohn* for reasons given by Serj. Manning, in his note to the report of that case (4).

The judgment was afterwards set aside on terms.

*Rule absolute accordingly.*

1848. } TATTERSALL v. PARKINSON.  
May 11. }

*Arbitration—Award—Rule to pay Money—Demand of Sum due.*

*In an action in which several issues were raised all matters in difference were referred to two arbitrators and an umpire, the costs of the cause to abide the result. The umpire awarded that all further proceedings in the cause should thenceforth cease, and be no further prosecuted, and that the plaintiff should pay to the defendant 12*s*. 0*½d*., being the amount which the umpire found to be due to him. A demand of 21*l*. 16*s*. 2*d*., being the costs of the cause, had been made upon the plaintiff, and payment refused, but no demand had been made of the sum of 12*s*. 0*½d*.*

*A rule having been obtained calling on the plaintiff to shew cause why he should not pay to the defendant both those sums, the Court, under the circumstances, refused to make the rule absolute for payment of the one sum that had been demanded.*

This was a rule calling upon the plaintiff to shew cause why he should not pay the defendant two sums of 21*l*. 16*s*. 2*d*. and 12*s*. 0*½d*. pursuant to an award.

It appeared from the affidavits that an action was brought by the plaintiff against the defendant, in which several issues were raised; and that by a Judge's order all matters in difference between the parties were referred to two arbitrators, with power to appoint an umpire; the costs of the cause to abide the result, and the costs of the reference and award to be in the discretion of the arbitrators. The umpire awarded "that all further proceedings in the said cause shall henceforth cease, and be no further prosecuted;" that the plaintiff should, on &c. pay to the defendant 12*s*. 0*½d*., being the amount which he found to be due to him; and that upon payment thereof the defendant should deliver to the plaintiff the four ash-pans mentioned in the particulars of the matters in difference; and that each of them, the said plaintiff and defendant, should bear and pay his own costs of the reference, and that the costs of his award should be borne and paid by them in equal moieties. It also appeared that a personal demand of the sum of 21*l*. 16*s*. 2*d*., being the costs in the cause, had been made upon the plaintiff, and payment refused, but that no demand had been made of the sum of 12*s*. 0*½d*.

*Pashley* shewed cause.—This rule must be discharged on two grounds. First, the award is bad and cannot be enforced. The costs of the cause are to abide the result, and no result appears on the face of the award, for the direction that all further proceedings in the cause are to cease and to be no further prosecuted cannot be considered as a result. *In re Leeming v. Fearley* (1) was an action of replevin which was referred to arbitration, the costs of the cause to abide the event. The award was that the plaintiff should pay the defendant 6*l*., and that the action should be no further prosecuted; and it was held that the award did not shew who ought to pay the costs, and, consequently, was not final. *Blanchard v. Lilly* (2) is distinguishable. There the award directed the actions to be discontinued, and on that account appears to have been held final. Secondly, there has been no demand of these two sums; and the authorities shew that in a case like the present a demand must be made similar to that which is neces-

(4) 3 Man. & Gr. 115, a.

(1) 5 B. & Ad. 408.

(2) 9 East, 497.

sary on motion for an attachment—*Richards v. Patterson* (3), *Winwood v. Hoult* (4).

*Hugh Hill*, *contra*.—The rule in this case may be made absolute, at least as to 21l. 16s. 2d., which sum has been demanded. This is like the case of a party demanding a large sum, and obtaining an attachment for the non-payment of that sum by agreeing to waive the costs.

[*PARKE, B.*—You cannot have a rule in this case unless you could have one for an attachment. The defendant ought not to make his application as it were piecemeal.]

Secondly, the award is sufficient. The costs are to abide the *result*, not the *event*, of the cause. The Court will always presume in favour of the validity of an award. The award amounts to a direction to the plaintiff to pay a sum of money to the defendant, and it is quite clear that the plaintiff was not entitled to recover anything.

*POLLOCK, C.B.*—I do not come to that conclusion; and certainly this is not a case in which we ought to enforce the extraordinary power of the Court.

*PARKE, B.* and *ROLFE, B.* concurred.

*Rule discharged, with costs.*

1848. }  
May 15. } *ALLEN v. SHARP.*

*Revenue—Assessed Taxes—Assessment—Appeal—Replevin—Horse-dealer.*

*The effect of the statutes 43 Geo. 3. c. 99. and 43 Geo. 3. c. 161. is to make the assessment by the assessors of assessed taxes final, subject to a right of appeal, by a party charged, to the Commissioners of Assessed Taxes, and from their decision to the Judges.*

*Where, therefore, assessors had assessed an inhabitant of the district for which they were appointed, to duties payable by him as "a horse-dealer," under the statutes 48 Geo. 3. c. 55. Sch. H. and 52 Geo. 3. c. 93. Sch. H. and upon refusal to pay the same a distress had been levied of his goods:—Held, upon replevin brought for*

(3) 8 Mee. & Wels. 313; s. c. 10 Law J. Rep. (N.S.) Exch. 272.

(4) 14 Ibid. 197; s. c. 15 Law J. Rep. (N.S.) Exch. 10.

NEW SERIES, XVII.—EXCHEQ.

*the goods so taken, that such an assessment was an answer to the action; and that an allegation in the avowry that the plaintiff did in fact "exercise the trade and business of a horse-dealer" was immaterial.*

*Quære, as to what constitutes "a horse-dealer" within the meaning of the statutes relating to assessed taxes.*

*Replevin.* Avowry, that on the 5th day of April A.D. 1844, and from thence until and on and to the end of the 5th day of April A.D. 1845, and from thence until the end of the 5th day of April 1846, and from thence until and at the said time when, &c. in the declaration mentioned, the plaintiff did, in the parish of St. Anne, in the district of St. Anne, &c., exercise the trade and business of a horse-dealer, and was during all the times aforesaid respectively an inhabitant of the said parish, within the district, &c. aforesaid; that after the 5th day of April A.D. 1845, and before the 20th day of June in the last-mentioned year, to wit, &c. J. S. and E. W., then being the assessors duly appointed according to the several acts of parliament passed for levying the several duties of assessed taxes, and relating thereto, and in all respects duly qualified to make the assessments thereafter mentioned, and having theretofore and after their said appointment, to wit, on the day and year last aforesaid, taken the oath required to be taken by such assessors, before they acted as such assessors, according to the said acts of parliament, did make an assessment upon the several inhabitants of the parish of St. Anne, Westminster, pursuant to the said acts, for the year ending the 5th day of April A.D. 1846, which said assessment was then before the said 20th day of June, to wit, &c. duly, and according to the said acts of parliament, certified upon oath by the said J. S. and E. W. to and allowed according to the directions of the said acts of parliament by J. R. and P. T., then being two of the Commissioners for the affairs of taxes, acting for the said district of St. Anne, according to the acts of parliament, &c.; that in and by the said assessment he, the plaintiff, as such inhabitant as aforesaid, and as a person so exercising the said trade and business in the parish, district, &c. aforesaid, was, by the said J. S. and E. W.,

then being such assessors as aforesaid, assessed in the sum of 25*l.*, as and for the duties of 22*l.* 10*s.* and 2*l.* 10*s.*, payable by horse-dealers, under the statute passed in the forty-eighth year of the reign of his late Majesty King George the Third, and in the fifty-second year of the reign of the last-mentioned king, for, amongst other things, granting duties, payable by persons who should use or exercise the trade and business of a horse-dealer within the cities of London and Westminster, and the liberties of the same respectively, the parishes of St. Marylebone and St. Pancras, in the county of Middlesex, and the weekly bills of mortality, or the borough of Southwark, in the county of Surrey; and also in the further sum of 2*l.* 16*s.*, part whereof, to wit, 2*l.* 10*s.* was the additional duty of 10*l.* per cent. upon the said sum of 25*l.*, that is to say, such additional duty of 10*l.* per cent. as was granted to our Lady the now Queen, by the statute passed in the third year of her reign, for granting to her said Majesty duties of Customs, Excise, and assessed taxes, and the residue of which said sum of 8*l.* 16*s.* 10*d.* was such additional duty of 10*l.* per cent., granted by the last-mentioned act, upon and in addition to certain other duties, amounting to 3*l.* 8*s.* 9*d.*, in which the plaintiff was duly assessed in and by the said assessment, and to the payment of which, and to be so assessed as aforesaid he, the plaintiff, was according to the said several statutes relating to assessed taxes liable.

The avowry then went on to allege the payment by the plaintiff of the said sums of 3*l.* 8*s.* 9*d.* and 6*s.* 10*d.*; the due appointment of the defendant by the Commissioners as collector of the said duties; the delivery to him of a warrant by the Commissioners requiring him to distrain, on non-payment thereof; the demand by the defendant, upon the plaintiff, of the said duties of 25*l.* and 2*l.* 10*s.*; a refusal, by the plaintiff, to pay the same; and the taking of the goods in the declaration mentioned by the defendant, as such collector, and by virtue of the said warrant as and for a distress for the said sum of 27*l.* 10*s.* so in arrear. Verification.

Replication, *de injuriâ*.

At the trial of the cause, a verdict was taken for the defendant, by consent, subject

to the opinion of the Court upon the following

#### CASE.

The avowry was admitted by the plaintiff to be entirely true, except as far as relates to the plaintiff having used or exercised the trade and business of a horse-dealer, or being or having been liable to be assessed for the duty payable by horse-dealers or persons using or exercising the trade or business of horse-dealers.

The duty was imposed under the provisions of the statute 48 Geo. 3. c. 55. sch. H, and 52 Geo. 3. c. 93. sch. H, whereby it is made payable by every person who shall use or exercise the trade and business of a "horse-dealer."

As to the plaintiff's liability to be so assessed, the following were the facts admitted at the trial, and on which the plaintiff contended that he was not liable.

The plaintiff, during the time in respect of which the assessment was made, as hereinafter mentioned, viz. from the 5th of April 1844 to the 5th of April 1845, was the proprietor of Aldridge's Repository, in Upper St. Martin's Lane, in the said parish of St. Anne, Westminster, and there carried on the business of selling horses and carriages, harness, and other things, for persons upon commission. The repository was open to all persons desirous of selling property of that description, and the general mode of selling was by public auction. These sales took place periodically, viz. once a week in the winter months, and twice in each week in the summer months, and the horses or carriages or other property were generally sent into the plaintiff's premises a few days previously to the day on which they were to be sold. They were arranged in lots, and catalogues and particulars of sale were printed and distributed, and the property was then put up for sale by public auction, by the plaintiff or his manager, upon the premises. If the same was sold the plaintiff charged the seller a commission of 5*l.* per cent. upon the purchase-money, and also a further sum for the keep of the horses or standing of the carriages or other property until the time of sale. If the same was not sold the plaintiff charged from 5*s.* to 7*s.* 6*d.* for putting it up by auction, and the keep or standing as before stated. \* Where the property was put up for sale, but was not

sold at the public auction, the plaintiff occasionally sold it after the auction for the owner by private contract, and he then made the same charges as if it had been sold at the auction. The number of horses sold by the plaintiff for other persons, between the 5th of April 1844 and the 5th of April 1845, otherwise than by public auction, was to that of the sales by public auction in the proportion of about 3 to 100.

The plaintiff also occasionally, but very rarely, received horses and carriages and other property from other persons for sale by private contract on their account, but not exceeding six instances in the course of any one year, and he then charged the commission as upon a sale by auction, and the keep or standing if sold, and if not sold then only the keep or standing, to the proprietors of such property. The business carried on by the plaintiff was simply selling horses and carriages and other property, in the way before described, for and as the property of other persons. He did not buy horses or carriages or other property for other persons, nor did he buy or sell horses or carriages or other property on his own account, in the way of trade or business. The plaintiff's principal business was selling horses and carriages by auction as before mentioned; but he also frequently sold by auction or commission for other persons being the owners thereof, harness and stable utensils and the stock of horse-dealers and people employing horses and carriages, and occasionally also leases of the premises on which the business of such persons had been carried on. The plaintiff, also, on all his printed posting-bills and catalogues of sales, printed and issued the following notice:—"The public is respectfully requested to take notice that the business of Aldridge's Repository is strictly confined to sales by auction and commission; there being no dealing on the part of the proprietor, nor by any person employed by him, to operate to the prejudice of either buyers or sellers, and that under no circumstance is the practice of misrepresenting the ownership of horses ever resorted to. The days of payment for the proceeds are Saturdays and Mondays only, upon production of the printed receipt." The plaintiff also, several times in each week, caused advertisements

to be inserted in the public daily newspapers to the same effect. The plaintiff, during all the time aforesaid, took out auctioneers' licences, and paid the duty thereon, for himself and also for his manager; and exercised no other trade or business as before mentioned.

The plaintiff having declined to pay this assessment, on the ground that he was not liable to the horse-dealers' duty, and having intimated his intention to raise the question of his liability, the seizure in question was made upon his goods, and he thereupon caused the goods to be replevied; and this action was then commenced by the plaintiff, in order to raise the question of his liability to be so assessed, as in the avowry set forth. If the Court should be of opinion that the plaintiff was liable to be assessed to the horse-dealers' duty as aforesaid, or that if not so liable the avowry could still be supported, the verdict for the defendant was to stand. If the Court should be of a contrary opinion, the verdict was to be entered for the plaintiff, with 5*l.* damages. The Court to be at liberty to draw such inferences of facts as a jury would have drawn; and, at the desire of either party, the present case is to be converted into a special verdict, and the inference of facts found by the Court in that case to be stated as facts.

*Sir F. Thesiger (Ogle and Bovill with him)*, for the plaintiff.—First, it will be contended by the other side, that replevin will not lie in the present case; but *George v. Chambers* (1) is a conclusive authority on that point in favour of the plaintiff. Parke, B., in his judgment in that case, says, "though in ordinary practice it is applied only to a distress for rent, yet a replevin is, at common law, a remedy applicable in all cases where goods are improperly taken."

[PARKE, B.—You need not argue that point further.]

Secondly, was the plaintiff liable to be assessed to the duty imposed upon horse-dealers? Did he exercise the trade or business of a horse-dealer within the meaning of the statutes relating to assessed taxes? It is submitted that he did not. To be a

(1) 11 Mee. & Wels. 149; s. c. 12 Law J. Rep. (N.S.) M.C. 94.

dealer a party must both sell and buy. He must buy with the intention to sell again—*The King v. the Commissioners of Excise* (2).

[ALDERSON, B.—I take it that the strict definition of “dealing” is “distributing.” A dealer is one who distributes.]

By the 5th section of the 29 Geo. 3. c. 49, a horse-dealer is defined to be one who seeks his living by “buying and selling” horses. That same definition must be applied in giving a meaning to the word “horse-dealer,” in the statutes under which the assessment in question has been made, for although the 48 Geo. 3. c. 55. repeals the former statutes with respect to the amount of duties to be paid, in other respects their provisions are still in force.

[PARKE, B.—You will be met by a preliminary objection that the assessment of the plaintiff as a horse-dealer by the assessor, is final, subject only to an appeal to the Commissioners, under the 69th section of 43 Geo. 3. c. 161, and from them, in the manner pointed out by the 73rd section, to the Judges.]

The objection in the present case is not to an overcharge, but to the assessment itself; and although the 73rd section allows an appeal in such case, the legislature does not use any words depriving the party of his right of action. Here the assessor acted without jurisdiction, if the plaintiff was not, in point of fact, a horse-dealer within the meaning of the statute.

[ALDERSON, B.—Upon looking at the 9th section of the 43 Geo. 3. c. 99, under which the assessors are appointed, and to the 30th section of the 43 Geo. 3. c. 161, by which assessors are required to make assessments on persons refusing or neglecting to deliver lists, it appears to me intended to make the judgment of the assessors final, subject to appeal in certain cases.]

That would be so in cases where they had jurisdiction to make an assessment upon the party, but not otherwise. In *Weaver v. Price* (3) it was held, that trespass lies against magistrates for granting a warrant to levy poor-rates, if the party distrained upon has no land in the parish in which the rate is made. The objection taken in

that case was that the remedy was by appeal against the rate, but it was overruled upon the ground that the Justices acted without jurisdiction—*Charleton v. Alway* (4). In *Marshall v. Pitman* (5), where the plaintiff, being an inhabitant of a parish, had been rated to the poor-rate, and claimed to be exempt because he had no stock in trade there, it was properly held that, the Justices having jurisdiction to make the rate, the plaintiff's remedy was by appeal to the Quarter Sessions and not by action.

[PARKE, B.—The question is, whether the assessment of the plaintiff as a horse-dealer is not matter within the jurisdiction of the assessors; if it be, the assessor's judgment upon it would be final, subject to the right of appeal—*Brittain v. Kinnaird* (6), *The Queen v. Bolton* (7).]

*The Earl of Shaftesbury v. Russell* (8) is an authority that although a statute gives a right to appeal, if a party grieved does not choose to avail himself of that right he may bring an action. But by the 24th section of the 43 Geo. 3. c. 99, which contains the first provision as to appeal, it would appear that such appeal had reference to “an overcharge or over-rating by any assessment,” and not to a complaint of the assessment itself; and so with respect to the 70th and following sections of the 43 Geo. 3. c. 161, until you come to the 73rd section, where an appeal against the assessment itself seems first to be included in the power of appeal. But there are no words used in that section which exclude the right of action by a party whom the assessors had never any right to assess.

*Pashley*, contra. — First, replevin does not lie for goods seized as a distress for a debt due to the Crown.

[PARKE, B.—That objection cannot avail you now: if an objection at all, it is one to the goods being replevied; but if replevied, the action of replevin clearly lies.]

Secondly, the decision of the assessor that the plaintiff was a horse-dealer, is con-

(4) 11 Ad. & El. 993; s.c. 9 Law J. Rep. (N.S.) Q.B. 237.

(5) 9 Bing. 595; s.c. 2 Law J. Rep. (N.S.) M.C. 33.

(6) 1 Brod. & Bing. 432.

(7) 1 Q.B. Rep. 66; s.c. 14 Law J. Rep. (N.S.) M.C. 33.

(8) 1 B. & C. 666; s.c. 1 Law J. Rep. N.B. 202.

(2) 2 Term Rep. 381.

(3) 3 B. & Ad. 409; s.c. 1 Law J. Rep. (N.S.) M.C. 90.

clusive of that fact, the plaintiff not having availed himself of his right to appeal. The case of *The Earl of Radnor v. Reeve* (9), decided upon sections 35. and 38. of the 25 Geo. 3. c. 43, which are identical with the provisions as to appeal in the statute of the 43 Geo. 3. c. 161, is directly in point. It was in that case expressly held, that where a statute declares the judgment of commissioners of appeal to be final, their judgment cannot be questioned in an action of trespass. The plaintiff being an inhabitant of the parish over which the assessors who assessed him had jurisdiction to act, the effect of the two statutes of the 43 Geo. 3. c. 99. and the 43 Geo. 3. c. 161, made them the judges as to whether he was a horse-dealer or not. The case of *Weaver v. Price* is quite distinguishable from the present. There the plaintiff not being an inhabitant of the parish, the Justices acted entirely without jurisdiction. So also in *Charleton v. Alway* the plaintiff was assessed to the land-tax in respect of that for which he was not liable to be assessed at all; and the Commissioners and assessors were therefore held to have had no jurisdiction whatever to assess him, no more than if they had assessed him in respect of property not in his occupation. If it were necessary to decide the point, the decisions of the Judges hitherto have been, without exception, that under the circumstances stated in the present case the plaintiff is, in fact, a "horse-dealer."

*Sir F. Thesiger*, in reply.—If this had been the case of a mere "overcharge," then the plaintiff would have had no remedy by action; but his grievance is that he ought not to have been assessed at all. His case, therefore, falls within the principle laid down in *Weaver v. Price* and *Charleton v. Alway*, and not within that of *The Earl of Radnor v. Reeve* and *Marshall v. Pitman*.

**PARKE, B.**—I am of opinion that the judgment of the Court should be given in favour of the defendant. It appears to me that, without the allegation that the plaintiff exercised the trade and business of a horse-dealer, the avowry discloses a complete defence to the present action; for the legislature has, in my opinion, made the

judgment of the assessors final and conclusive, subject to the power of appeal—in the first place to the Commissioners, and further, if necessary, to the Judges. And reasoning *à priori*, it would have been very absurd if the legislature had not done so. What a flood of litigation would be the result if every one who was dissatisfied with the judgment of the assessors had a right to bring an action as soon as that judgment was enforced by the party being distrained upon for the amount of his assessment. The actions would be innumerable, and great delay would inevitably take place in the decision of questions which it is most essential should be speedily determined; and that, too, when the legislature had given a short and effectual mode of controuling the assessment of the assessor. Upon reference, however, to the words of the act, I come to the same conclusion. By virtue of the 9th section of the 43 Geo. 3. c. 99. assessors are appointed by the Commissioners, have explained to them the principles upon which they are to proceed in making their assessments, are required to verify their assessments upon oath, and are subject to a forfeiture of 20*l.* for breach of duty; and although the 9th section does not by express words enact that their assessment shall be final and conclusive, yet I find, on referring to the 30th section of the 48 Geo. 3. c. 161, which provides for cases in which parties have refused or neglected to deliver lists, it is enacted that the assessment by the assessors "shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom" unless the ground of such refusal or neglect shall be such as the Commissioners may think reasonable. Under this section in cases where no appeal is allowed, the assessment by the assessors is final and conclusive. Now, let us look to the power of appeal given by the 24th section of the 43 Geo. 3. c. 99. That section enacts that "if any person shall think himself overcharged or overrated by any assessment or surcharge," &c., he may appeal. It has been said, in argument, that the wording of that section shews it is not meant to apply to cases where the personal liability to be rated is disputed, but only where the amount of the assessment is in question. Admitting,

for the sake of argument, that that is so, the plaintiff is in the latter predicament, because it is stated in the avowry, and admitted by the case to be true, that the plaintiff was liable to "other duties amounting to 3*l.* 8*s.* 9*d.*, in which he was duly assessed." I am at a loss to see any difference in principle between the case of a rate-payer assessed as the keeper of six horses and one male servant, where he asserts that he only keeps five horses, and is therefore overcharged, and where he disputes the keeping of the male servant. In either case his complaint is, that he is overrated. Moreover, I think that if there were any difference, the narrow construction contended for on behalf of the plaintiff ought not to be applied to the word "overrated;" for although that word, in its strictest signification, means a rating by way of excess, and not one which ought not to have been made at all, a far wider interpretation ought to be given to it here.

The case of *Weaver v. Price* is quite distinguishable from the present case. In that case the plaintiff had no land at all in the parish for which the rate was made; the Justices clearly therefore had no jurisdiction to grant a warrant of distress to be levied of his goods. So with respect to the case of *Charleton v. Alway*. There, by the terms of the act, the overseers were bound to separate in their assessment the land-tax due in respect of property belonging to different owners; and the plaintiff having paid the assessment in respect of one portion of the property, the assessment as to the other was a perfect nullity. But the case which was tried before Lord Eldon, of *The Earl of Radnor v. Reeve*, is quite conclusive. There the Court said, "that it had been determined by all the Judges in England, that when a statute provides that the judgment of Commissioners appointed thereby shall be final, their decision is conclusive and cannot be questioned in any collateral way." In like manner if a statute brings a matter within the jurisdiction of the magistrates, and they have the facts before them, it is for them to adjudicate whether those facts bring the case within their jurisdiction or not; and a superior Court will not interfere. Considering, therefore, that the assessment was final and conclusive, the allegation in the avowry

"that the plaintiff did exercise the trade and business of a horse-dealer" may be struck out, and enough will remain to constitute a good defence to this action. Our judgment will be that a verdict should be entered for the defendant; or if we are asked to find a special verdict, then it will be in the words of the avowry, leaving out this immaterial allegation.

ALDERSON, B. concurred.

ROLFE, B.—I am of the same opinion. Sir Frederick Thesiger seemed to think that it was somewhat anomalous, having regard to the cases which he relied on, to hold, that where the assessor has assessed a person in respect of that to which he is not liable to be assessed, that assessment should not be allowed to be questioned in any action. Now, I think, that the effect of our judgment is not to decide that when the assessor acts without jurisdiction his assessment will bind. Take the case of the assessor assessing a person living out of his district; he would then be doing something which the statute gives him no power to do, and his assessment would not bind the person assessed; whilst on the other hand, our construction of the statute is to make his decision, subject to the right of appeal, final and conclusive upon all matters and things within the district over which he has jurisdiction to act.

PLATT, B.—I am not prepared to bind myself by the decisions which are said to have been come to by Judges, that under circumstances similar to those stated in the present case, a party has been considered to be liable to the duties imposed upon "horse-dealers." I state this that I may not be considered to have pledged myself, should the case come before me in a proper shape, as one of the Judges. But my difficulty is this, that strike out of the avowry the allegation that the plaintiff was a horse-dealer and enough remains besides to justify the act of the defendant; for I cannot but think that the fact that the plaintiff has been assessed by the assessor as a "horse-dealer," is a sufficient justification of the distress. The legislature having thought it very fitting that questions relative to the assessment to the assessed taxes should be speedily decided, have provided a machinery for that purpose; first, by an appeal to the Commis-

sioners, and afterwards, if parties are dissatisfied, to the Judges, and, as it appears to me, have, subject to this appeal, made the assessment of the assessor conclusive. Without saying, therefore, whether the evidence in the case before me is sufficient to satisfy my mind that the plaintiff is a "horse-dealer" within the meaning of the statute, I think that the defendant is entitled to the judgment of the Court.

*Judgment for the defendant.*

1848. }  
May. 16. } STONES v. MENHEM.\*

*Practice.—View by Jurors—Side-bar Rule—Irregularity.*

*The defendant being sued in assumpsit, for work done by the plaintiff as a carpenter and bricklayer, and for bell-hanging, painting, and papering done to the defendant's house, applied to the plaintiff to appoint a shewer on his part, for the purpose of a view by the jurors; and, on the plaintiff's refusal, obtained a side-bar rule for a view which contained the name of the defendant's shewer only, with blanks for the time and place of the meeting of the jurors:—Held, by Parke, B., that this was not a case for a view, and that the side-bar rule must be set aside. And, semble, that the rule was irregular in not containing the names of both shewers, and the time and place of the meeting of the jurors.*

This was an action of assumpsit, for work done by the plaintiff, as a carpenter and bricklayer, to the defendant's house, and for bell-hanging, painting, and papering the same. The cause being at issue, the defendant, on the 8th of May, applied to the plaintiff to appoint a shewer on his part, to enable the jurors to have a view, and, on the plaintiff's refusal, served him on that day with the following side-bar rule:—

"In the Exchequer of Pleas.

"Easter term, in the 11th year of the reign of Queen Victoria.

"Monday, the 8th day } Side Bar. It is ordered of May 1848. } that a *distringas* for impanelling a jury shall issue in this cause, directed to the sheriff of the county of Middlesex, commanding

\* Decided by Parke, B. at chambers.

that the aforesaid sheriff have six or more of the first twelve jurors impannelled to try the issue between the said parties, according to the form of the statute in that case made and provided, to view the place in question between the parties aforesaid, on , which said jurors shall meet at the house of known by the name of at of the clock in the noon of the same day, and there shall be refreshed at the equal charges of the parties aforesaid, and that on behalf of the said plaintiff and George Corderoy, of 98, High Street, Marylebone, surveyor, on behalf of the said defendant, shall shew the place in question and dispute between the said parties to those jurors; but no evidence shall then and there be given them thereon, in any sort, and that the same jurors who shall view the place aforesaid and appear shall before any drawing be first sworn upon the jury for the trial of this cause.

"By the Court."

The plaintiff then obtained a rule, calling upon the defendant to shew cause why this side-bar rule should not be set aside, on the grounds, first, that the case was not one in which a view ought to be granted at all; secondly, that the side-bar rule itself was defective in not containing the name of both shewers and the time and place of meeting of the jurors.

Subsequently the defendant, on the 9th and 10th of May respectively, served the plaintiff with two appointments to name a shewer, which the plaintiff declined to attend.

Cause was shewn against this rule, before Parke, B. at chambers.

*Argument for the defendant.*—First, the work is defective in many respects, and the nature of it cannot properly be appreciated unless the jury are permitted to have a view of the premises; and there is no reason why a rule for a view should not be granted in a case like the present, or even to inspect a house or any other goods or articles that have been sold.

[PARKE, B.—I doubt whether this is a proper case for a view. The 4 Anne, c. 16. s. 8. enacts, that where it shall appear to the Court that it will be proper and necessary that the jurors "should have the view of the messuages, lands, or *place in question*, in order to the better understanding of the evidence," they may order writs of *distringas*, &c., to issue. It does not appear to me that a view of work done to a house can be considered a view of the "*place in question*."] ]



The rule for a view is not confined to cases where messuages or lands only are concerned, for by a general rule of all the courts, Hilary term, 2 Will. 4. s. 63, it is ordered that "the rule for a view may in *all cases* be drawn up by the officer of the court on the application of the party, without affidavit or motion for that purpose."

[PARKE, B.—The effect of that rule is not to extend the law, and to allow a view to be granted in cases where it would not have been granted previously to the rule.]

Secondly, the rule is correct in point of form. It is necessary to obtain a side-bar rule before the Master will make an appointment for the purpose of naming a viewer.

*Horn, contra.*—The question is whether, prior to the Regulæ Generales of Hilary term, 2 Will. 4, the Courts, upon cause shewn against a rule similar to the present, would have made it absolute. It is confidently submitted that they would not. The Jury Act, 6 Geo. 4. c. 50. s. 23, uses the language of the 4 Anne, c. 16, and enacts, that the jurors are to have a "view of the *place in question*, in order to their better understanding the evidence," which seems to imply that a view by the jurors is confined to the case where some messuage or land is to be inspected, and the case cannot be made intelligible without such inspection. But here the view cannot be said to relate to any *place in question*, nor is it necessary towards the understanding of the evidence; for the state of the work can be made clear to the minds of the jury by means of the evidence of surveyors, and other practical men. It is laid down by Mr. Bagley, in his book on *Practice*, p. 328, that it "sometimes happens, *most commonly* in actions of trespass *quare clausum fregit*, waste and nuisance," that a view is denied; and in practice it is certainly unusual for the Court to grant a view in cases merely of work done to premises. It cannot be contended that the Court would in all cases grant a view of goods merely because they might be too bulky to be brought into court. Secondly, the side-bar rule is irregular; it ought to have contained the place and hour of the attendance of the jury, and especially the names of *both* shewers. The practical

directions given by Mr. Bagley are, that if the opposite party refuses to name a shewer, the attorney on the other side is to get an appointment from the Master to name a shewer; that a *memorandum* of the rule, with the name and place of abode of the one shewer, and of the shewer nominated by the adverse party, or by the Master on his default, is to be taken to the office; and the clerk will draw up the rule. This shews that the side-bar rule ought to contain the name and abode of *both* shewers.

[PARKE, B.—The practice is stated in similar terms in *Arch. Pract.* p. 407, 6th edit.: "Draw up a precipe or memorandum of the rule you want. Get from the opposite attorney a memorandum of the name and place of abode of his shewer, and take it, together with a similar memorandum of your *own shewer*, and also of the time and place of meeting, &c., to one of the Masters, and draw up the rule."]

(He was then stopped.)

PARKE, B.—The rule for setting aside the side-bar rule must be absolute. The language of the acts of parliament, coupled with the practice, appear to me to shew that it is not a case in which a view ought to be granted. The necessity of a view seems to me to apply chiefly to actions of a local nature, such as trespass *quare clausum fregit*, nuisance, and the like. Judges are often requested to make orders for one party to be at liberty to inspect work done, and other matters; and we generally refuse, unless the opposite party will give his consent: but, according to the defendant's argument, a view by the jurors might be obtained as a matter of course. The rule will be made absolute; the costs to be costs in the cause.

*Rule absolute accordingly* (1).

(1) In 1 Burr. 254, Lord Mansfield says:—"Nothing can be plainer than the 4 & 5 Anne, c. 16. s. 8. The Courts are not bound to grant a view of course: the act only says, 'they may order it where it shall appear to them that it will be proper and necessary.'" It is stated by Mr. Bagley, in his *Practice*, p. 328, that "as this proceeding is attended with considerable expense, it should not be adopted unless it be clearly necessary."

1848. }  
May 2. } DEAKIN AND WIFE v. PENNIAL.

Stamp—Agreement—Statutes 55 Geo. 3. c. 184. and 7 Vict. c. 21.

*An agreement, made at a time when the 55 Geo. 3. c. 184, schedule, part 1, 'Agreement,' was in force, and under which it required a stamp of 1l., was, subsequently to the 7 Vict. c. 21. coming into operation, stamped, under a penalty, with the stamp of 2s. 6d., as required by the 2nd section and schedule of the latter act:—Held, that the agreement was admissible in evidence.*

Assumpsit, for money lent to the defendant by the plaintiff Hannah, whilst she was sole and unmarried, and on an account stated.

Plea—Non assumpsit.

At the trial, before Pollock, C.B., at the Middlesex sittings, after Michaelmas term last, the plaintiffs, in support of their case, gave in evidence the following document, signed by the defendant:—

“January 1, 1840.

“Miss Hannah Penniall.—I O U ten pounds, which I promise to pay you when I shall have received my legacy which my aunt shall leave me.”

The document had been stamped under a penalty with the stamp of 2s. 6d., pursuant to the 7 Vict. c. 21. s. 2, Schedule, which received the royal assent in 1844. The defendant's counsel objected to the reception of this instrument, on the ground that having been made in 1840, at which time the 55 Geo. 3. c. 184, Schedule, part 1, 'Agreement,' was in force, it required an agreement stamp of 1l. The learned Judge overruled the objection, and admitted the instrument, giving leave to the defendant to move to enter a nonsuit.

Willes (April 29,) moved accordingly. —Although this document was stamped with its present stamp after the passing of the 7 Vict. c. 21, which gives a stamp of 2s. 6d., where a stamp of 1l. was necessary before, it ought to have borne the stamp which was in force at the time it was made. The stamp duty is due to the Crown as soon as the contract is entered into.

[PARKE, B.—The question is, whether the stamp duty is due to the Queen the moment an agreement is written.]

The penalty accrues as soon as the time

has passed within which it might have been stamped. The Attorney General could, at that time, compel the payment of the penalty, and not allow the document to be stamped without it. The statute 37 Geo. 3. c. 136. s. 2. enacts that instruments, excepting bills of exchange, &c., unstamped, or on stamps of less than the legal value, may be duly stamped, on payment of the duty, and 10l. penalty.

[PARKE, B.—Can a debt be said to be due to the Crown at the time of the party's bringing the document to be stamped?]

The statute 23 Geo. 3. c. 58. s. 5. provides that no agreement shall be deemed to be void in case the same shall be stamped within twenty-one days after the same shall have been entered into.

*Cur. adv. vult.*

POLLOCK, C.B. now said—In this case there will be no rule. In *Buckworth v. Simpson* (1), where an instrument which was in reality a lease, but which bore an agreement stamp for 15s., was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1l. 10s., but was stamped in 1834, under the provisions of the 37 Geo. 3. c. 136. s. 2, with a stamp of 1l., being the amount of the stamp then in force, it was decided that the proper duty had been paid. Lord Abinger, in giving judgment in that case, makes use of the expression that “the statute authorizes the demand of the duties in force at the time when the stamp is affixed.” Applying that construction to the circumstances of the present case, it follows that the instrument was properly stamped.

PARKE, B.—The same point was decided in *Doe d. Dyke v. Whittingham* (2).

*Rule refused.*

1848. }  
May 6. } WINTERBOTTOM v. LEES.

Practice—Irregularity—Rejoining *Gratis*.

*Rejoining gratis means rejoining within four days from the delivery of the replication without a rule for that purpose, and does not mean rejoining within twenty-four hours.*

(1) 1 Cr. M. & R. 834; s.c. 4 Law J. Rep. (N.S.) Exch. 104.

(2) 4 Taunt. 20.

*The defendant delivered a rejoinder shortly before nine o'clock in the evening of the 29th of March, being the last day for re-joining, and also the commission day of the assizes. By the practice of the office a cause cannot be tried at the assizes, unless the record be passed before three o'clock of the afternoon of the commission day. The plaintiff, without waiting for the defendant's rejoinder (the Statute of Limitations), on the morning of the 29th inserted in the issue a rejoinder similar in substance to the defendant's, and delivered the issue with notice of trial. The defendant did not appear at the trial, and the plaintiff had a verdict:—The Court set aside the issue, Nisi Prius record, and trial.*

This was a rule calling upon the plaintiff to shew cause why the issue, notice of trial, Nisi Prius record, and the trial of this cause should not be set aside with costs.

The rule had been obtained on two grounds: first, that the rejoinder on the record differed from that delivered by the defendant; secondly, that the record had been passed by the plaintiff before the delivery of the rejoinder by the defendant, and consequently before the joining of the issue.

The defendant delivered his pleas on the 20th of March, and on the 25th received a replication with a demand of a rejoinder within twenty-four hours. The defendant, who was under terms of rejoining gratis, delivered a rejoinder (the Statute of Limitations,) shortly before nine o'clock of the evening of the 29th. The cause was to be tried at Chester, the commission day for which place was on the 29th; and by the practice of the office records must be passed before three o'clock on the commission day, at which hour the office closes. The plaintiff, without waiting for the delivery of the defendant's rejoinder, on the morning of the 29th inserted a rejoinder for the defendant, made up the record for the trial, and entered the issue. The defendant's rejoinder was, "that the said debts and causes of set-off in the said last plea mentioned did arise and accrue within six years next before the commencement of this suit." The rejoinder inserted by the plaintiff was, "that the said causes of set-off and every part thereof did arise and accrue to the defendant within six

years before the commencement of this suit." Notice of trial was served upon the defendant, but he did not appear at the trial, and the plaintiff had a verdict.

Martin having obtained the above rule,—Welsby and Hoggins now shewed cause.—First, there is no material variance between the two rejoinders, and the Court will not on that account set aside the proceedings. Secondly, the defendant, being under terms of rejoining gratis, ought to have delivered his rejoinder within twenty-four hours, and ought not to have taken four days. It is stated in *Lush's Practice*, p. 396, that rejoining gratis means rejoining without a four-day rule for that purpose, and within twenty-four hours after demand.

[ROLFE, B.—That is not so. *Addis v. Anderson* (1) shews that rejoining gratis means rejoining without a rule to rejoin, but that the defendant has still four days to rejoin.]

[PLATT, B.—The rule is laid down in the same manner by Mr. Tidd, in his *Practice*, p. 472.]

Secondly, there was not any irregularity in the manner in which the plaintiff passed the record; had he waited for the actual delivery of the rejoinder he would have been too late for the assizes.

[ROLFE, B.—What the plaintiff passed was not the record.]

It raises the same issue.

[PARKE, B.—It is not a transcript of the pleadings.]

[POLLOCK, C.B.—Issue was not joined at the time of sealing the record.]

A plaintiff may make up the issue and pass the record by anticipation, if he does it correctly.

[PARKE, B.—He has not done it correctly. He represents to the officer of the court that there is a complete issue, whereas that is not the case. The plaintiff cannot remove the difficulty, except by shewing the existence of such terms as either expressly or by implication authorised him to take the step he took.]

Martin, contra, was not called on.

*Per Curiam*.—The rule must be absolute.  
*Rule absolute.*

(1) 10 Mee. & Wels. 12; s. c. 11 Law J. Rep. (N.S.) Exch. 288.

1848. } PARRINGTON v. MOORE AND  
April 26. } ANOTHER.

*Malicious Trespass Act, 7 & 8 Geo. 4. c. 30. ss. 24, 28.—Arrest—Justification—Owner—Bona Fides.*

The plaintiff, a servant of a railway company, who were authorized to enter upon certain land of the defendant, for the purpose of boring to ascertain the nature of the soil, when in the act of digging pits in the land, bonâ fide and reasonably believing himself entitled so to do, was apprehended by the owner of the land, under the *Malicious Trespass Act, 7 & 8 Geo. 4. c. 30*, and taken before a Magistrate, and fined 7s. The defendant bonâ fide believed the plaintiff had committed an offence against the act:—Held, that as the plaintiff had not in fact committed such offence, the defendant was not justified in apprehending him merely because he reasonably supposed the plaintiff had committed such offence.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 117.]

1848. } BELCHER AND OTHERS, ASSIGNEES  
May 9. } OF HANNEN, A BANKRUPT, v.  
BELLAMY AND ANOTHER, EXECUTORS OF WINSLAND.

*Bankruptcy—6 Geo. 4. c. 16. s. 72.—Order and Disposition—Consent of True Owner—Debt.*

In 1843, H, residing in Australia, being indebted to B. in 771l. 3s. 4d., B. on the 8th of January 1844 assigned the debt to W, and on the 22nd of January joined W. in a letter to H. apprising him of the assignment, and requiring him to pay the debt to W. This letter was posted by W. to H, in Australia, in the ordinary way in which letters to that country are posted, and could not have reached Australia before the 10th of February had it been posted on the 8th of January. On the 10th of February a fiat in bankruptcy issued against B. On the 29th of January 1844 a bill for 50l. was remitted by H. in Australia, who had no notice of the bankruptcy, to the bankrupt, and by him handed over to W. The assignees of the bankrupt having brought an action against W. to recover the amount of the bill,—Held, that

W. having done all in his power to prevent the debt from remaining in the possession of the bankrupt it could not be said to be, by the consent of the true owner, in the order or disposition of the bankrupt at the time of his bankruptcy, and that the assignees were not entitled to recover.

Assumpsit against the defendants as executors of Nicholas Winsland, deceased.

The declaration stated that the said Nicholas Winsland in his lifetime was indebted to the plaintiffs, as assignees, for money had and received to their use. The defendants having pleaded *non assumpsit*, and issue having been joined thereon, the following case was, by consent, stated for the opinion of this Court.

#### CASE.

In 1843, before the bankruptcy of James Hannen, R. D. Hawkins, residing at Port Adelaide, in South Australia, was indebted to the bankrupt in 771l. 3s. 4d., being the debt referred to in the letter of the said N. Winsland of the 22nd of January 1844, which debt is not yet wholly paid. In 1843 the bankrupt directed Hawkins to make his remittances on account of this debt to the bankrupt's son James Hannen, jun.

Afterwards and before the bankruptcy, viz. on the 8th of January 1844, the bankrupt *bonâ fide* and for a valuable consideration, by deed, assigned to the said N. Winsland the debt due from Hawkins, and all his the bankrupt's interest therein, so far as he could by deed assign the same. On the 1st of February 1844, and before the bankruptcy, N. Winsland posted in the ordinary way in which letters to New South Wales are posted, a letter to Hawkins, with the concurrence of the said bankrupt, signed by him at the foot thereof, of which said letter and concurrence the following are true copies:—"To Mr. R. D. Hawkins, Adelaide, New South Wales.—I, the undersigned, Nicholas Winsland, &c. hereby give you notice under and by virtue of a certain indenture, bearing date the 8th of January inst., and made between James Hannen therein described of the one part, and myself of the other part, certain goods or the proceeds thereof, and all monies now due or to become due from you to the said James Hannen in respect thereof, amounting to 771l. 3s. 4d., were assigned and transferred

to me, the said Nicholas Winsland. And I give you further notice, and require you to make all further remittances on account of the said goods or monies to me, or to my credit at my bankers, Coutts & Co. Strand, London, whose acknowledgment will be your sufficient discharge. Dated this 22nd day of January 1844. Nicholas Winsland. Witness, John Burder, 5, Verulam Buildings, Gray's Inn, London.

"I concur in the above notice, dated this 22nd day of January 1844, James Hannen. Witness, John Burder, William Gozzard."

The fiat issued on the 10th of February 1844. The letter could not have reached Port Adelaide by that day; and Hawkins had no notice of the assignment at the date of the fiat, nor at the date of the bill hereinafter mentioned; nor could any other letter have reached Port Adelaide on or before the 10th of February, if the same had been regularly posted on the said 8th of January 1844; nor could the said N. Winsland by any means have communicated to the said Hawkins, or have given him notice of the aforesaid assignment, or the fact of the execution of the aforesaid deed before the issuing of the said fiat or the date of the bill hereinafter mentioned. Save as aforesaid nothing had been done to prevent the debt from being in the reputed ownership of the bankrupt.

On the 29th of January 1844, a bill for 50*l.* was remitted to the bankrupt's said son James Hannen, jun. in a letter from Hawkins, which was received by the bankrupt's said son after the issuing of the fiat, and after he had notice from the said N. Winsland of the aforesaid assignment from the bankrupt. The letter stated that the inclosed bill for 50*l.* on the bank of South Australia was in favour of J. Hannen, jun., and the bill was remitted to him and received by him in pursuance of the direction aforesaid, on account of the debt due from the said R. D. Hawkins. On receiving this bill of exchange, James Hannen, jun. having been indemnified by N. Winsland, inclosed and delivered the bill to him, and the amount thereof was received by the said N. Winsland.

The Court was to be at liberty to draw any inference of fact that a jury might draw.

The question for the opinion of the Court was, whether the assignees were entitled to

recover the proceeds of the bill from the defendants as executors of the said N. Winsland. If they were, then the defendants were to withdraw their plea, and judgment by default was to be entered for the plaintiffs, with damages, 50*l.*, with interest at 5*l.* per cent. from the 16th of September 1844, by confession. If not, a *nolle prosequi* was to be entered.

*Peacock*, for the defendants (May 3).—The question is, whether on a debt having been assigned, and the assignor being unable to communicate that fact to the debtor before the bankruptcy of the creditor, the debt can be said to remain in the possession, order, or disposition of the bankrupt, by the consent of the true owner, within the meaning of the Bankrupt Act, 6 Geo. 4. c. 16. s. 72. (1). The debt cannot be said to have been in the order or disposition of the bankrupt, when the assignee, the true owner, did all in his power to communicate the assignment to the debtor. *Burn v. Carvalho* (2) is in point.

[PARKE, B.—There are several cases which decide that where the owner of goods has taken all the means in his power to express his dissent to the goods remaining in the bankrupt's hands, they are not to be considered as remaining in the order or disposition of the bankrupt.]

[POLLOCK, C.B.—*Load v. Green* (3) was the case of a party buying goods of others with the fraudulent intention of not paying for them, and becoming bankrupt with the goods in his possession. There we held that the goods were not, at the time of the bankruptcy, in the order and disposition of the bankrupt *with the consent* of the plaintiffs, as the latter never did consent to the apparent ownership *as such*, and that at the time of the bankruptcy the bankrupt was

(1) That section is as follows:—"That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission."

(2) 4 Myl. & Cr. 690; s. c. 9 Law J. Rep. (n.s.) Chanc. 65.

(3) 16 Mees. & Wels. 216; s. c. 15 Law J. Rep. (n.s.) Exch. 113.

the real owner, and not the plaintiffs, the sellers.]

He then referred to *Fletcher v. Manning* (4).

No one appearing for the plaintiffs, the Court said there must be judgment for the defendants; that the true owner of the debt, having tried all means of expressing his dissent, could not be said to have consented to the goods remaining in the order or disposition of the bankrupt.

*Bramwell*, who, on the former day had been absent in consequence of a professional engagement, was now (May 9) allowed to appear in behalf of the plaintiffs. — The question is, what is the meaning of the words in the 72nd section, goods and chattels in the order or disposition of the bankrupt with the consent of the true owner. They mean a permissive occupation by the bankrupt, not contrary to the consent of the true owner. The defendant's testator, Winsland, by taking a conveyance of the debt, consented to allow it to remain in the order and disposition of the bankrupt.

[POLLOCK, C.B.—Your fallacy lies in assuming that the testator consented whilst he was the true owner of the debt. That is not so: as soon as he became the true owner he dissented.]

If, after goods are once vested in a buyer, there be any space of time, however short, during which they remain in the possession of the seller, and during that time the bankruptcy of the seller takes place, they pass to his assignees. In the present case there was a consent by the testator for however short a period of time, although there may afterwards have been a dissent. Suppose money is left to a woman on condition of her marrying with her guardian's consent, and that consent is given by the guardian, and the marriage takes place in a distant country, can it be said that there was no consent, because the guardian having discovered the husband to be an unworthy person, afterwards, and before the marriage, became desirous of signifying his dissent, but was prevented by distance from doing so? Here the testator had once consented to the debt remaining in the order and disposition of the bankrupt; and that is all that is necessary to make the 72nd section of the statute

(4) 12 Mee. & Wels. 571; s. c. 13 Law J. Rep. (N.S.) Exch. 150.

attach. *Livesay v. Hood* (5) shews that goods in the hands of a retail dealer upon sale or return, pass under a commission of bankruptcy against him, by the 21 Jac. 1. c. 19. This section of the statute has a very beneficial operation.

[PARKE, B.—In *Brown v. Heathcote* (6) a debtor having assigned to his creditor certain goods in two ships then at sea, together with the bills of lading and policies of insurance relating to them, and the debtor having become a bankrupt, it was held, that as everything which could shew a right to the ship and cargo had been delivered over to the creditor, the bankrupt could not be said to have the order and disposition of the goods, Your argument is, that goods at sea could not be bought at all, so as to defeat the claim of the assignees in the event of the seller becoming bankrupt. In fact it goes to this length, that no goods at a distance could be safely purchased at all. The Court, in delivering judgment in *Load v. Green*, cited the judgment of Lord Redesdale in *Joy v. Campbell* (7), as to the construction of the analogous Irish Act. That learned Judge there observes, that the statute "refers to chattels where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits unconscientiously, as the act supposes, to have such order and disposition." Here the debt belongs to the testator, and he has not unconscientiously allowed the bankrupt to remain in possession of it, as he could not prevent it.]

In this case there is a sufficient consent on the part of the true owner to cause the property to pass to the assignees. The fallacy on the other side is in supposing that there must be a constant and continuing state of consent. He cited *Lingard v. Messiter* (8) and *Fletcher v. Manning*.

*Peacock*, contra, was not called on.

POLLOCK, C.B.—It is very probable that the original bankrupt acts were not intended originally to apply to the case of debts, but merely to that visible and ap-

(5) 2 Campb. 83.

(6) 1 Atk. 160.

(7) 1 Scho. & Lef. 336.

(8) 1 B. & C. 308; s. c. 1 Law J. Rep. K.B. 121.

parent possession of property, which is calculated to give the appearance of wealth. But since the case of *Ryall v. Rolfe* (9), it is too late to say that debts are not within the Bankrupt Act. The question of debts, however, does not involve the same consideration as that of goods, because a man can hardly be said to be the apparent owner of debts, and to obtain credit by means of them. The question as to debts arises chiefly with respect to assignments of debts, bonds, or policies. It has been held that where no notice of the assignment has been given, the debt remains in the order and disposition of the bankrupt, with the consent of the true owner. It may be observed that the statutes of bankruptcy passed at a period very different from the present; and that if we were now called upon for the first time to construe the acts, we should not probably concur in all the decisions that have taken place on the subject. I differ from the plaintiffs' counsel in his opinion that this statute operates beneficially in all the cases to which it is applied. For if his views were acted upon, all the transactions of commerce would be paralyzed, since nothing could be more injurious than that a sale of goods must be followed by an instantaneous delivery, on pain of their being held to be in the order and disposition of the bankrupt seller. The modern rule is, that goods are not deemed to be in the possession of the bankrupt with the consent of the true owner, if the latter takes pains to obtain possession of them. The question then is, whether the true owner in the present case did consent to the goods remaining in the bankrupt's disposition: he did not, for he forthwith gave notice of the assignment to the debtor, for the purpose of defeating the transaction. The plaintiffs' counsel says that the assignee of the debt consented to its remaining in the bankrupt's hands. I cannot agree to that: the assignee took the debt with the right of claiming it *instantly*; and he immediately gave notice to the debtor. The result is, that the assignees of the bankrupt are not entitled to recover, and our judgment must be for the defendants.

PARKER, B.—I am of the same opinion. I quite concur with the Lord Chief Baron,

that, formerly, the Bankrupt Act was not supposed to apply to debts, but merely to goods. The case of *Ryall v. Rolfe*, however, has decided that it applied to choses in action. The spirit of modern commerce is very different from that of ancient commerce; and if the legislature had to pass bankrupt acts in the present times they would not, in my opinion, consider it just that one party should pay his debts with the goods of others. The truth is, that, at the present day, a trader does not gain credit from the mere fact of having a warehouse full of goods; but, from his mode of dealing, and his general character. The Bankrupt Act, however, must be construed as it now stands; and then it is clear that the present case is not within its provisions. To bring the case within this part of the statute there must be a real owner distinct from the apparent owner; and to entitle the goods to be considered in the order and disposition of the bankrupt, with the consent of the true owner, the latter must consent unconscientiously to the bankrupt's remaining in possession of them. This was well explained by Lord Redesdale, in *Joy v. Campbell*, in construing the analogous Irish Act. In conformity with that decision, the bankrupt's assignees can claim the debt only in the event of the assignee of the debt having unconscientiously allowed it to remain in the hands of the bankrupt.

(9) 1 Ves. 348, n.c. 1 Atk. 165.

he was reputed owner," they shall pass to his assignees. Now the consent of the true owner is to be proved, and is not to be inferred from the mere fact of nothing having been done. Indeed, but for the decisions that debts are within the operation of the section in question, I should have considered the point at least doubtful whether a debt could be said to be in the order and disposition of the bankrupt, solely by reason of his being left in possession of it. But as long as the case of *Ryall v. Rolle* continues to be law, we are bound by that authority. Where a party leaves a chose in action in the hands of another, he is considered to leave it in the order and disposition of that other, unless he is active, and gives notice, in which case it is not in the order and disposition of the other, with the consent of the true owner.

PLATT, B. concurred.

*Judgment for the defendants.*

1848. } PAVIELL v. THE EASTERN COUN-  
May 11. } TIES RAILWAY COMPANY.

*Arbitration—Arbitrator—Mistake as to Law—Corporation—Order of Reference not under Seal—Appointment of Attorney.*

The plaintiff agreed with the defendants, by deed, to execute a portion of a railway for them at certain prices stipulated therein; and the defendants covenanted to give the plaintiff possession of certain land for the above purpose, within a specified time. The plaintiff having brought an action of debt against the defendants to recover a sum of money for extra work, rendered necessary, as he alleged, by the defendants' omission to give him possession of the land within the specified time, an order of reference was made for referring to arbitration "the claims made in the action." It was objected, before the arbitrator, that the plaintiff could not, in the present form of action, recover in respect of the extra work, his remedy being by an action for damages for a breach of covenant. The arbitrator received the evidence, and awarded a sum to the plaintiff in respect of the extra work:—Held, that as the arbitrator had not been guilty of misconduct, and had acted within his jurisdiction, his mistake in point of law was no ground for setting aside the award.

*The Court refused a rule for setting aside the order of reference, on the objection that the order, being made by the defendants, who were a corporation, was not under seal, and that their attorney, who entered into it, had not been appointed under seal.*

This was a motion for a rule calling upon the plaintiff to shew cause why the award made in this cause should not be set aside, under the following circumstances:—In 1841 the Eastern Counties Railway Company being about to construct a railway, entered into a contract under seal with the plaintiff, that he should execute a portion of it. The sum to be paid for a part of the work done was 29,948*l.*, and the entire work was described in drawings, plans, and specifications. The deed contained a clause that the contractor should not be entitled to charge for any alteration or addition, unless made under the sanction of a note in writing, signed by two of the directors of the company. By the deed entered into between the parties the company were bound to deliver possession of certain land to the plaintiff for the purpose of making the railway within a specified time. A portion of the work to be performed by the plaintiff consisted of an extensive embankment, the working of which was difficult and expensive, and, as the plaintiff alleged, was rendered more so by reason of the defendants' not having put him in possession of the land within the time limited by the deed. In consequence of this he made a claim upon the company of 10,307*l.* 0*s.* 1*d.*, by way of extra work, rendered necessary, as he alleged, by their neglect to give him possession of the land. Payment of this sum having been refused by the company, the plaintiff brought an action of debt for work and labour, &c. against them, to recover the above sum, together with other sums, amounting in the whole to about 15,000*l.* After the suing out of the writ, it was agreed to refer the matter to arbitration, and a Judge's order was obtained, by the terms of which, "the claims made in this action" were alone referred. On behalf of the defendants it was insisted, before the arbitrator, that the plaintiff was not entitled to recover in the action of debt, in respect of extra work rendered necessary by the alleged non-delivery of the land by the



defendants, but that the plaintiff's remedy was by an action of damages for breach of covenant. The arbitrator received evidence of the extra work having been rendered necessary by the non-delivery of the land at the time specified, and awarded to the plaintiff the sum of 14,410*l.* 7*s.*

*Martin*, in support of the motion.—The arbitrator has exceeded his jurisdiction in awarding damages to the plaintiff in a case where the debt alone was referred to him, and damages could only be recovered in a special action for breach of covenant. The defendants do not contend that he has been guilty of any corruption or other misconduct.

[*POLLOCK*, C.B.—This is a case where the arbitrator has made a mistake in the law.]

His mistake consists in including matters not within his jurisdiction.

[*PARKE*, B.—Not so. He had a right to decide whether the defendants were indebted to the plaintiff or not, and he has found that the defendants were indebted to the plaintiff upon a cause of action, which, in truth, was an action for damages. If, indeed, upon the face of the award he had said, that the defendants were indebted to the plaintiff in the sum of 10,000*l.* for not delivering up the land to him within a certain time, the award would have been void as to that; but if he makes an erroneous decision in a matter within his jurisdiction, the award ought not to be set aside.]

The submission to the arbitrator was of a *debt*, and the arbitrator has inserted in his award a claim which is not a debt.

[*PARKE*, B.—If he had inserted it knowingly, the award might have been set aside on the ground of misconduct.]

The arbitrator received the evidence after an objection to its admissibility had been made by the defendants.

[*POLLOCK*, C.B.—The defendants might have applied to a Judge to revoke the submission.]

[*PARKE*, B.—The arbitrator had to decide whether the plaintiff was indebted to the defendants in a *debt*. He makes a mistake, and decides that that which is the subject of an action on the case is a debt. It is simply the case of an erroneous decision; and if parties choose to refer a matter to a Judge

of their own selection, they are bound by his decision both in fact and in law. The fallacy lies in assuming that he has exceeded his jurisdiction. He has not done so; he has decided wrongly upon a matter within his jurisdiction.]

*Martin* then moved to set aside the Judge's order of reference.—The grounds of this application are, that the order of reference entered into by the defendants, who are a corporation, was not under seal, and that the attorney, who agreed to it on behalf of the defendants, was not appointed by any instrument under seal. An order of reference is a mere agreement sanctioned by a Judge, and differs from an ordinary agreement in this circumstance only, that it is capable of being enforced in a more summary way than by a mere action. It ought, therefore, to possess all the essentials of an ordinary agreement, and in the present case ought to have been under seal.

[*POLLOCK*, C.B.—Then, according to that argument, an order of *Nisi Prius* for a reference in the case of a corporation ought to be under seal.]

Undoubtedly the argument must go that length.

[*POLLOCK*, C.B.—In that case, wherever a corporation is a party to an action, the action cannot be referred in the usual way.]

In such a case the order of reference ought to be under seal.—Again, the attorney of the company was not appointed under seal, and had no authority to refer the cause.

[*PARKE*, B.—The appointment of an attorney confers all the powers usually exercised by an attorney; and by usage every attorney may refer a cause in which he is appointed attorney.]

[*POLLOCK*, C.B.—The plaintiff may proceed to enforce the award, and the defendants may rest their defence upon these grounds. If the defendants are right, they do not require the assistance of this Court; and supposing a rule were granted, the other side might choose to have the matter settled by a court of error. We shall not interfere.]

*Per Curiam* (1).—The rules must be refused.

*Rules refused.*

(1) *Pollock*, C.B., *Parke*, B., *Robt*, B. and *Platt*, B.

1848. }  
 April 19. } DONE v. WHALLEY.

*Bond—Co-Sureties—Contribution.*

*One of two co-sureties to a bond received from the principal a promissory note for the sum secured by the bond. In an action for contribution brought by such surety against his co-surety,—held, that it was a question of fact for the jury to say, whether the note was given in pursuance of an arrangement between the parties that the defendant should be thereby discharged, or simply as a collateral security from the principal to the plaintiff; in which latter case the defendant would not be discharged.*

Assumpsit for money paid, and on an account stated.

Pleas—as to 22*l.* 15*s.* parcel, &c., payment of that sum into court; as to the residue, non assumpsit.

At the trial, which took place before Erle, J., at the last assizes for the county of Chester, it appeared, that the action was brought to recover contribution upon a bond for 250*l.*, which one Dodd had executed as principal, and the plaintiff and the defendant as sureties, and the amount of which the plaintiff had been compelled to pay. Previously to the execution of the bond, Dodd had borrowed money of a third party, giving as a security for the same a promissory note for 200*l.*, made by himself as principal and the plaintiff as surety. This note having become due, and an application for payment having been made, a sum of 250*l.* was offered to be lent to Dodd, upon the plaintiff and the defendant entering into the bond now sued on as co-sureties; but before the plaintiff would execute the bond in question, she insisted on this promissory note being delivered up, and on a fresh promissory note for 250*l.* being given by Dodd to her, which was accordingly done, and she thereupon signed the bond. There was no evidence that the defendant was aware of this arrangement between Dodd and the plaintiff.

Under these circumstances, the counsel for the defendant objected that the action would not lie; but the learned Judge overruled the objection, and left it to the jury to say, whether the plaintiff and the defendant were co-sureties for Dodd, and that if so the plain-

tiff would be entitled to recover. The jury found a verdict for the plaintiff.

*Evans* now moved for a new trial, on the ground of misdirection.—The right of one surety to recover contribution from his co-surety is an equitable action—*Cowell v. Edwards* (1). Inasmuch, therefore, as the plaintiff insisted upon and received from the principal, Dodd, a promissory note for the amount of her liability upon the bond, she had no right to resort to this action for the purpose of recovering contribution from her co-surety.

[*ROLFE, B.*—Surely it was a question of fact upon what terms the defendant became surety; *prima facie* the loan having been made to Dodd, and the defendant and the plaintiff being co-sureties, the plaintiff had a remedy against the defendant for contribution.]

In the notes to *Lampleigh v. Braithwaite*, in *Smith's Leading Cases*, vol. 1. p. 71, the law is thus laid down: "On the same ground as the liability of a principal to reimburse his surety, depends the right of one surety or joint contractor who has been obliged to satisfy the whole demand, to recover a proportionable contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand, parcel of which his fellow was compellable to satisfy; though, indeed, if one have become surety at the instance of the other, particularly if that other have received from the principal a separate indemnity for himself, it will be different."—*Turner v. Davies* (2).

*POLLOCK, C.B.*—There ought to be no rule in this case. The simple question was, whether the promissory note for 250*l.* given by Dodd to the plaintiff, was given by him as a mere collateral security to her for the payment of the money secured by the bond, or whether there was any arrangement entered into between Dodd, the plaintiff and the defendant, by which the defendant was to be relieved from all liability upon this bond in consideration of the note being given by Dodd to the plaintiff. This was a question of fact for the jury, and they appear to me to have come to a right conclusion upon the evidence.

(1) 2 Bos. & Pul. 268.

(2) 2 Esp. 478.

PARKE, B.—I am of the same opinion. This only differs from the ordinary case of a co-surety to a bond given for money advanced to the principal, in the fact that a promissory note for the sum secured by the bond had been given by the principal to the plaintiff. The point, therefore, is *quo animo* the note was given? If there were any ground for supposing it to have been given in pursuance of an arrangement entered into between Dodd and the plaintiff, that she was to look only to him and not to the defendant at all, the defendant's counsel should have asked the Judge to leave that question to the jury. If, on the other hand, the fact was that the note was given by Dodd to the plaintiff by way of collateral security that he would repay her if she should be called upon to pay the amount of the bond that would not at all affect her right of action against the defendant. And this clearly was the effect of the evidence given at the trial.

ROLFE, B. and PLATT, B. concurred.

*Rule refused.*

1848. }  
Jan. 14. } GALSWORTHY v. STRUTT.

*Covenant, Construction of—Liquidated Damages—Penalty.*

*The plaintiff and the defendant being attorneys and solicitors, carrying on business at Ely Place, in London, in co-partnership, dissolved the partnership by indenture, whereby the defendant covenanted with the plaintiff that he, the defendant, would not thereafter, within the next seven years, directly or indirectly, by himself or in partnership, carry on the business of an attorney or solicitor within fifty miles from Ely Place, nor interfere with, solicit, or influence the clients of the said co-partnership, and if he should infringe the covenant, then that he would immediately pay to the plaintiff 1,000*l.* as and for liquidated damages, and not by way of penalty:—Held, that the intention of the parties was, that the sum of 1,000*l.* was to be considered as liquidated damages, and not as a penalty.*

Covenant. The declaration stated the making of an indenture on the 19th of June

1841, between the defendant of the one part and the plaintiff of the other; and, after reciting that the plaintiff and the defendant were partners as attorneys and solicitors at Ely Place, in the county of Middlesex, and that the plaintiff had been applied to to dissolve the co-partnership on certain terms, witnessed that the said parties had dissolved the partnership by consent, upon certain terms therein set forth: "and the said John Strutt doth hereby covenant, promise, and agree to and with the said John Galsworthy, that he, the said John Strutt, shall not nor will at any time or times hereafter within the next seven years, directly or indirectly, either by himself or in co-partnership with another or others, carry on the said practice, profession, or business of an attorney or solicitor within the distance of fifty miles from Ely Place aforesaid, save as hereinafter mentioned, nor interfere with, solicit, or influence the clients of the said late co-partnership; and if the said John Strutt shall in any respect infringe the present covenant, then and in such case he, the said John Strutt, shall immediately thereupon pay to the said John Galsworthy, his executors or administrators, the sum of 1,000*l.* as and for liquidated damages, and not by way of penalty: provided always nevertheless, that the said John Strutt shall not be prevented from transacting any matter of business or being concerned for any person or persons not being a client or clients of the said co-partnership, and upon his remaining properly qualified as an attorney and solicitor, through or by means of the said John Galsworthy, as his agent, upon the usual terms, and upon the like charges and costs as are usually paid and allowed by attorneys and solicitors to their agents. The breaches alleged were, that the defendant had carried on the business of an attorney within fifty miles from Ely Place otherwise than through the plaintiff as his agent, and as the attorney and solicitor of one W. Smith and others, and that he had interfered with, solicited, and influenced divers persons who had been and were clients of the co-partnership, and that he had not paid the plaintiff the sum of 1,000*l.* in the indenture mentioned.

The defendant pleaded payment of 50*l.* into court, and other pleas.

At the trial, which took place before

Pollock, C.B., at the Sittings after Michaelmas term last, no evidence having been offered by either party, the jury, under the direction of the learned Judge, found a verdict for the plaintiff for 1,000*l.*, leave being reserved for the defendant to move to enter a verdict for him.

*Sir J. Jervis (Attorney General,)* now moved accordingly.—The sum of 1,000*l.*, stipulated to be paid for breach of contract, is a penalty, not liquidated damages. The question arises on the record. The leading case on this subject is *Kemble v. Farren* (1), which was confirmed by *Boys v. Ancell* (2), and has uniformly been cited with approbation. There the defendant had agreed with the plaintiff to act as principal comedian at Covent Garden Theatre, and the agreement contained a clause that if either party should neglect or refuse to fulfil the agreement or any part thereof, or any stipulation therein contained, he should pay 1,000*l.*, to which sum it was agreed that the damages should amount; and which sum was declared to be liquidated and ascertained damages, and not as a penalty or penal sum, or in the nature thereof. And Tindal, C.J., in delivering the judgment of the Court, says, "That a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty appears to be a contradiction in terms." In *Horner v. Flintoff* (3), Parke, B. says, "Where parties say that the same ascertained sum shall be paid for the breach of every article of an agreement, however minute and unimportant, they must be considered as not meaning exactly what they say, and a contrary intention may be collected from the other parts of the agreement." The judgment of Alderson, B., in the same case, is also important.

[PARKE, B.—The learned Chief Justice, in *Kemble v. Farren*, considers it unreasonable to hold that if the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* a day, he should become liable to the payment of 1,000*l.* In the present

case the damages are incapable of exact estimation; the injury arising from the seduction of a client cannot be ascertained beforehand. This is not like the case of the payment of a small ascertained sum, as in *Kemble v. Farren*; and, therefore, it is reasonable in the present case to say that the parties mean what their language, taken in its obvious sense, imports, namely, that the entire amount of 1,000*l.* is to be paid.]

The result then is, that if in the present case a client had required a release to be drawn at York, and had paid the defendant 6*s.* 8*d.* for drawing it, the whole penalty of 1,000*l.* would attach.

[PARKE, B.—The plaintiff cannot estimate beforehand the damage arising from the loss of each client, and therefore stipulates for the payment of this large sum by way of liquidated damages.]

The Courts do not lay down a safe principle when they proceed on the ground of the larger or smaller amount of injury to the party.

[PARKE, B.—If the defendant sets up in business several times, or solicits clients once only, he is to pay the sum of 1,000*l.* once only and for ever.]

*Boys v. Ancell* is in point.

[PARKE, B.—This is a mere question of construction. A man may make an improvident bargain, but in construing his language the Courts always lean against that interpretation which would make him pay a large sum for a small matter.]

[PLATT, B.—How do you distinguish this case from *Rawlinson v. Clarke* (4)? There the penalty was for doing a single act, which was capable of being done in various ways.]

In that case the parties had defined the meaning of the word "practice." He referred to *Beckham v. Drake* (5).

PARKE, B.—I think there is no ground for a rule in this case. There is no inconsistency in supposing the parties to have meant that 1,000*l.* should be paid on a breach of this covenant. But it is clear, that the defendant is not to pay more than a single 1,000*l.* In this case the damage is incapable of an

(1) 6 Bing. 141; s. c. 7 Law J. Rep. C.P. 258.

(2) 5 Bing. N.C. 390; s. c. 8 Law J. Rep. (N.S.) C.P. 267.

(3) 9 Mee. & Wels. 678; s. c. 11 Law J. Rep. (N.S.) Exch. 270.

(4) 14 Mee. & Wels. 187; s. c. 14 Law J. Rep. (N.S.) Exch. 364.

(5) 8 Ibid. 846; s. c. 10 Law J. Rep. (N.S.) Exch. 356.

exact estimate, for the amount of injury arising to an attorney from his partner's leaving him and carrying his business to another, cannot be correctly ascertained beforehand. To avoid questions, therefore, the parties make an agreement similar to that made in *Lowe v. Peers* (6). It is a reasonable thing for parties to stipulate for the payment of a fixed sum, where the amount of damage is difficult to ascertain. Here, the parties have stipulated for the payment of 1,000*l*. But then it is contended, that *Kemble v. Farren* establishes that where a sum of money is to be paid for the violation of engagements of different degrees of importance, the sum which is stated as liquidated damages is to be considered as a penalty. No such doctrine, however, is there laid down by Tindal, C.J., but the judgment there given has been adhered to by the Courts, and does not interfere with our opinion. In that case, the question was treated by Serj. Wilde, in his argument, as one of construction only. He says, that although the sum fixed upon might appear exorbitant when applied to slight violations of the contract, yet the parties, probably, fixed it on the whole agreement, on account of the difficulty in ascertaining the damages. That is the case here; the damages cannot easily be estimated. In that case Tindal, C.J. says, "For we see nothing illegal or unreasonable in the parties by their mutual agreement settling the amount of damages uncertain in their nature at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained." The law on the subject is correctly expounded in that case. Without doubt, parties may stipulate to pay as liquidated damages any amount they may agree upon. They may annex a very large sum to the violation of their agreement, but they must do so in express terms, and the Court must see clearly that they have that intention before it holds that they are liable to pay the larger amount. The rule, therefore, is correctly laid down in *Kemble v. Farren*, and I expressed that opinion in *Horn v. Flintoff*, when I said we were bound by the decision of the Court of Common Pleas in *Kemble v. Farren*. I also used similar language in

*Green v. Price*. In *Beckham v. Drake* it was stipulated that if either party to the contract should fail to observe it, he should pay to the other 500*l*. by way of specific damages; but as the contract contained stipulations of various degrees of importance, it was only necessary to look at it with reference to all the facts to see that in that case a penalty only was recoverable and not liquidated damages. In *Green v. Price*, I said, "The principle is, that although the parties may have used the term 'liquidated damages,' yet if the Court can see upon the whole of the instrument taken together that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words and consider it as being in the nature of a penalty only." My Brother Alderson there says, "But where the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it, by way of liquidated damages, those words must be read in their ordinary sense, and cannot be construed to import a penalty." Here, a sum of money is to be paid by the defendant for setting up in business in opposition to the plaintiff, and the damage may be very different, according as the business is set up at the beginning or at the end of the term. The defendant is bound by this contract if it be clear; and it is clear that he stipulated to pay 1,000*l*. for the breach of any one of the conditions, and they are such that the damage arising from the violation of any of them cannot be ascertained beforehand. The whole question is one of construction only, in which it is necessary to discover the intention of the parties, or ascertain the meaning of the language they have used.

ALDERSON, B.—In this case the rule is clear, although it has not been distinctly expressed in some of the cases. It is a rule of construction, and is applied thus—where an agreement contains stipulations the breach of which produces a definite amount of damage, for which a disproportionate sum is to be paid, it is not reasonable to infer that the parties intended the whole amount to be paid. Thus, in *Kemble v. Farren*, the parties could not have intended that 1,000*l*. should become due on a failure to pay the sum of 3*l*. 6*s*. 8*d*. So, in *Beckham*

(6) 4 Burr. 2225.

*v. Drake*, it was not meant that a disproportionate sum should be paid in respect of damage, which on the face of the instrument amounted to 3*l.* 3*s.* only. Under these circumstances, the Courts have construed the sum agreed to be paid to be a penalty and not liquidated damages. But where the amount of the damage that may be sustained is uncertain, it is not absurd for the parties to fix upon a definite sum to be paid in respect of a breach; and therefore, under such circumstances, it is reasonable to give their language its natural meaning. The parties are unable to define the damage beforehand, and therefore they fix it at a definite sum. In the present case the damage is undefined, for it would vary considerably if the defendant established his business forty miles from the plaintiff, or next door to him; or if he established it at the beginning of the first year or the end of the last. The parties, therefore, ascertain the damage by a fixed sum, meaning thereby to prevent the necessity of going before a jury. My observations in the case of *Horner v. Flintoff* were intended to apply to the case where some damages are liquidated and others unliquidated. In *Kemble v. Farren*, the parties had said that on non-payment of the salary of 3*l.* 6*s.* 8*d.* payable to the defendant, and for the non-performance of other stipulations, the sum of 1,000*l.* should become due; and Tindal, C.J. observes, that the parties could not have meant that either should be liable to the payment of that large amount, the plaintiff if he had neglected to make a single payment of 3*l.* 6*s.* 8*d.*, or, on the other hand, the defendant if he had refused to conform to any usual regulation of the theatre, however minute or unimportant. The word "specifically" is used by me in *Horner v. Flintoff* in a correct sense. This case has been followed up by *Green v. Price* and *Rawlinson v. Clarke*, where the same principle was acted upon.

PLATT, B.—I am of the same opinion, and I concur with my Brother Parke in the limitations he has applied to this case. If the damages are uncertain and general, there is no reason to alter the words of the contract. Here, the covenant is framed to protect the plaintiff's business from being interfered with, and the parties intended

that the sum specified should constitute the amount of damage. They therefore stipulate in terms, that if the contingency should occur, the sum of 1,000*l.* is to be paid as liquidated damages. I am unable to distinguish this case from that of *Rawlinson v. Clarke*, for here, the damages are uncertain, and might all be recoverable from a jury for aught that the Court can see to the contrary.

POLLOCK, C.B.—I am of the same opinion. The matter is plain, and is governed by the decided cases. *Kemble v. Farren* is a clear authority that where the injury is uncertain, the sum specified is to be taken as liquidated damages. Tindal, C.J. says, "But that a very large sum should become immediately payable, in consequence of the non-payment of a single small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times attempted to relieve by directing juries to assess the real damages sustained by the breach of the agreement." The principle of the present case is included in the judgment of Tindal, C.J. in *Kemble v. Farren*.

*Rule refused.*

1848. } NICHOLSON v. BROOKE AND  
May 10. } OTHERS.

*Practice.—Trial—Several Defendants—Right to address the Jury.*

*In an action brought against several defendants, who appear at the trial by different counsel, it is matter for the discretion of the Judge whether he will allow more than one counsel to address the jury on behalf of the defendants.*

*Semble—that if, at the close of the plaintiff's case there is only one point for the opinion of the jury, only one speech should be allowed.*

Debt for wages and salary due to the plaintiff as the secretary and servant of the defendants.

All the defendants appeared and pleaded the same plea by the same attorney, viz.

except as to 23*l.*, never indebted, and as to 23*l.*, payment of that sum into court.

At the trial, which took place before Parke, B., at the London Sittings, on the 26th of April last, it appeared that the plaintiff acted as secretary to a company, of which the defendants were all members, but the contest was as to whether all the defendants were parties to the contract with the plaintiff.

The counsel for one of the defendants having addressed the jury,

*Lush*, as counsel for Brooke, claimed the right to address the jury also, but the learned Judge refused to allow him to do so ; and the jury eventually found a verdict for the plaintiff.

*Lush* now moved, on behalf of the defendant Brooke, for a new trial.—The learned Judge was wrong in refusing to allow me to be heard.

[PARKE, B.—I thought that substantially there was only one defence on the part of all the defendants, for if any one of them had not been a party to the contract with the plaintiff, the plaintiff would have failed as to all.]

If the defendants had appeared by separate attornies, and had pleaded separately, then, according to the authorities, they might, by their respective counsel, have addressed the jury—*King v. Williamson* (1), *Massey v. Goyder* (2), *Ridgeway v. Philip* (3). This last case was a case of partnership, and is in point with the present, except that there the defendants appeared by separate attornies, whereas in the present case they all appeared by the same attorney ; but that in principle should make no difference.

POLLOCK, C.B.—It must be always a matter for the discretion of the Judge at Nisi Prius whether he will allow more than one counsel to be heard on the part of the defendant. If, at the close of the plaintiff's case, there is only one point for the opinion of the jury, as in the present case, only one counsel should be heard. We can derive no other principle from the cases which have been cited, except that it must always be

in the discretion of the Judge to allow more than one speech or not.

PARKE, B., ROLFE, B., and PLATT, B. concurred. *Rule refused.*

1848. }  
May 11. } HAWKINS v. WILKINSON.

*Practice—Judge's Order—Time to plead—Three Summonses.*

*A party is entitled to a Judge's order on the default of the opposite side in attending two summonses, and he ought not to obtain a third summonses.*

*The defendant, having obtained two Judge's summonses for time to plead, neither of which was attended by the plaintiff, on the non-attendance on the second summons, made an affidavit of service, and left it with the Judge's clerk for signature. The Judge having left chambers without signing it, the defendant, at the suggestion of the clerk, took out a third summons, returnable on the following day, when, on default of attendance, he obtained an order, previously to which, at the expiration of the time for attending the second summons, the plaintiff had signed judgment :—Held, that the judgment was regular.*

This was a rule calling upon the defendant to shew cause why an order of Pollock, C.B., and also an order of Parke, B. should not be rescinded.

The order of the Chief Baron was to set aside the judgment signed by the plaintiff in this case ; and the order of Parke, B. was for the plaintiff to pay the defendant the costs of the application, to be taxed, on the tenth day of the then next term, if the plaintiff should not have obtained an order by that time to set aside the order of the Lord Chief Baron. It appeared that on the 9th of February the defendant's attorney obtained a summons for time to plead, returnable on the 10th, which summons was not attended by the plaintiff's attorney. On the 10th a second summons was taken out for the 11th, attendable at ten o'clock on that day. The defendant's attorney attended at the Judge's chambers, and on the summons being called on in its turn, and no one appearing on behalf of the plaintiff, he made an affidavit

(1) 3 Stark. 162.

(2) 4 Car. & Pay. 162.

(3) 1 Cr. M. & R. 415 ; s. c. 4 Law J. Rep. (N.S.) Exch. 14.

of service, and left it with the Judge's clerk for the purpose of obtaining the Judge's signature. The Judge, however, left without signing the affidavit. Under these circumstances, the clerk suggested that a third summons, returnable on the 12th, should be taken out. This was done, and was served upon the plaintiff's attorney, who, however, did not attend it. The defendant's attorney, on the 12th, made an affidavit of service and attendance, and having, after four o'clock on that day, obtained an order to plead several matters, delivered the pleas on the same evening. In the mean time the plaintiff had signed judgment, on the 11th of February, after the hour when the second summons became returnable.

*Archbold* shewed cause.—The order setting aside the judgment was correct, as the plaintiff ought not to have signed judgment before the third summons was returnable. That summons operated as a stay of proceedings until it was returnable. Formerly no order could have been obtained until after the third summons was attendable—*1 Tidd's Pract.* 511.

[*PARKE, B.*—After the second summons the defendant had the remedy in his own hands; but the case was altered after the third summons.]

[*PLATT, B.*—If the defendant does not take his remedy, the other side may reasonably think he does not intend to pursue that course.]

A party who is compelled to obtain a third summons has the same privilege under the present practice as he had under the former.

*Lush*, in support of the rule, was not called on.

*PARKE, B.*—The defendant ought to have had the affidavit signed, and the order drawn up on the day when the second summons was returnable. He ought not to have relied on the advice of the Judge's clerk. The judgment being regular, the rule will be absolute for setting aside the Judge's orders; but the judgment may be set aside on payment of costs by the defendant.

*POLLOCK, C.B., ROLFE, B., and PLATT, B.* concurred.

*Rule absolute accordingly.*

1848. } DUKE, KNT., AND OTHERS, v.  
May 16. } ANDREWS.

*Railway Company—Contract for Shares—Letters of Application and Allotment—Effect of words "Not transferable."*

*The defendant having applied to a railway company for an allotment of 100 shares, undertaking to accept the same or any less number, and to pay the deposit thereon, received an assignment of sixty shares, by a letter of allotment, from the company, headed by the words "Not transferable:."—Held, in an action by the company against the defendant, to recover the deposit, that the contract was not binding on him, inasmuch as his proposal was absolute, whereas the acceptance in the letter of allotment was conditional, as it contained a qualification that the contract was "not transferable."*

Assumpsit by the committee of management of the Dorking, Brighton and Arundel Atmospheric Railway Company, against the defendant, as an allottee of sixty shares in the said company, to recover the sum of 126*l.*, being a deposit of 2*l.* 2*s.* on each share. The declaration was framed on a special contract by the defendant to pay the deposit in consideration of the plaintiffs' allotting the shares to him.

The defendant pleaded non assumpsit and other pleas.

The cause came on for trial, at the London sittings, after Trinity term, 1847, when a verdict was by consent taken for the plaintiffs, with 126*l.* damages, subject to the opinion of this Court upon a SPECIAL CASE, which, in substance, was as follows:—

The plaintiffs as the committee of management of the above-mentioned railway, having issued a prospectus of the company, the defendant who was a silk and ribbon agent in London, on the 10th of October 1845, wrote and sent to the secretary of the company the following letter of application for shares:—

"To the committee of the Dorking, Brighton and Arundel Atmospheric Railway by Horsham and Shoreham.

"I request you to allot me one hundred shares of 20*l.* each in the above undertaking,



and I hereby undertake to accept the same or any less number which may be allotted to me, and to pay the deposits thereon, and to execute the parliamentary contract and agreement when required. Dated this 10th day of October 1845.

"Name in full—John Holman Andrews. Residence—27, West Square, Lambeth. Business or Profession (if any)—Silk and ribbon agent, 26 and 27, Addle Street, City.

References—W. Hughes Hughes, Esq.—T. P. Buckland, 84, Watling Street."

On the 25th of November 1845, the managing committee sent the following letter of allotment to the defendant:—

"*Not transferable.*—25.—The Dorking, Brighton and Arundel Atmospheric Railway. No. A. 23. Shares 60. Deposit 126*l.* Offices, Adelaide Hotel, London Bridge, November 25, 1845.

"Sir,—The committee having upon your undertaking agreed to allot to you sixty shares of 20*l.* in this railway, I have to request that you will pay the deposit of 2*l.* 2*s.* per share, amounting to 126*l.*, to the account of the company, to either of the undermentioned banks, on or before the 9th day of December 1845.

"*This letter must be produced at the time of payment, and the bankers' receipt will afterwards be exchanged for the scrip certificate, upon your executing the parliamentary contract and subscribers' agreement, which will lie for signature at the office on and after Friday, the 21st day of November instant, and, for the convenience of persons residing in the country, at such other places and times as will be announced by advertisement in the local newspapers.*

"I am, sir, your obedient servant,

"R. Turner, Secretary *pro tem.*

"John Holman Andrews, 27, West Square, Lambeth.

"The London and County Bank, Lombard Street, and Brighton, and at the several country branches.

"Messrs. Hall, West & Borrer, Union Bank, Brighton.

"N.B.—The parliamentary contract and subscribers' agreement must be executed by you before the 15th day of December 1845.

"No.                      November      , 1845.

"Received on account of the committee of management of the Dorking, Brighton

and Arundel Atmospheric Railway Company, to account for on demand.

For

£

"In order to prevent mistakes or error the subscriber will be pleased to fill in the following blanks in his own handwriting, at the time he obtains this receipt.

"Name of subscriber in full

"Place of business (if any)

"Place of residence

"Profession or trade

"Subscriber's usual signature."

The above letter of allotment was received and kept by the defendant, but no notice was taken of it, nor was any deposit paid by him. Very few of the allottees having paid their deposits, the committee of management were prevented by want of funds from bringing the scheme before parliament.

It was agreed that the Court should be at liberty to draw the same inferences as a jury might draw.

The question for the opinion of the Court

[ALDERSON, B.—Your argument is, that the words amount to a mere caution.]

Yes. But even supposing the words "not transferable" were more than a mere notice, and were intended to restrain the allottee from transferring his bargain to a third party, yet they are not a new term in the contract, inasmuch as they do not alter the legal effect, since if they are struck out the contract between the company and the allottee is not transferable by common law.

[PARKE, B.—If the words are to be construed as a term in the contract they might prevent the allottee from transferring his equitable right to the shares; whereas his intention may have been to obtain such a contract as he could transfer.]

The argument now used on the other side was presented to the Court of Common Pleas in *Wontner v. Shairp* (1), and that Court appeared to attach but little value to the argument. The words "not transferable" are not to be considered as embodied in the letter of allotment. If the words bear the same meaning as "not saleable" they are inoperative, as they would not prevent the defendant from disposing of his interest.—He then argued that the words in the letter of allotment: "this letter must be produced at the time of payment," did not introduce any new term into the contract contained in the letter of application, and he cited *Vollans v. Fletcher* (2).

H. T. Atkinson, for the defendant, was not called upon.

PARKE, B.—The defendant is entitled to our judgment. There is in this case no binding contract. The proposal is absolute, but the acceptance in the letter of allotment is conditional. The latter contains a qualification that the contract is not to be transferable. The party purchasing this letter of allotment may have bought it thinking it was transferable, whereas the company say they will not recognize his transferee as the holder of the shares. The two stipulations are not *ad idem*, and therefore there is no valid contract. This appears to have been

the opinion of the Court of Common Pleas in *Wontner v. Shairp*.

ALDERSON, B.—The letter of allotment would bear a very different value if the words "not transferable" were omitted.

ROLFE, B. and PLATT, B. concurring,—

*Judgment for the defendant.*

1848. }  
May 3. } HARRISON v. CLIFTON.

*Bill of Exchange—Infancy—Evidence—Pleading.*

*A declaration by an indorser against the acceptor of a bill of exchange stated, that the bill was drawn on the 20th of September 1847, payable four months after date, and that the defendant then accepted the said bill. Plea, infancy of the defendant. It was proved that the defendant became of full age on the 24th of December 1847:—Held, that this was no evidence of the defendant's being an infant at the time of his accepting the bill.*

Assumpsit by the indorser against the defendant as the acceptor of two bills of exchange. The first count of the declaration stated that W. C. J. Anstruther on the 20th of September 1847 made his bill of exchange, directed to the defendant, for the sum of 1,000*l.*, payable four months after date; that the defendant then accepted the said bill; and that the same was indorsed to the plaintiff. The second count was the same in all respects, except that the bill was for 500*l.*

Plea—Infancy of the defendant at the time of accepting the said bills.

At the trial, before Rolfe, B., at the Westminster Sittings in this term, the defendant's counsel, in support of the plea, proved that the defendant became of full age on the 24th of December 1847, and that the declaration was delivered on the 20th of March 1848. He then contended, that this evidence, coupled with the date of the bill, shewed that the bill was accepted before the defendant attained his full age. The learned Judge thought the plea was not proved, and he directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him, if the

(1) *Ante*, C.P. 38.

(2) 1 Exch. Rep. 20; a.c. 16 Law J. Rep. (N.S.) Exch. 173.

Court should be of opinion that the evidence supported the plea.

*Whitehurst* now moved accordingly.—There was evidence for the jury in support of the plea. The bill must have been drawn four months before the 20th of March, the day of delivering the declaration; and as it is stated in the declaration that "the bill was drawn on the 20th of September, and that the defendant *then* accepted the said bill," that is evidence of his having accepted it before the 24th of December, the day when he is proved to have attained his majority. It was urged on behalf of the plaintiff, that it did not appear at what time the bills were drawn, but they will be assumed to have been drawn on the day on which they bear date, according to the authority of *De La Courtier v. Bellamy* (1), and *Hague v. French* (2), which shew that where a bill of exchange bears no date, it will be taken to be dated on the day when it was drawn.

[*PARKE, B.*—Admitting the bill to have been drawn on the day on which it bore date, why may not the defendant have accepted it some time after?]

It is stated in the declaration that the bill was drawn on the 20th of September, and that the defendant *then* accepted the said bill.

[*PARKE, B.*—That does not mean that he accepted it on that day. The averment would be proved by shewing that he accepted it on the 28th of December.]

*POLLOCK, C.B.*—You are attempting to push the doctrine of intendment very far. The defendant avers that he was under age at the time of accepting these bills; he is bound to make out that matter affirmatively; and all that can be said is, that his evidence leaves the point in doubt. The case may stand over for a week, to enable the defendant to move upon affidavits.

The case accordingly stood over, but the motion was not renewed.

*Rule refused.*

(1) 2 Show. 422.

(2) 3 Bos. & Pul. 173.

1848. }  
May 12. } *OSWALD v. THOMPSON.*

*Bankruptcy—Act of Bankruptcy—Fraudulent Conveyance*—6 Geo. 4. c. 16. s. 3.—13 Eliz. c. 5.

*A deed of assignment amounting to an act of bankruptcy, under the 3rd section of the 6 Geo. 4. c. 16, is not void as against the future creditors of the assignor.*

This was an interpleader issue to try the right to certain goods seized by the sheriff of Middlesex under a writ of execution, upon a judgment recovered by the defendant in an action of *Thompson v. Pace*.

At the trial, which took place before Alderson, B., at the sittings for Middlesex, held during this term, it appeared, that on the 15th of January 1846, Pace executed a deed of assignment to the plaintiff of all his furniture, including the goods afterwards seized by the sheriff. Pace was at that time in embarrassed circumstances; and on the 21st of April a fiat in bankruptcy issued against him, the deed of assignment above mentioned being the act of bankruptcy to support the fiat. The debt of Pace to the defendant was not contracted until the latter part of the year 1847.

The learned Judge was of opinion, that inasmuch as the defendant did not become the creditor of Pace until after the execution of the deed of assignment, it could not be void as against the defendant, even although its execution might amount to an act of bankruptcy under the 6 Geo. 4. c. 16. s. 3; and subject to that direction, he left it to the jury to say whether the goods contained in the assignment were the property of the defendant. The jury found that they were; and a verdict for the defendant was accordingly entered.

*E. James* now moved for a new trial, on the ground of misdirection.—The learned Judge should have directed the jury that inasmuch as the deed of assignment amounted to an act of bankruptcy on the part of Pace it was altogether void, and that no property in these goods passed to the plaintiff. The 3rd section of the 6 Geo. 4. c. 16. enacts, *inter alia*, that any person who shall "make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels with intent to defraud or delay his

creditors shall be deemed to have thereby committed an act of bankruptcy." Such a deed, it is submitted, becomes of none effect, not only with respect to his present, but also with respect to his future creditors.

*Per Curiam* (3).—It is clear, that, under the statute of 13 Eliz. c. 5, a voluntary conveyance is not void as against future creditors. It is equally clear that a conveyance fraudulent under the Bankrupt Act and an act of bankruptcy, is not necessarily fraudulent under the statute of 13 Eliz.; and there is nothing in the 3rd section of the 6 Geo. 4. c. 16. which can have the effect of making any deed comprised within the provisions of that section void for all purposes. Inasmuch, therefore, as the defendant did not become a creditor of Pace's until long after the deed of assignment to the plaintiff was executed, the direction of the learned Judge at the trial was perfectly right.

*Rule refused.*

[IN THE EXCHEQUER CHAMBER.\*]

1848. }  
Feb. 5; } THORPE v. FLOWDEN.  
May 15. }

*Writ of Error—Tithe Commutation Act, 6 & 7 Will. 4. c. 71. s. 46.—Feigned Issue.*

*No writ of error lies upon a judgment of a superior court upon a feigned issue brought under the provisions of the statute 6 & 7 Will. 4. c. 71. s. 46. (the Tithe Commutation Act.)*

*And a writ of error having been brought upon such judgment, the Court of Exchequer Chamber ordered the writ to be quashed.*

This was a feigned issue brought in the Court of Exchequer under the 46th section of the 6 & 7 Will. 4. c. 71. to try the plaintiff's right to the tithes of Aston-le-Walls, in the county of Northampton.

The cause came on for trial, at the Midsummer Assizes for that county in 1844, when a verdict was taken for the plaintiff

by consent, subject to a special case, with liberty to turn the same into a special verdict, if allowed by law. The special case was argued, in the Exchequer, in Michaelmas term, 1845, when judgment was given for the defendant; and afterwards by virtue of a Judge's order the *Nisi Prius* record was amended, by inserting therein the special case as a special verdict of the jury.

A writ of error having been brought upon this judgment by the plaintiff, a rule was obtained, on behalf of the defendant, in December last, calling upon the plaintiff to shew cause why the writ of error so brought should not be quashed.

*Willes* shewed cause (Feb. 5).—It will be contended, on the other side, that under the 46th section of the 6 & 7 Will. 4. c. 71. no writ of error lies upon the judgment of the Court below. But if that section be referred to, it will be seen that it contemplates an action being brought. It directs that such action shall be commenced by writ of summons; and it does not leave the parties to an ordinary feigned issue such as is found under the Interpleader Act, which is sent down to be tried without any writ first issuing. The section throughout calls the proceeding an action. *Prima facie*, therefore, this action must be subject to all the ordinary legal incidents of an action, amongst others to a writ of error.

[PATTESON, J.—Has not this point been decided? I remember that in the case of *Fellowes v. Clay* (1) the Judges were divided in opinion as to whether there had been a misdirection on the part of the Judge at the trial, and my Brother Coleridge withdrew his judgment, in order that the cause might go down to be tried again, when a bill of exceptions might be tendered to the ruling of the Judge. But I understood that it had been decided that no writ of error lay.]

[ERLE, J.—I was counsel in that case. It was as my Brother Patteson has stated. Lord Lyndhurst, who was then Lord Chancellor, intimated an opinion that a writ of error would not lie.]

That case never found its way into the Court of Exchequer Chamber, and the point could never have been decided judicially.

(3) Pollock, C.B., Parke, B., Rolfe, B., and Platt, B.

\* Coram Patteson, J., Coltman, J., Maule, J., Wightman, J., Cresswell, J. and Erle, J.

(1) 4 Q.B. Rep. 313; s. c. 12 Law J. Rep. (N.S.) Q.B. 202.

What was done, therefore, in that case ought not to prejudice the present case one way or the other. This point has arisen under the Interpleader Act, in a case of *King v. Simmons* (2), where the Court of Exchequer Chamber held that there could be no writ of error upon a proceeding under the Interpleader Act; but that case has gone up to the House of Lords, and their decision upon that very point is now pending. In the judgment delivered by Tindal, C.J., in that case, great stress was laid upon two points, neither of which is applicable to the present case: first, the circumstance that the Interpleader Act does not direct any writ of summons to be issued, and that a writ of error obtained without such writ would be an anomaly; and, secondly, that the 7th section of the 1 & 2 Will. 4. c. 58. requires the judgment upon an interpleader rule to be entered up in a special manner. But the proceedings in the present case commence by writ of summons, and the judgment entered up is that the plaintiff be in mercy and the defendant go without day. The defendant in error having entered up, and obtained such a judgment in the court below, ought to be estopped from saying that the writ of error does not lie.

[PATTERSON, J.—The words of the 46th section of the 6 & 7 Will. 4. c. 71. are, “that the verdict which shall be given in such action or the judgment of the Court upon the case, subject to which the same may be given, shall be final and conclusive upon all parties thereto, unless the Court wherein such action shall be brought shall set aside such verdict, and order a new trial.”]

If this case falls within the class to which those words apply, it is submitted that what is intended by them is, that the judgment of the Court shall have the finality and conclusiveness which are the usual attributes of a judgment of one of the superior courts: that is to say, final and conclusive unless reversed by a court of error; but the statute by no means intended to prevent the bringing of a writ of error. To deprive a party of his right to do so express words

should have been used. But the words cited by Patterson, J. from the 46th section do not apply to a case like the present. Here the Judge, at the trial, did not direct the jury simply to find a verdict subject to a special case. There was a verdict, no doubt, found, and there was a special case directed; but the verdict was found subject to the opinion of the Court upon a special case, and further subject to the opinion of the Court of error upon a special verdict. Such special verdict has been entered upon the record, and the proceedings are taken out of the operation of the 46th section.

*Watson and Pigott, contra.*—No writ of error lies in this case. It is clear from the language of the 46th section of the statute, that the decision of the Court below was to be final and conclusive for all purposes. The object of the legislature was to create a machinery for raising and deciding questions concerning tithes; and although the proceeding under the 46th section is called an action, and a writ is required to issue, and an appearance may be entered, it has raised incidents which do not belong to an ordinary action. A feigned issue is required to be delivered, and the parties are required, upon the trial of the issue, to produce all books, deeds, papers and writings, terriers, maps, plans, and surveys relating to the matters in issue. The judgment which has been given by the Court below would appear to be a nullity, for the statute does not contemplate any judgment of record being entered up, but only a verdict being entered. There is no necessity for any judgment, for the costs are in the discretion of the Court. Now it is laid down in *Bac. Abr.*, and 1 *Salk.* 263. is given as the authority, that “whenever a new jurisdiction is created by act of parliament, and the Court or Judge that exercises that jurisdiction acts as a Court or Judge of record, according to the course of the common law a writ of error lies on their judgment; but when they act in a summary method, in a new course, different from the common law, there a writ of error does not lie, but a *certiorari*.” Moreover the 46th section says, “that it shall be lawful for the Judge by whom any such action shall be tried, if he shall think fit, to direct the jury to find a

(2) 7 Q.B. Rep. 289; s.c. 14 Law J. Rep. (N.S.) Q.B. 248.

verdict, subject to the opinion of the Court upon a special case; and the verdict which shall be given in any such action, or the judgment of the Court upon the case, subject to which the same may be given, shall be final, and binding upon all parties thereto, unless the Court wherein such action shall be brought shall set aside such verdict and order a new trial to be had therein, which it shall be lawful for the said Court to do, if it shall think fit." The obvious meaning of this section is, that the verdict, subject to the opinion of the Court upon the special case, shall be conclusive, except in one event, namely, that that Court shall think fit to set aside the verdict and grant a new trial. It clearly does not contemplate the reversal of the proceedings upon error. Suppose this Court should, after argument of this case, reverse the judgment of the Court of Exchequer, what would the Tithe Commissioners do? The verdict would still stand, and the Commissioners might be compelled by mandamus to act in pursuance of it.

*Willes* replied.

*Cur. adv. vult.*

The judgment of the Court was now (May 15) delivered by—

**PATTESON, J.**—This was a motion to quash a writ of error brought on a judgment of the Court of Exchequer, upon the grounds that under the circumstances a writ of error will not lie. It was a feigned issue brought under the provisions of the statute 6 & 7 Will. 4. c. 71. s. 46, in which a verdict was found for the plaintiff, subject to a special case, which was afterwards turned into a special verdict, and judgment given for the defendant. The statute in question provides, that a party dissatisfied with the decision of a Tithe Commissioner may cause an action to be brought, and deliver a feigned issue; that the parties shall produce all deeds, &c.; that the Judge may direct the jury to find a verdict, subject to the opinion of the Court on a special case, "and the verdict which shall be given in such action, or the judgment of the Court upon the case, subject to which the same may be given, shall be final and binding upon all parties thereto, unless the Court shall set aside such verdict, and order a

new trial." It then directs, that if the facts be not disputed, a case may be stated at once for the opinion of the Court, and the decision of such Court shall be binding upon all parties concerned therein, "Provided always, that after such verdict given, and not set aside by the Court, or after such decision of the Court, the said Commissioners shall be bound by such verdict or decision, and the costs of every such action, or of stating such case, and obtaining a decision thereon, shall be in the discretion of the Court in or by which the same shall be decided, which may order the same to be taxed by the proper officer of the court, and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the same court." Nothing is said in express terms as to a special verdict; nor could it be necessary if the opinion of one Court was intended to be conclusive, because that opinion could be obtained as well on a special case as a special verdict. If the facts be undisputed, it is plain that no opportunity of removing the decision of the Court upon questions of law was meant to be afforded; nor can any reason be assigned why any distinction should be made, and that decision should be reviewed after the facts are ascertained by a jury, since the law only, and not the facts, would be submitted to a court of error upon a special verdict. Again, power is given to the Judge at the trial to *direct* a special case, which he cannot do at common law; and such power would seem to have no object but that of confining the decision on the law to one Court whose decision should be final and conclusive, by making the Judge, without the consent of the parties, so to shape it. Further, it should seem that the proviso as to costs shews that no judgment of record was intended to be pronounced, because it directs the costs to be in the discretion of the Court, and that they may be obtained by execution in like manner *as if they had been recovered upon a judgment of record*, which excludes the supposition that a judgment of record was intended to be entered up. But it is argued that as an action is to be brought, all the incidents of an action will attach, and amongst them the finding of a special verdict (which is not in terms

prohibited) and a judgment thereon, and therefore that this case is distinguishable from that of a feigned issue, under the Interpleader Act, in which there is no action; and, therefore, the case of *King v. Simmonds* is no authority upon the present occasion, nor the case of *Snook v. Mattock* (3). Those cases, however, proceeded not so much on the ground that no writ was to be issued or action brought, as upon the plain intention of the legislature that no ordinary judgment of record should be entered up. We are of opinion, looking at all the provisions of the act in question, that the same plain intention of the legislature appears in the 46th section, on which this question arises, and that the same consequence follows, namely, that the legislature, intending to exclude a judgment of record in feigned issues under this act, has in effect excluded any writ of error.

We are of opinion that, whether the facts be put in the shape of a special case or a special verdict, the Court has power only to direct how that verdict shall be entered, which is made binding on the Commissioners; but that no judgment of record can be entered on which to ground a writ of error. This being so, the case of *King v. Simmonds* is a direct authority to shew that the proper course is for this Court to quash the writ of error, and the present rule must be made absolute.

*Rule absolute.*

1847. }  
Nov. 27. } DUNCAN v. BENSON.\*

*Ship and Shipping—Bottomry Bond—Authority of Master of Ship—Liability of Shippers' Goods for Repairs—Demurrer—Plea.*

*In cases of necessity affecting the interest of the shipper, and where the sale or pledge of the cargo is directly or indirectly for his benefit, the master of the vessel becomes his agent for the purpose of selling or pledging the cargo.*

*The vessel of the defendant, the ship-*

(3) 5 Ad. & El. 239; a. c. 5 Law J. Rep. (N.S.) K.B. 206.

\* Decided in Michaelmas term.

*owner, requiring repairs in a foreign port, in consequence of damage sustained by perils of the sea, the master by one bottomry bond hypothecated, for the necessary repairs, the vessel, the freight and the cargo, including the goods of the plaintiff, the shipper. The vessel and freight proving insufficient to defray the expenses of the repairs, the plaintiff was compelled to contribute towards making up the difference, and was also forced to pay certain costs incurred in an Admiralty suit, instituted by the obligee of the bottomry bond:—Held, that the ship-owner was responsible to the shipper for the costs of the Admiralty suit, and also for the value of the goods on a contract of indemnity, and that it made no difference that the goods were rendered liable by one instrument of hypothecation.*

*To an action on such contract the defendant pleaded that the bottomry bond was executed by the master, without any express authority from him, the defendant, and before the same was executed, the costs and expenses exceeded the value of the ship, when repaired, and the freight; that as soon as the defendant received notice of the premises he abandoned the ship and all right to her and to all freight, and refused to ratify, and never did ratify, the act of the master in executing the bond:—Held bad, on general demurrer.*

*Assumpsit.* The first count of the declaration stated that the defendant, before and at the time of the making of the promise, &c. was owner of and interested in the possession of a certain ship called the *Lord Cochrane*, then being at Pernambuco, in South America, and bound from thence to Liverpool, of which said ship one L. H. Smith then was the master, duly appointed by the defendant; and that the plaintiff, at the special instance and request of the defendant, caused to be shipped and loaded on board of the said ship at Pernambuco divers goods and merchandises of him the plaintiff, of the value of 5,000*l.*, to be carried and conveyed in the said ship, by the defendant, for the plaintiff, from Pernambuco to Liverpool, and then to be delivered by the defendant to the plaintiff, the dangers and accidents of the seas and navigation only excepted, for certain freight and reward

then agreed to be paid by the plaintiff to the defendant; that the said ship set sail and proceeded on her said voyage from Pernambuco to Liverpool, with the said goods and merchandises of the plaintiff and certain other cargo on board thereof, and afterwards and whilst she was so proceeding on her said voyage with the said goods and merchandises and cargo on board, the said ship struck upon a certain reef and bank in the high seas, by which said several premises the said ship became and was greatly injured and damaged, and thereupon and in consequence of the said injury and damage it became and was then deemed to be proper and necessary by the said L. H. Smith, he then being the master of the said ship and the agent of the defendant in that behalf, to put back and sail back again to Pernambuco, and to have the said injury and damage repaired, and the said ship, with the said goods and merchandises of the plaintiff and the said other cargo so on board thereof, did thereupon then put back and sail back again to Pernambuco, and the said injury and damage was then and there repaired by and under the direction and authority of the said master, and the costs and expenses then necessarily incurred at Pernambuco, in and about the repairing the said damage and injury, and in and about providing the necessary stores and victuals for the supply of the said ship and the crew thereof, and in and about making and disbursing the other payments and disbursements then properly and necessarily made and disbursed by the said master, on behalf of the defendant, at Pernambuco aforesaid, in order to have the said repairs effected, and to enable the said ship to complete the voyage from Pernambuco to Liverpool, amounted in the whole to a large sum, to wit, the sum of 7,132*l.* 3*s.* 8*d.*; that Pernambuco was in a foreign country, that is to say, in South America, and neither the defendant nor any other person interested in the said ship was then there, but on the contrary thereof were natives of, and then resident in England; and the said master, L. H. Smith, had not nor was he provided by the defendant nor any other person with money or funds to enable him to pay and defray the costs and expenses aforesaid, or

to complete the said voyage from Pernambuco to Liverpool, and thereupon, being then unable to raise or borrow money by any other means, in order to obtain the said sum necessarily required by him to pay the said costs and expenses, the said L. H. Smith, then being master of the said ship, and acting as such, and within the scope of his authority, did then and there, at Pernambuco aforesaid, lawfully execute a certain bottomry bond, under his hand and seal, to the tenour and effect, that he, the said L. H. Smith, master of the barque or vessel called &c., for himself and in the name of the said defendant, was held and firmly bound unto Messrs. M'Calmont & Co., of the city of Pernambuco, merchants, in the penal sum of 10,000*l.*, for the payment of which unto the said M'Calmont & Co., the said master thereby bound himself, as well as the aforesaid owner, by those presents; and it was in and by the said bond further expressed and declared, that whereas the above-bounden L. H. Smith, for himself and owners, had taken up and received of and from the said M'Calmont & Co. the full and just sum of 7,132*l.* 3*s.* 8*d.*, being the needful repairs to, and expenses on the said barque and her cargo, and which said sum of 7,132*l.* 3*s.* 8*d.* was to run on the block freight and cargo of the said barque, and to proceed from thence to the said port of Liverpool, at the rate or premium of 20*l.* per cent.: in consideration whereof, the casual risks of the seas excepted, and for the further securing of the said M'Calmont & Co., the said L. H. Smith, for himself, as well as in the name of the before-mentioned owner, did, by these presents, mortgage and assign over to the said M'Calmont & Co. her freight and cargo, &c.; and it was further declared that the said barque, her freight and cargo, were then assigned over for the security of the money taken up by the said L. H. Smith, for himself and the before-recited owner, and should be delivered to no other use or purpose whatsoever, until payment of that bond was first made with the premium that might become due thereon, and the condition of the said writings obligatory was thereunto and to each of them subscribed to be to the tenour and effect following, that is to say, that if the above-bound L. H. Smith, for



himself and his said owner, should and did well and truly pay or cause to be paid unto the said M'Calmont & Co. the full and just sum of 8,558*l.* 12*s.* 4*d.* sterling, being the principal of that bond, together with the premium which should become due thereon, at or before the expiration of twenty days after the arrival of the said barque in the port of Liverpool, or, in case of the loss of the said barque, such an average as should have become due on the salvage, then that obligation to be void and of no effect, otherwise to remain in full force and virtue; and the plaintiff, in fact, saith that the said M'Calmont & Co. then duly advanced, lent and paid to the said L. H. Smith the said sum of 7,132*l.* 3*s.* 8*d.*, upon the security aforesaid, and on no other, and which said sum was then duly applied by the said L. H. Smith in paying and defraying the said costs and expenses so necessarily incurred at Pernambuco; that the said bottomry-bond was a valid and binding instrument, and operated by law to bind and hypothecate the said cargo on board the said ship, and amongst it the said goods and merchandises of him, the plaintiff, so shipped and loaded on board thereof as aforesaid, of all which said several premises the defendant then, &c. had notice, and thereupon, and in consideration of the said several premises aforesaid, the defendant then promised the plaintiff to indemnify and save him harmless against any loss or damage which might lawfully accrue to him, the said plaintiff, as owner of the said goods and merchandises, by or by reason of the said premises; that afterwards, to wit, on &c., the said ship again proceeded on her said voyage, and with her said cargo, and with the said goods and merchandises of the plaintiff, then being part of the said cargo, to wit, on the day and year aforesaid, safely arrived at Liverpool; that the said L. H. Smith did not nor did the defendant, at or before the expiration of twenty days after the arrival of the said ship at Liverpool, or at any other time pay to the said M'Calmont & Co., or to any one on their behalf, the said sum of 8,558*l.* 12*s.* 4*d.* in the said bond mentioned, or any part thereof; that by reason of the non-payment of the said sum of 8,558*l.* 12*s.* 4*d.* the said M'Calmont & Co., in due

form of law, to wit, on &c., took proceedings, and made suit in the Court of Admiralty, against the said ship, her freight and cargo, to recover payment of the said sum of money, and afterwards, to wit, on &c., duly obtained judgment and execution for the recovery thereof; and the costs of the said suit, amounting together to a large sum, to wit, the sum of 13,991*l.* 5*s.* 3*d.*; that the value of the said ship, and of her freight and of her tackle, apparel, furniture, and appurtenances, then amounted in the whole to a less sum than the said sum of 8,558*l.* 12*s.* 4*d.* in the said bond mentioned, to wit, to the sum of 3,191*l.* 5*s.* 3*d.*, and that sum alone was realized to the said M'Calmont & Co., out of, and in respect thereof, whereby and by reason of which said several premises the sum of 10,000*l.* remained and was due and unpaid to the said M'Calmont & Co., upon and by virtue of the said bond and judgment; whereupon the plaintiff was forced and compelled to pay to the said M'Calmont & Co., and did then pay to the said M'Calmont & Co., as a contribution towards the said last-mentioned sum, and the interest thereon lawfully accruing, for all which he and his said goods and merchandises were then liable, the sum of 2,000*l.*, then being a less sum than the value of his said goods and merchandises, and being over and above the said freight payable in respect thereof; that the said payment and contribution, which he was so compelled to make as aforesaid, was loss and damage which lawfully accrued to him, the plaintiff, as owner of the said goods and merchandises, for and by reason of the said premises; and he, the plaintiff, also sustained further loss and damage, as owner of the said goods and merchandises, by reason of the said premises, that is to say, loss and damage to the amount of 1,000*l.* for costs, which he, the plaintiff, was forced and obliged to pay and became liable to pay as well to the said M'Calmont & Co. as his own costs necessarily and justifiably incurred by him in and about the said proceedings in the said Admiralty Court, which were so taken upon the same bond by reason of the defendant having refused to pay the said sum therein mentioned; of all which said several premises the defendant then had notice. Yet the

defendant did not nor would indemnify or save harmless the plaintiff against the said loss or damage which so lawfully accrued as aforesaid to the said plaintiff as owner of the said goods and merchandises or any part or portion thereof, but wholly neglected and refused so to do, whereby, &c.

Sixth plea, that the said bottomry bond in that count mentioned was executed by the said master without any express authority from the said defendant, and that before and at the time when the same was executed by the said master at the place and under the circumstances in the said count mentioned, the amount of the costs and expenses in the said count mentioned would exceed, and in fact exceeded, the amount of what would be and was the value of the said ship when repaired as in the said count mentioned, and of all the freight which would be earned by the said ship in case she should, after being repaired as in the said count mentioned, proceed upon her said voyage and should safely arrive at Liverpool with all her cargo; that when and so soon as he received notice of the premises he did abandon the said ship and all right and title to the same and to all freight in respect of the said voyage, and did refuse to ratify and never did ratify the act of the said master in executing the said bottomry bond in the said count mentioned. Verification.

Demurrer.

*Martin*, for the plaintiff (June 2, 1845), in support of the demurrer.—The plea is bad. A ship-owner is bound to supply a proper ship for carrying the goods, and is liable to pay the costs of repairing the ship. That appears from the judgment of Bayley, J. in *Powell v. Gudgeon* (1). The master has a clear right by the general marine law to hypothecate either the ship or the cargo or both for the purpose of continuing the voyage—*Freeman v. the East India Company* (2). In the present case the defendant by his authorized agent pledged the plaintiff's goods, and the latter is entitled to be indemnified from the loss he has sustained.—He cited and referred to *Exall v. Partridge* (3), *Brown v. Boorman* (4), and 53 Geo. 3. c. 159.

(1) 5 Man. & Selw. 431.

(2) 5 B. & Ald. 617.

(3) 8 Term Rep. 308.

(4) 11 Cl. & Fin. 1.

*Sir T. Wilde*, contra.—It cannot be contended that the owner of a ship is liable to pay any amount of money that may be expended upon her—*Carew v. White* (5). A ship-owner is responsible for such repairs done to a ship by a master's orders as a prudent owner himself, if present, would order—*The Alexander* (6). No authority that can be given by the owner of the cargo will authorize the captain to give a bottomry bond which shall bind the owner of the ship. This bond, as far as relates to the goods, must be held to have been given by the master as agent for the owner of the goods. A ship-owner may, indeed, be liable where the vessel, being capable of repair, has been repaired, and the owner has adopted her in that state; but it is essential to notice a distinction between the case of a ship which is irreparable and one which a prudent owner would repair. When a ship is reparable the captain who repairs her may be deemed the agent of the owner of the cargo. The captain is not the agent for all the parties; but he is the agent for some parties according to their several interests, and not for all purposes.

[ALDERSON, B.—There was a case in this court (7) in which we held that the master of a vessel has authority to pledge the credit of the owner for an advance of money which was necessary for the prosecution of the voyage.]

The judgment of Sir W. Scott in the case of *The Gratitude* (8) is strongly in favour of the defendant's view, and seems to shew that in a case like the present the master is the agent of the shipper rather than of the owner. His language is this:—"The proposition contained in the act does not go the length of asserting universally, that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it *under the circumstances* of this particular case. In the course of the discussion, however, the argument has been carried to the entire extent, and it has been

(5) 3 Bro. P.C. 325; Abbott on Shipping, edit. by Serj. Shee, 136.

(6) 4 Rob. Adm. Rep. 92.

(7) *Arthur v. Barton*, 6 Mee. & Wels. 138; s. c. 9 Law J. Rep. (N.S.) Exch. 187.

(8) 3 Rob. Adm. Rep. 240.

contended that the master has no right to bind the owners of the cargo in any case—upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said that he is the mere depositary and common carrier, as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. The position, that in no case has he a right to bind the owners of the cargo is, I think, not tenable to the extent in which it has been thrown out; for though in the ordinary state of things he is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law—unless the law can be supposed to mean that valuable property on his hands is to be left without protection and care. It must unavoidably be admitted that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea as in intermediate ports into which he may be compelled to enter." In the present case the holder of the bottomry bond has a remedy against the ship, but not against the ship-owner.

*Martin* replied.

*Cur. adv. vult.*

The Court having directed a second argument, the case was again argued by *Martin*, for the plaintiff, and *Sir F. Kelly* for the defendant.

*Martin* (*Willes* with him, April 30th and May 5th), in support of the demurrer.—The language of *Sir W. Scott* in *The Gratitude* being somewhat ambiguous, has been wrested by the other side into an authority for the position that the master of the ship was the agent for the owner of the goods only. But, independently of the question of agency, the master has authority in cases of necessity to deal with the goods. Any man in the case of a fire may go into the house where the fire is raging for the purpose of preserving

the goods, but such a person is not, strictly speaking, the agent of the owner of the house. The plaintiff's goods are made surety for the debt of the ship-owner, and the latter is bound to indemnify the former on the authority of *Exall v. Partridge*.

[*POLLOCK, C.B.*—*Sarguy v. Hobson* (9) was the case of a master of a ship, who having no other means of raising money sold part of the cargo in payment of repairs.]

Secondly, the master had a right to hypothecate the cargo—*The Gratitude*, p. 257. The question is, whether the owner of the ship is bound to indemnify the owner of the goods whose property has been taken. The decision of *Sir W. Scott* as to the power of the master to hypothecate or sell the cargo, has been adopted by *Lord Tenterden*, in his work on *Shipping*, p. 371, edit. of 1847. *Lord Tenterden* says, in case of sale "if the ship reach the place of destination the merchant will be entitled to receive the clear value for which the goods might have been sold at that place." The authority for that position is *Alers v. Tobin*, at Guildhall, October 30th, 1802, before *Lord Ellenborough, C.J.*

[*PARKE, B.*—In *Richardson v. Nourse* (10) the captain had sold part of the cargo for repairs. The liability to indemnify proceeds on the principle, that the captain has employed part of the shipper's goods to enable him to perform his duty to others.]

He referred to *Powell v. Gudgeon*, *Carr v. White*, *Abbott on Shipping*, p. 118, *Webster v. Seekamp*, and *Arthur v. Barton* (11). He then contended that the declaration was good, and the plea bad, and cited *Benson v. Chapman* (12).

[*PARKE, B.* referred to *Vlierboom v. Chapman* (13)].

*Sir F. Kelly* (*Barstow* with him), contra.—This is a mere speculative action, and is not maintainable. The money in this case was borrowed by the master, not in his character of agent for the ship-owner, but for the benefit of the owner of the cargo,

(9) 2 B. & C. 7; s. c. 1 Law J. Rep. K.B. 222

(10) 3 B. & Ald. 237.

(11) 4 Ibid. 352.

(12) 6 Man. & Gr. 792; s. c. 13 Law J. Rep. (N.S.) C.P. 25.

(13) 13 Moo. & Wels. 230; s. c. 13 Law J. Rep. (N.S.) Exch. 384.

who alone is benefited. It must be admitted that where money is borrowed by the master to be laid out in repairs for the benefit of the ship-owner, and the master acts as agent of the ship-owner, the latter is liable for those contracts. But that rule does not apply to money procured by means of a bottomry bond where the sum raised exceeds the value of the ship. In such a case the master is acting as agent for some other person than the ship-owner. Where money is borrowed on a bottomry bond the ship only is pledged, and the lender must look to the ship only. The master has no authority to borrow on the credit of the owner beyond the value of the ship. In case of necessity, indeed, he is agent for all the parties concerned, acting for the benefit of each. In the case of *The Gratitude*, the argument was, that the master, although he was the agent of the ship-owner, was not the agent for the owner of the cargo.

[They then read a large portion of Sir W. Scott's judgment, commencing with the passage quoted by Sir T. Wilde.]

If the ship is of sufficient value to pay the money borrowed, the ship only is liable; but if it is not sufficient, then, first the freight and afterwards the owner of the cargo may be made responsible. In fact, this is not the case of a loan of money, but a pledging of the ship. The owner of the cargo derives benefit from the pledging of the vessel, and ought to bear his share of the burthen. Where the master of a vessel lying at a foreign port is compelled to sell the cargo, and can only sell it at a loss, he will be placed in great difficulty if the owner of the cargo is permitted to recover the money against the owner of the ship. The learned Judge would not have used the language he is represented to have used in the case of *The Gratitude* if he had thought the owner of the cargo had a remedy against the ship-owner.

*Martin* replied.

*Cur. ad. vult.*

The judgment of the Court was now delivered by—

POSLOCK, C.B.—This case, which is one of considerable importance, was argued for the second time in Easter term last, before my Brothers Parke, Rolfe, Platt, and myself,

having been previously heard when my Brother Alderson was present. The question arises on a demurrer to a plea to the first count of a declaration in assumpsit, brought by the shipper of goods, from Pernambuco to London, against the ship-owner, to recover compensation for the loss he had sustained, the master having, in consequence of damage to the ship by perils of the seas in a foreign port, properly hypothecated for the necessary repairs the ship and also the freight and cargo, including the plaintiff's goods, by one bottomry bond; and the goods having become liable, on the deficiency of the ship and freight to pay the difference, and the plaintiff having been compelled to pay it. The facts are stated at length on the record, and made the consideration for a promise by the defendant to indemnify; and the question on the declaration is, whether these facts raise an implied, or are a good consideration for an express, promise to do so. There is a plea which states that the bottomry bond was executed by the master without the defendant's express authority, and that when so executed the costs and expenses exceeded in amount what would be the value of the ship when repaired and its freight, and that the defendant when he received notice thereof abandoned the ship and freight, and did not ratify the act of the master. But there is no doubt that notwithstanding those circumstances, the bond was valid, for it is clear that a merchant advancing money on bottomry in a foreign port, though bound to shew a reasonable case of unprovided necessity for the advance from the want of repair or otherwise, is not bound to inquire into the expediency of incurring the expense of those repairs, with reference to the interest of the owner—*The Vidua* (14); and on the argument, Sir F. Kelly admitted the validity of the bond. The question then is, whether, under the circumstances stated in the declaration, the defendant is responsible to the plaintiff for the sum he had been obliged to pay; and we are all clearly of opinion that he is. It is the primary duty of the master acting for the owner to do his best to convey the cargo to its place of destination in the same ship, and in case

of damage to repair it. "He ought to look out for the means of accomplishing his own and his employer's contract, that is, the safe conveyance of the property intrusted to his care, and with some vehicle which he had contracted to furnish"—*The Gratitude*. The owner of the goods is under no obligation to contribute to any expenses except such as constitute a general average, and the repairs in this particular case do not fall under that description. To accomplish the object of repairing the vessel, the master is authorized to bind his owner, by causing the repairs to be done on his credit, in which case the tradesmen may sue the owner, or by borrowing money on his credit where that is necessary, in which case the lender has his remedy against the owner, or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale—*Richardson v. Nourse*; and in this case the shipper may sue the ship-owner, or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to recover compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the ship-owner on his account, and for his use, to enable him to do his duty by repairing the vessel, and in all the ship-owner must pay the lender. The agency to borrow by these various modes, and so to bind his employer to the lender, is cast upon the master by the necessity of the case. That the ship-owner was bound in all these cases to repay the money borrowed was not disputed by Sir F. Kelly, but he argued that the bottomry of the ship by the master made all the difference, and had the effect of limiting the responsibility of the owner to the value of the ship and freight, and that to be enforced by a remedy against the ship only. He could not contend that if there was a sale or hypothecation *before* or *after* the bottomry, the owner would not be liable for the amount borrowed by means thereof, and he was therefore obliged to limit the freedom from further responsibility to the single case where the hypothecation of the ship and cargo was effected by one instrument. For this position there is no principle, nor when properly considered any authority. The bottomry bond gives no

remedy to the lender against the owner of the ship, nor against the owner of the cargo personally: the remedy is *in rem*, in both cases. But as between the freighter and ship-owner the cargo of the former is pledged to secure the debt of the latter; and where the former has been compelled to pay the debt through the medium of the pledge, he must be reimbursed. What difference can it make on principle, whether this liability of the ship by bottomry is by a separate instrument or by the same as that which attaches liability to the cargo? The supposed authority for this proposition, and which was mainly relied on by Sir F. Kelly, was some part of the judgment of Lord Stowell in the case of the *Gratitude*. The language then made use of by that eminent Judge, if taken literally, appears to sanction the notion that the master is acting merely as the agent of the shipper in hypothecating the cargo; that the hypothecation is for his benefit, and that he must bear the loss. But the judgment must be understood *secundum subjectam materiam*. The question in that case was, whether the act of the master in hypothecating the cargo was done by the implied authority of the shipper *so as to give the pledgee a good title*. This was the question in the cause; not whether that act of the master would give a remedy to the shipper against the owner of the vessel,—a question entirely beside the case; the opinion there expressed, that the master had an authority arising from the necessity of the case to bind the shipper, meaning only that he was bound as to pledgee or purchaser of the goods, whose title could not be impugned; and the pledgee was the plaintiff in that suit.

The authority which necessity gives the master to borrow for his benefit would not be effectual; no borrowing could take place through the medium of sale or hypothecation of part, or the hypothecation of all the cargo, unless a good title could thereby be given to the purchaser or pledgee. There is an agency, therefore, created by the same necessity, and given by the shipper to the master, to bind him by the sale or pledge. But the agency for the freighter is confined to cases of necessity affecting his interest, and when the sale or pledge is directly or indirectly for his benefit. It is directly

beneficial when goods are damaged by the perils of the sea and sold; it is directly so where there is damage to the ship, and repairs of the ship become necessary for the benefit of the whole adventure. In all other cases where by no possibility the shipper could derive benefit, there is no implied authority from him to the master, and the act of sale or pledge would be simply wrongful. This authority from the shipper to the master to give a good title by a sale or pledge is explained and limited by Lord Stowell, in his celebrated judgment in the case of the *Gratitude* above referred

to; and the observations on which so much stress was laid by Sir F. Kelly are to be understood as made with reference to this authority; and so understood, they do not affect the present question, which is not one between shipper and creditor. Another part of Lord Stowell's observations, as to contribution, or the sale of part, are applicable to cases of general average only, and must have been made with reference to such a case. We are all clearly of opinion that the plaintiff in this case is entitled to our judgment.

*Judgment for the plaintiff.*

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END OF EASTER TERM, 1848.

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# CASES ARGUED AND DETERMINED

IN THE

## Court of Exchequer of Pleas.

TRINITY TERM, 11 VICTORIÆ.

1848. }  
June 5. } SERRELL v. ALLEN.

*Contract, Construction of—Pleading—  
Attorney—Retainer.*

*The declaration stated that the plaintiff was the attorney of a certain railway company; that it was intended to apply for an act for the incorporation of the same, and that in consideration that the managing committee of the said railway would, by the permission and at the instance of the plaintiff, retain the defendant as attorney about performing certain business for the company, in preparing books of reference, serving notices on the landowners, and doing the conveyancing business consequent upon the act of parliament being obtained, if such act should be so obtained, he, the defendant, promised to allow the plaintiff one-third part of the profits of the said business. Averment, that the said managing committee did, with the permission and at the instance of the plaintiff, retain the defendant as attorney in and about the performing certain work and business for the said company, in preparing books of reference, serving notices on landowners, and were ready and willing to retain the defendant in and about the conveyancing business consequent upon the said intended act of parliament being obtained, if the said act had been obtained. Breach, non-payment of the third part of the profits:—Held, that the declaration was bad, the meaning of the contract being, that the work to be done, and not the retainer, was to be contingent upon the passing of the act of parliament.*

*Assumpsit.* The declaration stated that the plaintiff was the attorney and solicitor of, and employed by certain persons (naming them), being the committee of management of a certain railway company, of which the plaintiff had been registered as the solicitor; that it was intended to apply for and procure an act for incorporating the said company, and that the plaintiff would have obtained great gains and profits about the business of the said company; that in consideration that the said committee of management would, by and with the consent of the plaintiff and at his instance, retain the defendant as attorney and solicitor in and about the performing of certain work as such attorney and solicitor for the said company, so far as the same might concern a certain portion of the said intended railway in and about the preparing books of reference, serving notices on the landowners, and doing the conveyancing business consequent upon the said intended act of parliament being obtained, as aforesaid, if such act should be so obtained the defendant promised the plaintiff that he, the defendant, would allow him one-third part of the profits arising to the defendant from the performing by the defendant of such work and business as aforesaid, and would pay him such third part of the said profits within a reasonable time after the securing thereof to the defendant. Averment, that the said committee of management did with the consent of the plaintiff, and at his instance, "retain the defendant in and about the performing of certain" work and business as the attorney and solicitor of the said company, so far as the same apper-

tained to a certain portion of the said railway, to wit, in and about the preparing books of reference, serving notices on land-owners, and doing other acts and business for the said company as such attorney and solicitor, and were ready and willing to retain the defendant to do, and in and about the doing of the conveyancing business consequent upon the said intended act of parliament being obtained, if the said act had been obtained, so far as such conveyancing business appertained to the said district, but the said act had not, in fact, up to and at the time of the commencement of this suit been obtained. [The declaration then alleged that the defendant did perform work for the company; that a large sum of money had been paid to him by the company, and that he had not paid over one-third part of the profits to the plaintiff.]

Demurrer, assigning, amongst other grounds, that the time when the said managing committee were to retain the defendant as attorney and solicitor was not alleged, and could not be ascertained with due certainty, whether it was to be made forthwith after, or within a reasonable time after, or at any time after such making of the promise.

*M. Smith*, in support of the demurrer.—The declaration is bad for uncertainty. The averment of performance ought to be an averment of an absolute retainer to do the work contingently upon the act passing, whereas the averment is of a contingent retainer merely; or rather it is an excuse by the plaintiff for not giving a retainer as to part, on the ground of the act not having passed. The contingency of the act passing affects not the retainer, which is to be given at all events, but the work to be done by the defendant.

*Zush*, for the defendant, being called on by the Court (1) to determine whether he would amend, elected to do so.

*Judgment accordingly.*

1848. }  
June 14, 15. } SYMONDS v. DIMSDALE.

County Courts—Writ of *Certiorari*—  
9 & 10 Vict. c. 95. s. 90.

*A writ of certiorari to remove a plaint from the county court may issue, under the 9 & 10*

(1) Pollock, C.B., Alderson, B., Rolfe, B. and Platt, B.

*Vict. c. 95. s. 90, upon an ex parte application, if the Judge, in the exercise of his discretion, thinks it proper to grant leave without notice to the other party.*

In this case a rule had been obtained to set aside a *certiorari* issued, pursuant to leave granted by Platt, B., to remove a cause from the County Court of Oxford.

The affidavits on both sides shewed that a plaint was levied in the County Court of Oxford by the plaintiff, a horse-dealer, at Oxford, to recover 13*l.* for the hire of horses and gigs, supplied to the defendant whilst resident in the university as an undergraduate. The defendant gave notice, under the 76th section of the Small Debts Act, 9 & 10 Vict. c. 95, that he intended to set up, by way of defence, his infancy. On the evening of the 23rd of May the plaintiff served the defendant with notice, pursuant to the 70th section, that he meant to try the cause by a jury on the 26th. The 24th being Her Majesty's birthday, no Judge was at chambers on that day; but on the morning of the 25th the defendant, on the ground that a question as to what are necessities for an infant could not be fairly tried by an Oxford jury, obtained leave from Platt, B., under the 90th section, to issue a writ of *certiorari*. No notice of the application was given to the plaintiff, and the proceedings at chambers were entirely *ex parte*. The writ of *certiorari* was served on the morning of the 26th, before the trial came on. The rule was obtained on the ground that a Judge has no authority to give leave to issue a writ under the 90th section unless the other party has notice of the proceeding, so that he may be heard if he pleases.

*Whateley* and *Barstow* shewed cause (June 14).

[*Per Curiam*.—We are satisfied that, under the circumstances, there was sufficient ground for issuing the writ, and that there was a sufficient reason for dispensing with notice to the other party if the Judge had power to dispense with it under any circumstances.]

The sole question, then, is whether the Judge could legally allow the writ to issue on an *ex parte* application. That depends on the construction of the 9 & 10 Vict. c. 95. s. 90, which enacts "that no plaint entered in any court holden under this act shall be removed or removable from the said court into any of Her Majesty's superior courts of record



by any writ or process, unless the debt or damage claimed shall exceed 5*l.*, and then only by leave of a Judge of one of the said superior courts, in cases which shall appear to the Judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms, as he shall think fit." If a construction is put upon this enactment rendering it necessary to give the other party notice in all cases, the act would often be inoperative. In the present case it was barely possible to serve the *certiorari* in time; and if the plaintiff had been levied in a county court in a remote part of the country it would have been impossible; and it would manifestly have been practically impossible in the present case to find the plaintiff (who might, perhaps, keep out of the way) in time to give notice of the application to the Judge, and then to obtain the writ in the space of two days, one of which was a holiday. An *ex parte* application may be *prima facie* suspicious, and the Judge, in the exercise of his discretion, may require it to be explained why the other side had no notice; but there is nothing in the act imperatively requiring notice to the other side, and convenience and analogy shew that it is not requisite in all cases. The writ of *certiorari* at common law is a writ of right—*Landons v. Shiel* (1), and, like all writs of right, issues *ex parte*: so is the *habeas corpus cum causa* to remove a cause from the Palace Court: even a writ of *capias*, which affects the liberty of the subject, issues *ex parte*. The words and meaning of the act enlarge the Judge's power by giving him authority to fetter the issuing of the writ by such terms as he pleases, and do not clog the discretion of the Judge by insisting upon notice.

*Keating*, in support of the rule.—The enactment requires the Judge to exercise a discretion on the terms on which the writ is to issue. These terms may affect the plaintiff's interest; for instance, in the present case the plaintiff has, in consequence of this writ, thrown away the costs of the proceedings in the court below, and there may be cases in which he would be more seriously affected. It is contrary to all principle that a Judge should decide *ex parte* conclusively on any matter without hearing both sides.

(1) 3 Dowl. P.C. 80.

[*ALDERSON, B.*—The question is, whether the enactment gives the Judge a discretion which he will do well to exercise in general by hearing both sides, but which he may under special circumstances exercise without that which is in general desirable, or whether notice is indispensable. The wording of the section seems to give a general power to remove a plaintiff above 5*l.*, and then adds a restriction, that it must be by leave of a Judge.]

And of a Judge exercising a discretion, which he cannot duly exercise without hearing both parties.

*Cur. adv. vult.*

*POLLOCK, C.B.* now (June 15) delivered the judgment of the Court.—We think this rule should be discharged. The question depends upon the true construction of the 90th section of the Small Debts Act. [His Lordship read the section.] The question is, whether the latter words, "as he shall think fit," necessarily import that the Judge should have both parties before him in order that he may be in a situation to exercise his discretion. We are all of opinion that this is not so, and that the writ may issue *ex parte* if the Judge is satisfied that it ought to do so.

In general, the writ of *certiorari* is the right of the subject at common law, and though it is taken away in many cases by different acts of parliament we think the analogy of common law ought to be followed; and as at common law the application for a writ of *certiorari* is always *ex parte*, we think that the authority of the Judge, or rather the right of the subject, should not be taken away without express words.

The enactment here is not framed to fetter the power of the Judge, but to give him additional power. He may inquire into all the circumstances and clog the issuing of the writ by such terms as he thinks fit. This he may do without having the other party before him. There are neither express words nor necessary reasons to limit the power of the Judge. The rule must therefore be discharged, and as it is an appeal from the decision of a Judge, not in consequence of any intimation of his, it must be discharged with costs.

*Rule discharged, with costs.*

1848. { PLATELL v. BEVILL.  
May 2, 5, 31. { JACOBS v. HYDE.

*Insolvent—Order for Protection—7 & 8 Vict. c. 96—5 & 6 Vict. c. 116. s. 10—Pleading—Plea in bar.*

*A final order obtained by an insolvent under the 7 & 8 Vict. c. 96. constitutes an absolute bar to an action for the debt as to which it is a protection.*

*To an action of debt the defendant pleaded that after the accruing of the debt, and after the passing of the 5 & 6 Vict. c. 116, and before the passing of the 7 & 8 Vict. c. 96, and before the commencement of the suit, &c., a petition for protection from process was duly presented by the defendant to the Court of Bankruptcy, and afterwards filed therein; and that thereupon and after the passing of the secondly-mentioned act, a final order for protection and distribution was made in the matter of the petition by a Commissioner of the Court of Bankruptcy; and that the debt accrued before the filing of the petition:—Held, that the plea was good both in form and substance.*

**Debt.** The declaration contained only the money counts.

**Plea**—That after the accruing of the said debts and causes of action in the said declaration mentioned, and after the passing of an act of parliament passed in a session of parliament held in the 5th and 6th years of the reign of Her present Majesty Queen Victoria, intituled 'An Act for the relief of insolvent debtors,' and before the passing of a certain other act of parliament passed in a session of parliament held in the 7th and 8th years of the reign of her said Majesty, intituled 'An Act to amend the law of insolvency, bankruptcy and execution,' and before the commencement of this suit, to wit, on the 22nd day of July, A.D. 1844, a petition for the protection of the defendant from process was duly, and according to the form of the statute in such case made and provided, presented by the defendant to Her Majesty's Court of Bankruptcy, and afterwards, to wit, on the day and year aforesaid, filed in the said court, and thereupon afterwards, and before the commencement of this suit, and after the passing of the said secondly-mentioned act, to wit, on the 26th

day of September 1844, a final order for protection and distribution was made in the matter of the said petition by Joshua Evans, Esq., a Commissioner of the said Court of Bankruptcy, duly authorized in that behalf. That the said several debts and causes of action in the declaration mentioned, and each and every of them and every part thereof, accrued before the date of the said filing of the said petition in the said Court of Bankruptcy. Verification.

Special demurrer upon the ground that the plea was not in the form authorized by the statute; that the proceeding of the Court in the matter of the said petition and the final order of the Commissioner were not averred in the plea to have been entered of record; that the plea did not shew that the first order was signed by the Commissioner; that the plea should have shewn who was protected by the order, and what was thereby ordered to be distributed; that the plea ought to have shewn the form of the order; that after the passing of the statute of the 7 & 8 Vict. c. 96, the Commissioner had no power to make an order which would be a bar to the action.

**Butt**, for the plaintiff (May 5).—First, this plea is bad in substance. It has been decided in *Toomer v. Gingell* (1) that an order for protection, made under the 7 & 8 Vict. c. 96, protects the person of the insolvent only from process. Maule, J. in that case observes, that that statute does not make the order for protection a plea in bar. Secondly, if the Court should think that the 10th section of the 5 & 6 Vict. c. 116. is still in force, and that the plea in effect states an order made under that section, the plea is bad in form upon the grounds specially stated in the demurrer—*Lewis v. Harris* (2), *Gillon v. Deare* (3), *Cook v. Henson* (4), *Tyler v. Shinton* (5).

**Ring**, who appeared for the defendant, was not called upon.

[**PARKE, B.**—We all think that under the authority of *Cook v. Henson* this plea

(1) 4 Dowl. & L. P.C. 182; s. c. 15 Law J. Rep. (N.S.) C.P. 255.

(2) *Ante*, Q.B. 129.

(3) 3 Dowl. & L. P.C. 142; s. c. 15 Law J. Rep. (N.S.) C.P. 25.

(4) 1 Com. B. 908; s. c. 14 Law J. Rep. (N.S.) C.P. 295.

(5) 15 Law J. Rep. (N.S.) Q.B. 204.

is in form sufficient. The other point we will consider.]

*Cur. adv. vult.*

In the case of *Jacobs v. Hyde*, which was also an action of debt, and in which the plea was similar in substance to the above, the plaintiff had replied "that a final order for protection and distribution was not made *modo et formâ*; whereon issue was joined."

At the trial, before Pollock, C.B., at the London Sittings after Hilary term, 1847, the defendant put in evidence in support of his plea, an order for protection made under the 7 & 8 Vict. c. 96. The learned Judge was of opinion that this was an order protecting the person of the defendant only, and that the plea was therefore not proved.

A rule for a new trial on the ground of misdirection having been obtained,—

*Humfrey and Hunter* shewed cause (May 2), relying on the case of *Toomer v. Gingell*.

*Hake*, contra.—The plea is drawn in the words of the 10th section of the 5 & 6 Vict. c. 116. and discloses a final order; stating it not in terms, but according to the legal effect imparted to it by the statute. The order is in terms a protection to the person only; and does not purport either to vest the insolvent's estate in assignees or to distribute it, but both these effects issue upon the passing of it (sect. 7), and the distribution of the future estate is to take place under the direction of the Court (sect. 12). If the final order shall be refused, the 10th section of the 7 & 8 Vict. c. 96. divests the estate out of the official assignee, and reverts it in the petitioner. The order is, therefore, a cause of effecting a distribution as much as if it had purported on the face of it to be an order for distribution. The plea in *Toomer v. Gingell* was bad for not stating that the defendant's property was liable to distribution, but that case is no authority for the plaintiff in this case. The observations, indeed, of Maule, J. in that case are in favour of the plaintiff's view, but those observations were extrajudicial and cannot be supported. It clearly was not the intention of the legislature to repeal the 10th section of the 5 & 6 Vict. c. 116, for by sect. 30. of the subsequent act, the legislature expressly reserves to the insolvent "every benefit and protection" in respect to his debts which were afforded

"in the recited act and in this act," and by sect. 74. it is enacted that nothing in the 7 & 8 Vict. c. 96. "shall be construed to repeal, affect, or in any manner alter the provisions of the 5 & 6 Vict. c. 116. except so far as is expressly provided, or except so far as the provisions of the 5 & 6 Vict. c. 116. may be inconsistent with or at variance with the provisions of the 7 & 8 Vict. c. 96." These acts, therefore, should be construed as one act; and the result is, that an order for protection made under the 7 & 8 Vict. c. 96. has the effect of an order made under the 60th section of the 5 & 6 Vict. c. 116, and distributes the estate of the insolvent as well as protects his person.

*Cur. adv. vult.*

The judgment of the Court (6) in *Platell v. Beville*, was now (May 31) delivered by—

ROLFE, B.—[After stating the pleadings, his Lordship proceeded]:—In the course of the argument the Court intimated its opinion that the plea was sufficient in form, and stated all that by the statute of the 5 & 6 Vict. c. 116. s. 10. was required to constitute a good defence. The only remaining question was, whether the final order, obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to an action for the debts as to which it is a protection, or operates only as a protection to the person of the insolvent; in which latter case it ought not to be pleaded as an absolute bar, but specially in bar of execution against the person only. We are of opinion that it is an absolute bar, and consequently our judgment must be for the defendant. We have to construe the provisions of two acts of parliament, which are by no means clearly expressed, especially the latter, the wording of which, particularly of the form given in the schedule for the order of protection, is likely to mislead the reader; but on a careful consideration of the clauses of both acts, we think the intention of the legislature is sufficiently plain, and that there is no difference in the legal effect of the final order given under the second, from that given under the first act, as to the discharge of the insolvent. In both, we are of opinion that it constitutes an absolute bar to the actions

(6) Pollock, C.B., Alderson, B., Rolfe, B., and Platt, B.

in respect of which it is a protection, as it is admitted it did under the first act. The last act terms the final order as one made "*under the provisions of the said act, as amended by this act*" (sect. 22). The section then proceeds to define from what debts the person is to be protected (adopting the language of the old Insolvent Act, 7 Geo. 4. c. 5. s. 46), and directs the form in the schedule to be followed: but the power of making the final order arises from the former act, and its effect is the same as under the former act, except so far as it is varied by the latter. Section 74. of the latter act directs that nothing therein contained shall be construed to repeal, affect, or in any manner alter the provisions of the 5 & 6 Vict. "except so far as herein expressly provided, and except so far as the provisions of the said recited act may be inconsistent with, or at variance with the provisions of this act." Now the last act does make certain express alterations; it provides a more easy way of petitioning for the protection from process in the first instance (which petition is still to be *under the former act*), for it dispenses with notice in the *Gazette*, &c. It also provides for the appointment of the creditors' assignee, and the vesting of the estate in him by the appointment prior to, or at least independently of the final order, whereas, under the former act, the creditors' assignee had not the estate vested in him until the final order, which, by sect. 4, was to be for the protection of the person of the insolvent, and *vesting the estate in the creditors' assignee*, and also in the official assignee, to be named by the Commissioner. An alteration is made in the effect of the assignment to the official or creditors' assignee, by section 11, by vesting powers in them, and by section 19, by vesting in them goods in the apparent ownership of the insolvent; but with respect to property acquired after the final order, no alteration seems to have been made. By the first act, on the passing of the final order, all the estate, *present and future*, of the insolvent vests in the assignee, as under a fiat; but then by sect. 9, the assignees must file a claim, in order to take after-acquired effects, and cannot take possession but by an order from the Commissioner, or the Court of Review, so that both sections being read together, it seems that the assignees take all present property ab-

solutely, and have a right to obtain all that is subsequently acquired by the insolvent. This is the only way of reconciling these contradictory clauses. The 4th section, explained by the 73rd section, leaves no doubt on this question, under the second act; for the appointment vests the property of the insolvent; that is, all present and future estate which shall come to him *before he shall have obtained the final order*, leaving all subsequently-acquired property to be dealt with under the former act; for the 9th section of that act is certainly not repealed. In our view, the rights of the assignees to after-acquired property are the same under both acts. The alterations above noticed, and others, are made by the 7 & 8 Vict.; but that statute makes no alterations in the effect of the order *as a defence*, at least no express alterations; and it leaves the 10th section, which gives the defence, unrepealed. Nor is there any enactment in the new statute which is inconsistent with the provision that the final order should constitute a sufficient plea in bar; and, therefore, by the 7th section, that provision must be in full force. If the former act had vested all subsequently-acquired property in the assignees, and the latter act had altered this, there would have been ground for the implication that the legislature meant to do away with the absolute defence given by the 10th section, and to leave the creditors to take the remedies against subsequently-acquired property by *fieri facias*. But we think the rights of the assignees to after-acquired property are not affected, and, consequently, that such implication does not arise; and there is, therefore, no inconsistency or variance between the first and second act, in this respect, to authorize us to reject the 10th section as being impliedly repealed by the new act. The form given by the schedule, it is true, protects expressly the person only; and the giving such a form is, no doubt, an incautious mode of legislating, and is calculated to mislead; but then the final order, directed by the first act, is no more than an order of protection of the person. Section 4th says the order shall be called a final order, and shall be for the protection of the *person from process*, and for vesting of the estate, which latter operation is now otherwise provided for; but its effect as a measure of protection is only in

terms for the protection of the person ; not a word is directed to be introduced that imports any protection but that of the person in the order itself. The privilege of pleading it in bar arises entirely from the 10th section, which describes the legal effect of such an order as "an order for protection and *distribution*,"—a very inaccurate expression, no doubt, for there is nothing in the order, as required by the first act in general terms, and particularly directed in the schedule to the second act, which takes notice of a distribution, or requires it. The final order, under the second act, is not an order for distribution, but neither was the final order required by the first act ; and if the 10th section allows the order to be pleaded in inapposite terms, the same direction must be followed as to that required by the second, and it may also be pleaded in the same inapposite terms. Considering the two acts together as one system, we see no reason to suppose that the legislature, which clearly meant to give facilities to the debtor to obtain his discharge, intended also to limit the operation of that discharge under the new act, all his property, present and future, being disposed of for the benefit of creditors in the same way in both acts. We think that the legal effect of the discharge is the same in both acts, and that the effect artificially described in the 10th section belongs just as much to an order under the second as under the first act. This view of the two acts differs from that which my Brother Maule is reported to have taken in the case of *Toomer v. Gingell*. The question in that case was not fully argued ; the learned counsel for the defendant having, after taking time, acted upon the impression as to the meaning of the second act, which its language is, at first sight, so likely to create, and abandoned the argument. Upon the best consideration we can give to these acts, we think that the impression was a wrong one, and that the effect of the final order is the same under both acts.

*Judgment for the defendant.*

His Lordship then said :—The case of *Jacobs v. Hyde* is decided by this, and in that case the rule must be absolute.

*Rule absolute.*

1848.  
June 28.

RIDLEY v. THE PLYMOUTH, DEVON AND STONEHOUSE BAKING AND GRINDING COMPANY.  
 THE KINGSBRIDGE MILL COMPANY v. THE SAME.

*Contract—Joint Stock Company—Evidence.*

*In an action ex contractu against a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, the plaintiff must prove that the contract was made by persons having authority from all the shareholders to bind them by such a contract ; and this may be done by proving that the contract was sanctioned by the persons authorized by the deed of the company to conduct the affairs of the company. The plaintiff is not confined to proof of authority conferred by the deed, if he can in any other way shew that the whole of the shareholders have mediate or directly given authority to those making the contract to bind them ; but it is not enough to shew that the contract was made or sanctioned by some of the directors, without proving that by the deed or otherwise the shareholders had authorized that number to act for them.*

*Therefore, where the deed of a company appointed eleven directors and declared that five should be a quorum, the company were held not to be bound by contracts made at a board meeting by three only of the directors.*

*If a contract be made or sanctioned by a competent number of the governing body, in such a manner that it would bind the company if only a partnership at common law, it binds it, though completely registered under 7 & 8 Vict. c. 110 ; for the 44th section, which enacts that contracts in the absence of certain requisites shall be void and ineffectual, also prohibits the company from taking the objection of the absence of these requisites.*

*The company cannot therefore object that a contract is not in writing, signed by two directors, and under the seal of the company, or signed by an officer of the company, but it may object that the persons making the contract had no authority at all to bind the whole shareholders.*

*Semble—That acts and admissions by a competent number of the governing body of the company are admissible as evidence*

against the company, and have the same legal effect as if made by the company itself, and, consequently, that a verbal statement made by the chairman, at a board meeting of the directors, to the plaintiff, that a distress made on his goods had been rightfully made by the landlord of the company, and that the company were bound by a contract made with the plaintiff in their name, to indemnify him against it, would have operated as a ratification of the contract with the plaintiff, and have been original evidence of the rightfulness of the distress (without producing or accounting for the absence of the lease to the company, under which the rent distrained for became due though shewn to be in writing), if there had been a competent number of the directors present at the board meeting, when the statement was made.

These were actions of assumpsit. In that of *Ridley v. the Plymouth, Devon and Stonehouse Baking and Grinding Company*, the declaration contained a count for money paid; and the defendants had pleaded *non assumpsit* (1).

In that of *The Kingsbridge Mill Company v. the same defendants*, the declaration was for goods sold and delivered, to which the defendants pleaded *non assumpsit*.

At the trial, before Wightman, J., at the Exeter Spring Assizes, 1848, it appeared that the first of these actions was brought to recover a sum of money paid to redeem the plaintiff's goods, which had been taken under a distress by the landlord of premises demised by him to the company, and by them sublet to the plaintiff. It was proved by the returns that the defendants were a completely-registered company, and that there were eleven directors, whose names appeared on the return. The plaintiff then proved that he entered on the premises under a written agreement, purporting to be made and signed by one Lord as secretary for the company, and that his goods were afterwards seized as a distress for rent by the head landlord. The plaintiff then called Lord, who proved that, at the time he signed the agreement, he was acting as secretary for the company, but was not formally ap-

pointed till afterwards. He also proved that, after the distress was made, the plaintiff came to a board meeting of the directors, and had a conversation with the chairman. It was objected that he could not be asked what passed, as the admissions of the chairman were not evidence against the company. The learned Judge permitted the question to be asked. The witness then proved a conversation amounting in effect to a complete recognition of the contract with the plaintiff, and an admission of his whole case. On cross-examination it appeared that the lease to the company was in writing; and that there were only three directors present at this meeting; and that in fact never more than three directors had acted together. The counsel for the defendants objected that the company, being a corporation, could not be bound by a contract not under seal; or at all events that the plaintiff was bound to prove affirmatively that the persons making this contract had power to bind the shareholders, and therefore ought to put in the deed of the company; and that the admissions of the directors were no evidence of the terms of the tenancy of the company, which required to be proved by the writing, to shew that the distress was lawful. [There were other objections, which it is not necessary to notice as the judgment of the Court *in banc* did not turn on them.] Finally, the defendants put in the deed of the company as their own evidence, the plaintiff's counsel objecting that it was not evidence against him. By the deed it appeared that five directors were required to form a quorum.

The same facts are applicable to the second action, which was brought to recover the price of a quantity of flour sold and delivered to the defendants.

In both cases the learned Judge directed a verdict for the plaintiff, with leave for the defendants to move to enter a nonsuit or a verdict for them.

Rules having been obtained accordingly, cause was shewn in the first case by—

*Crowder and Greenwood*.—A company registered under the 7 & 8 Vict. c. 110. is only a corporation *quodammodo*, and for particular purposes. The language of the 25th section is very peculiar: "The shareholders shall be and are hereby incorporated as from the date of such certificate, by the

(1) The pleadings in this action were special, but it is unnecessary to notice them, as all the points on which the Court expressed an opinion arose on the general issue to the count for money paid.

name of the company, as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company." And the preamble shews that this was advisedly done, for the purpose of investing these companies with the incidents of corporations, with modifications. The manner in which these companies shall contract, is pointed out in the 44th section, by which it is enacted that "every contract (with some exceptions that do not touch this case) shall be in writing, and signed by two at least of the directors of the company, on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or any of them, such contract shall be void and ineffectual, *except as against the company on whose behalf the same shall have been made.*" This contract, it may be, would be void, if the company sought to enforce it, because of the absence of the requisites; yet it is good as against the company. The exception seems to have been put into the act in order to deprive the company of the power of setting aside a contract for the want of requisites which it lies in the power of the company to affix or not.

[PARKE, B.—But how do you get over the fact that Lord was not secretary at the time he signed the agreement? And what do you say to the objection that the company could not be shewn to be liable to indemnify the plaintiff, except by putting in evidence the written agreement between the company and their landlord to shew that the landlord's distress was rightful?]

Both objections are answered by the evidence of Lord as to what took place at the board meeting when the chairman spoke for the board to the plaintiff, and admitted the validity of the contract, and that the distress was lawful, and the company bound to indemnify the plaintiff. That was a ratification of the contract made by Lord with the

plaintiff, and an admission by the company of the effect of the agreement between them and their landlord, and was original evidence of it.—*Slatterie v. Pooley* (2). The objection made at the trial was, that the company could not make admissions except under seal, and that this conversation was not evidence at all against them.

[PARKE, B.—There certainly was ample evidence of a confirmation at that time, if the persons present had power to bind the company. It must be conceded that it is not every shareholder of the company that has power to bind them, and how do you shew this board had such power? The other point comes round to the same thing; viz. had the board, who made the admissions, power to bind the company?]

The whole management of a joint-stock company is committed to the directors. The act, by section 25, "empowers and requires the company to appoint, for the conduct and superintendence of the execution of the affairs of the company, not less than three directors." Each, therefore, of the directors has ostensibly the full authority of a managing partner to conduct and superintend the affairs of the company, or, at all events, three have such power. The plaintiff is not cognizant of the deed, which may limit a director's powers as between himself and his partners, but cannot affect the rights of third persons dealing *bond fide*.

*Butt and Collyer*, in support of the rule.—This contract, at least, was beyond the power of any number of the directors, for the company was never formed as a company to lease lands and indemnify tenants; but it is not necessary to argue that point. The authority given to the directors is given by the deed, and the deed should have been put in evidence by the plaintiff, to shew what that authority was. There should, therefore, have been a nonsuit on the weakness of the plaintiff's case. The deed was put in evidence by the defendants, and shewed that five was a quorum, and that the three who made or sanctioned this contract had no authority. There should, therefore, be a verdict for the defendants.

PARKE, B.—I think the rule must be made absolute. I am now satisfied that a

(2) 6 Mee. & Wels. 664; a. c. 10 Law J. Rep. (N.S.) Exch. 8.

contract may bind a company of this sort, though it is not under seal; and that the exception in the 44th section, though it is curiously worded, has the effect of making the want of the formalities an objection that does not lie in the mouth of the company. The company cannot object that those who have made a contract on its behalf, have not made it in the formal manner pointed out in the 44th section, for the words of the section prevent it from doing so; but it may still object that they had no authority to make contracts on behalf of the company at all. In an ordinary partnership, each individual partner has, by the common law and usage of trade, power to bind all his co-partners. But the same rule does not apply to joint-stock companies; and the question is, who have authority to bind them? That must depend upon the terms of the deed of partnership, or upon usage. The 7 & 8 Vict. c. 110. s. 7. provides that a copy of the deed shall be deposited for the purpose of registering the same. Every person, therefore, who deals with a registered joint-stock company, has it in his power to ascertain at the registry what are the contents of the deed, and what are the powers of the directors, and who have authority from the shareholders, under the deed, to bind them; but a person who seeks to make the company liable is not confined to proving his case by the deed. He must shew that the contract was made by persons having the authority of the shareholders to bind them, which he may do, either by proving the deed, and shewing that the authority given in it has been pursued, or by shewing that the whole of the shareholders have, by usage or otherwise, sanctioned these persons in entering into contracts not sanctioned in the deed. The plaintiff here failed in proving this. With respect to the subscription of the agreement being by a person, who, at the time, was not secretary, I think the agreement would have been binding on the company, if it had been proved that a competent number of the directors had afterwards sanctioned and confirmed it, but the proof failed in that.

PLATT, B.—I am of the same opinion. Had there been a contract under seal, it would have bound the company; but that not being proved, it was necessary to shew

that a contract was entered into by a number of the governing body competent to bind the company. That was not proved.

*Rule absolute to enter a nonsuit.*

In the second case—

Crowder appeared to shew cause, and submitted that the defendants must be held liable for goods actually consumed by them in the course of their trade, on their premises.

[PLATT, B.—That is a fallacy. The company consist of many persons who may never be near the premises, and who do not consume goods, or contract for them, or know anything about them except through their agents. A man may very well trust five directors with power to trade for him, and yet decline to trust a smaller number. Have you, in this case, any proof that the body of the company, or a competent number of the directors, ordered or sanctioned the ordering of this flour?]

PARKE, B.—The company consists of many members, perhaps 400 or 500, each of whom is liable on a judgment against the company. The plaintiff is to shew that all of these members are bound to pay for this flour. The persons who ordered the flour are personally liable for it, unless it be shewn that the company directly or indirectly sanctioned the act. If you can shew a recognition of the contracts by a quorum of directors, or an account stated with them, or an authority given by five directors to the person who actually ordered the flour, it may do; but if it be like the last case, you cannot get at the shareholders except through the deed; and the deed gives authority to five directors, not to three.

*Rule absolute for a nonsuit.*

1848. }  
June 13. } JONES v. SMITH.

*Venue, Change of—Material Evidence.*

*Proof of anything directly affecting the amount of damages is material evidence within the meaning of the ordinary undertaking on bringing back the venue.*



This was an action on the case, for negligence by the defendants, in Merioneth, whereby the plaintiff's arm was broken; and the declaration alleged, as special damage, that thereby the plaintiff was not able to pursue his profession of attorney at Dolgelly in Merioneth.

Plea—Not guilty.

The venue had been originally, Middlesex; it had been removed to Merioneth, and brought back to Middlesex, on the usual undertaking to give material evidence in Middlesex.

At the trial, before Parke, B., the only evidence in Middlesex given was the roll on which the plaintiff was admitted as an attorney. A verdict was found for the plaintiff, with leave for the defendant to move to enter a nonsuit, on the ground that this was no compliance with the undertaking.

Martin now moved accordingly.—The allegation on the record of special damage makes no difference, for there was no proof of any damage arising from his being an attorney: it was left to inference, and might have been inferred as well without any allegation on the record.

[POLLOCK, C.B.—Still the damages are part of the issue; and this was evidence of the damages, material in one sense, though perhaps not within the meaning of the undertaking, unless that includes all relevant evidence.]

[PARKE, B.—I should like to consider whether, in order to recover damages, in respect of his loss of practice as an attorney, it was necessary to prove the roll.]

Not at all; it is quite immaterial whether he was an admitted attorney or not. If he did practise in fact, the defendant, a wrong doer, could not set up that he was not on the roll. It is, therefore, not material evidence. The case which is most against the defendant is *Greenway v. Titchmarsh* (1), but there the evidence was of a payment which formed a part of the damage: here it is beside the question.

[ALDERSON, B.—If the attorney was not admitted, he could not compel his clients to pay him; and the practice, therefore, which he lost would be of less value.]

[PARKE, B.—You cannot get out of that:

it directly affects the quantum of damages, and, therefore, is material evidence; though I thought at the trial, and still think, it goes to the very verge of the rule.]

*Per Curiam*—

*Rule refused.*

1848. }  
June 16. } MURRAY v. MANN.

*Fraud—Principal and Agent—Money had and received.*

*Any false statement knowingly made for the purpose of inducing a party to enter into a contract is fraud in law.*

*Fraud in one contracting party does not render the contract void, but only defeasible at the option of the other contracting party.*

*Money had and received by an agent under such a defeasible contract, ceases to be had and received to the use of the principal when the contract is defeated; and the agent may shew this as a defence against the principal, though the fraud was entirely his, and the principal was innocent of it.*

This was an action of debt. There was a plea of set-off for money had and received. (The remainder of the pleadings are not material.)

At the trial, before Parke, B., at the Middlesex Sittings, in this term, it appeared that the plaintiff as agent for the defendant sold and delivered a horse warranting it free from vice, and received the price from the purchaser. The horse was not free from vice and was returned with the defendant's sanction, and the money repaid to the purchaser by the plaintiff before the action commenced. This sum of money was the subject of the set-off.

The learned Judge in summing up told the jury that the question depended upon whether the money was rightfully repaid by the plaintiff. His Lordship said that on the sale of a specific chattel the property passed, and that the purchaser had no right to return the horse on account of a breach of warranty, unless there was a term to that effect in the contract (which in the present case there was not), or the contract was induced by fraud, or the seller agreed to take the horse back. He left it to the jury, therefore, to say whether, in the present case the defendant had

(1) 7 Moo. & Wels. 221; s. c. 10 Law J. Rep. (N.S.) Exch. 86.

sanctioned the taking back of the horse, of which there was ample evidence, or, if not, whether the contract of sale was induced by fraud, telling them that in either case they must find for the plaintiff on the question of set-off; and that if the plaintiff at the time he made the contract of sale knew that the warranty was false, and concealed his knowledge from the purchaser, it was fraud sufficient to give the purchaser a right to set aside the contract. The jury found for the plaintiff; and now

*Humfrey* moved for a new trial, on the ground of misdirection.—He submitted that the Judge ought not to have told the jury that the sale with a warranty which the vendor knew was false was fraudulent as a matter of law, but merely to have left it to the jury as a fact from which they could infer fraud. And he also contended that inasmuch as there was no evidence that the defendant, the principal in the sale, had any knowledge of the falsehood, the fraud must be taken to be exclusively the fraud of the plaintiff, the agent, and that the guilty agent would not now be permitted to set up his own fraud as a defence to the innocent principal's claim.

[*PARKE, B.*—The defendant claims this money as his by virtue of a contract made by his agent. That contract is defeasible in consequence of fraud. In *Cornfoot v. Fowke* (1), the majority of the Court held, that fraud on the part of an agent would enable the other contracting party to avoid the contract as against the principal, who was innocent of any fraud in a criminal sense, though civilly responsible for the fraud of his agent. Here, the purchaser exercised the option which he had and set aside the contract, and the money ceased to belong to the defendant. I thought that no action for money had and received would lie on his part after the contract was avoided, even assuming that the fraud was exclusively that of the agent.]

Suppose that the agent had actually paid the money over to the principal, and that then the purchaser had recovered back the money from the agent who made the contract with him on account of a fraud of the agent's, could the agent then have recovered it from his principal? He could never be

permitted to come into a court of justice and set up his own fraud as a ground of action against an innocent person.

[*PARKE, B.*—A court of justice will not permit a party to set up his own fraud in order to enforce a fraudulent contract: but is that applicable to a collateral fraud? I think the agent might in the case you suppose recover the money as paid on a consideration that had failed, but it is not necessary to decide that now.]

*POLLOCK, C.B.*—There must be no rule. It is difficult to say what can be fraud at a sale, if making a false representation knowingly for the purpose of obtaining a higher price is not. As to the other point, the defendant claims the money as his by virtue of a contract. The plaintiff says that the contract was defeasible in consequence of his fraud, and that it has been defeated. The money, therefore, does not belong to the defendant. The plaintiff may refuse to pay it to him, or, if he has paid it, he may recover it back.

*PLATT, B.*—I concur. The defendant, if he adopts the plaintiff's act, must adopt it altogether. He cannot say, I adopt your contract so far as to make the money mine, but I do not adopt your contract in so far as it was by your fraud defeasible; he must adopt it wholly or not at all. If that were not so he would keep both horse and price, for the property of the horse is clearly in him, inasmuch as the purchaser has defeated the contract that took it out of him.

*PARKE, B.*—I agree on both points. In summing up I was desirous of laying down the law accurately to the jury; and therefore, although there was ample evidence of the defendant's assent to the plaintiff's taking back the horse, and consequently to returning the price, I told them that unless there was such an assent, the purchaser was not entitled to return the horse on account of a breach of the warranty, unless there was a condition in the contract to that effect, or unless there was fraud entitling the purchaser to avoid the contract. That was settled to be the law in the case of the sale of a specific chattel in *Street v. Blay* (2). I explained to the jury what was fraud, and in defining it to them I told them

(1) 6 Mee. & Wels. 358; s.c. 9 Law J. Rep. (N.S.) Exch. 297.

NEW SERIES, XVII.—EXCHEQ.

(2) 2 B. & Ad. 456.

that if the warranty that the horse was free from vice was made to induce the purchaser to alter his condition by entering into the contract, and was false within the knowledge of him who made it, it was fraud. If this was wrong, there should be a new trial. There have been many cases in which the distinction between moral and legal fraud has been considered. One of the most curious occurred when I was a Judge of the King's Bench—*Polhill v. Walter* (3). There the defendant accepted a bill by procuration, when he had, in fact, no authority to do so, and knew he had none, but it was done with very honest intentions. Still it was untrue that he had authority to accept, and it was held that telling an untruth knowingly for the purpose of inducing another to alter his position was legal fraud. But no such distinction arises here. The falsehood was told to obtain a better price for the horse; and surely a lie told by a person for the purpose of obtaining a pecuniary benefit is fraud in every sense, moral and legal. The other point on which there is more doubt was not discussed at the trial, but it passed through my mind, and I answered it as has been done to-day. The plaintiff is not seeking to deprive the defendant of money that would be his unless he set up his fraud. He shews that in consequence of the fraud the money did not become the defendant's. The money was as it were in a state of deposit whilst the contract remained defeasible, for it cannot be too often repeated that fraud does not render a contract void, but only voidable at the option of the other party. When the purchaser here thought fit to avoid the contract the money ceased to be money had and received to the use of the defendant, and the set-off failed.

*Rule refused.*

1848. } FREEMAN AND ANOTHER v.  
June 21. } EDWARDS AND TWO OTHERS.

*Grant—Rent-charge—Mortgage—Lien on Goods—Trespass.*

*A rent-charge, with a power of distress, cannot be created except by a grant binding some legal interest in the land, and ceases to exist when the same person, who is owner of*

(3) 3 B. & Ad. 114; s. c. 1 Law J. Rep. (N.S.) K.B. 92.

*the rent, becomes entitled to the whole legal estate in the land out of which it issues.*

*The interest of a mortgagor in possession is not a legal estate at all, and consequently cannot support a rent-charge with powers of distress.*

*A grant, purporting to be the grant of a rent-charge, with powers to distrain, made by a person having no legal estate in the land, may operate as an irrevocable licence by the grantor to seize such goods as may be on the land at the time the grantee seizes, and to treat them as a distress, and may therefore justify the seizure of the goods of the grantor himself, and give the grantee an interest in them after seizure; but it does not give any interest in the goods of the grantor before seizure, and does not justify the seizure of the goods of third persons at all.*

*Therefore, in an action of trespass de bonis asportatis by the assignees of a bankrupt, a plea setting forth an indenture of mortgage of copyholds in fee, by which the mortgagor granted that the mortgages might distrain for the arrears of interest; and averring a surrender and admission of the mortgagee in pursuance of it, and justifying the seizure of the goods on the premises, whilst still in the possession of the bankrupt, but after bankruptcy as a distress, was held bad after verdict; and the plaintiffs had judgment non obstante verdicto.*

This was an action of trespass, by the plaintiffs, as assignees of John Leedham, a bankrupt, for seizing goods belonging to the plaintiffs, as assignees.

[There were several pleas, on which issues were joined, which it is unnecessary to notice.]

The defendants pleaded, thirdly, that before the time when, &c., and before and at the time of the making of the indenture thereafter mentioned, and before the said John Leedham became bankrupt, the said John Leedham was seised in his demesne as of fee, at the will of the lord of the manor of Wakefield, in the county of York, according to the custom of the said manor, of certain customary tenements and messuages, demisable by copy of court roll of the said manor, and being so seised, and before the said time when, &c., and before the said John Leedham became bankrupt,

by a certain indenture then made between the said John Leedham of the one part, and the defendants, Henry Lees Edwards and William Busfield, of the other part, he, the said John Leedham, in pursuance of a certain therein-mentioned agreement, and in consideration of the sum of 1,400*l.* sterling, to him, the said John Leedham, paid and advanced by the said H. L. Edwards and W. Busfield, upon the execution of the said indenture, did, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said defendants, H. L. Edwards and W. Busfield, their heirs, executors, administrators, and assigns, that he, the said John Leedham, his heirs or assigns, and also Nancy, the wife of him, the said John Leedham, for the purpose of releasing all claim and title to free-bench, and all other necessary parties should and would forthwith well and effectually surrender, pass, and give up into the hands of the lord of the manor of Wakefield, in the said county of York, according to the custom of that manor, amongst divers other messuages or tenements, a certain messuage, dwelling-house, or tenement, commonly called or known by the name or sign of the Queen's Head Inn, together with a certain brew-house, kitchen, stable, shop, and outbuildings adjoining and belonging, with the appurtenances, situate respectively in the parish of Halifax, in the county of York, to the use and behoof of the said defendants, H. L. Edwards and W. Busfield, their heirs and assigns for ever, to be holden of the lord of the said manor by the rents, suits, and services in respect of the same premises due and of right accustomed, subject nevertheless to a certain proviso for redemption of the said premises in the said indenture contained. And the said John Leedham did, in and by the said indenture, covenant and agree to and with the said H. L. Edwards and W. Busfield that he, the said John Leedham, should and would well and truly pay or cause to be paid unto the said H. L. Edwards and W. Busfield the principal sum of 1,400*l.* with interest for the same, after the rate of 4*l.* 10*s.* for 100*l.* for a year, on the 23rd of June next ensuing the making of the said indenture without any deduction or abatement on any account whatsoever. And for the better payment

of the interest of the said sum of 1,400*l.*, the said John Leedham "did in and by the said indenture grant unto the said H. L. Edwards and W. Busfield, that as often as it should happen that the said interest should be in arrear, in the whole or any part, for the space of twenty-eight days after the 23rd of June or the 23rd of December in any year during the continuance of the security of the said indenture, it should be lawful for the said defendants, H. L. Edwards and W. Busfield, into and upon the said messuages or tenements, hereditaments, and premises hereinbefore covenanted to be surrendered, or into or upon any part thereof, in the name of the whole, to enter and distrain for the same interest and the arrears thereof;" and the distress or distresses then and there found to impound, and in pound to detain, and in due time to appraise and dispose of the same according to the due course of law, in the same manner in all respects as landlords are authorized to do in respect of distresses for arrears of rent reserved upon leases for years, to the intent that the said H. L. Edwards and W. Busfield should thereby be paid and satisfied all arrears of the said interest, and all costs occasioned by the non-payment thereof, as by the said indenture, reference being thereunto had, will, amongst other things, more fully appear.

The plea then averred, that the said John Leedham being so seised of the said customary messuages and tenements, with the appurtenances, he, the said John Leedham, and also Nancy his said wife, for the considerations aforesaid, and in pursuance of the aforesaid covenant, afterwards and before the said times when, &c., and before the said John Leedham became bankrupt, at a general court of the lord of the said manor of Wakefield, according to the custom of the said manor, to wit, in open court there, surrendered the said customary messuages and tenements, with the appurtenances, to the use of the said defendants, H. L. Edwards and W. Busfield, their heirs and assigns, to the intent that they might be admitted tenants of the said premises, all which said premises being copyhold were then and there at the said court, to wit, by copy of court rolls, granted unto the said H. L. Edwards and W. Busfield, to hold to them, their heirs and assigns for ever,

subject, nevertheless, to the proviso or agreement for redemption thereof contained in the hereinbefore mentioned indenture, and with, under, and subject to the powers, provisos, declarations and agreements comprised therein, and according to the purport, intent and meaning of the said indenture, to be holden of the lord of the said manor by the rents, suits and services according to the custom thereof. And the defendants, H. L. Edwards and W. Busfield, were then and there at the same court admitted, to wit, by copy of court roll, tenants of the said messuages and tenements, according to the form and effect of the said surrender, and according to the custom of the said manor.

The plea then averred, that after the making of the said indenture and surrender, and after the admittance of the said defendants, H. L. Edwards and W. Busfield, as aforesaid, and whilst the said sum of 1,400*l.* remained due and owing upon the said security and during the continuance of the said security of the said indenture, and whilst the said power of distress was in full force and virtue, and before the said time when, &c., 3*l.* 10*s.* of the interest aforesaid, at the rate aforesaid, of the said sum of 1,400*l.* for one half year, was due and unpaid from the said John Leedham to the said defendants, H. L. Edwards and W. Busfield, and continued so due and unpaid for more than twenty-eight days next following, whereupon the said defendants, H. L. Edwards and W. Busfield, in their own right, and the defendant, the said Thomas Hilliwell, as the servant and bailiff of them, the said H. L. Edwards and W. Busfield, and by their command, at the said time when, &c., in the declaration mentioned, under and by virtue of the said power of distress so granted as aforesaid, and of the said stipulations in the said indenture contained in that behalf, entered into the said messuage or dwelling-house, brew-house, kitchen, stable, shop, and out-buildings, being in the possession of the said John Leedham, to distrain for the said half year's interest so due and in arrear as aforesaid, and did then and there distrain the said goods and chattels in the declaration mentioned, the same being then in and upon the said premises, and being subject to such distress as and for a distress for the

said sum of 3*l.* 10*s.* so in arrear from the said John Leedham as aforesaid, which are the supposed trespasses whereof the plaintiffs above complained.

The plaintiffs replied by traversing the possession of Leedham at the time of the distress, on which issue was joined, and on this issue the verdict was for the defendants.

All the other issues were found for the plaintiffs.

*Knowles* having obtained a rule nisi to enter judgment *non obstante veredicto* for the plaintiffs, on the ground that the plea confessed the trespasses without justifying them,—

*Martin* and *Cowling* now shewed cause.—The effect of the grant, contained in the indenture and set out in the plea, is to create a rent-charge, and make the distress lawfull. In *Littleton*, s. 221, it is said, "Also if one make a deed in this manner, that if A. of B. be not yearly payed at the feast of Christmasse for terme of his life xx. s. of lawfull money, that then it shall be lawfull for the said A. of B. to distreyn for this in the mannor of F. &c., this is a good rent-charge; because the mannor is charged with the rent by way of distress. And yet the person of him which makes such deed is discharged in this case of an action of an annuitie, because he doth not grant by his deed any annuitie to the said A. of B, but granteth only that he may distreine for such annuitie," &c. And in the commentary on that section *Co. Litt.* 146, *b.* Lord Coke says, "And yet no rent is expressly granted out of the manor; but by the grant that he shall distrain for such a yearly sum of money in judgment of law the manor is charged with the rent." *Johnson v. Falkner* (1) was also cited on this point; it makes no difference that the estate here is copyhold, for a rent may be created out of lands of any tenure, or however small the estate may be—*Saffery v. Elgood* (2), *Co. Litt.* 147.

[*PARKE, B.*—But here, after the grant, there is a surrender, and the mortgagee is admitted to the whole estate. How can the rent-charge continue to affect the estate after it has become the estate of the grantee?

(1) 2 Q.B. Rep. 925; s. c. 11 Law J. Rep. (N.S.) Q.B. 193.

(2) 1 Ad. & El. 191; s. c. 3 Law J. Rep. (N.S.) K.B. 151.

In order to simplify the question, suppose that the lands were freehold, and that after the creation of a rent-charge the estate was conveyed to the grantee, would not the rent-charge be extinguished?]

It is the practice of conveyancers to rely on such clauses of distress in mortgages, and the Court will not overthrow their practice unless compelled to do so by some rigid rule of law. There is no such rule of law; for the reason why a conveyance of the estate, charged with a rent-charge to the grantee, destroys the rent-charge is, that it merges. But there never is a merger of an interest by the operation of the same instrument which creates it; for the law, in order to effectuate the intention of the parties, will so marshal and construe the instrument as to prevent the interest from being destroyed as soon as it exists. In order to give an operation to such a grant in a mortgage in fee, the Court will construe the deed to mean that the mortgagor shall retain possession and have a legal estate out of which the rent may issue. It clearly was the intention of the parties to this deed that the surrender should not destroy the power of distress, and that Leedham should, whilst he retained possession, have an estate to support the rent-charge. Why should not a rent-charge issue out of an equity of redemption in possession?

[PARKE, B.—A mortgagor in possession is not a tenant to the mortgagee: there was a case in which it was said that the mortgagor was in the relation of tenant to the mortgagee, but that case has been generally disapproved of. If, indeed, there was any part of the mortgage deed amounting to an agreement that Leedham should hold the possession as tenant to the mortgagee, that would create a tenancy; but here the utmost effect of your argument is, that the parties contemplated that Leedham should, after the admittance, continue to occupy as mortgagor: that creates no estate on which the grant can operate so as to create a rent-charge, for the possession of a mortgagor is, in law, no estate at all.]

[PLATT, B.—That must be so, for the mortgagee may bring ejectment, and lay the demise on a former day. If the mortgagor had any estate, however precarious, the demise should be laid after it was determined.]

[ALDERSON, B. referred to the notes to *Keech v. Hall* (3).]

[PARKE, B.—Have you any case in which it has been held that a rent-charge and the fee simple in possession could co-exist in the same person?]

It must be admitted that no such case has been found; but, at all events, this operates as a covenant for a valuable consideration, giving a licence to seize the goods; and being irrecoverable by the bankrupt himself, it is not revoked by his bankruptcy—*Hawthorn v. the Newcastle-upon-Tyne and North Shields Railway Company* (4).

[ALDERSON, B.—There the goods were in the possession of the company.]

*Knowles* (Addison with him), in support of the rule.—The deed had its full operation by creating a rent-charge, which existed from the time of the deed till it was destroyed by the admittance of the grantee, and therefore it does not operate as a covenant or licence afterwards; but even if it did, such a licence is personal, and does not bind the goods—*Howes v. Ball* (5).—(He was then stopped by the Court.)

PARKE, B. — The assignees acquire all the property of the bankrupt, but subject to such equities as attach on the goods at the time of the bankruptcy. The utmost effect that can be given to this deed is to consider it as operating as a covenant that the mortgagees may seize such goods of the mortgagor as shall be on the premises at the time the distress is made, and treat them as if distrained. Such a covenant would not affect any specific goods before seizure, and, therefore, the goods came to the assignees not subject to any equity. Probably, the argument that the grant operated so as to create a rent-charge is correct; and if so, the rent-charge continued until the surrender and admittance. But it is not necessary to decide that, for as soon as the grantee of the rent-charge, if it was one, became entitled to the fee simple in possession, the rent-charge was gone, and the covenant ceased to exist as an obligation binding the land. It might, however, still exist as a personal covenant, binding the covenantor, though it would not affect third

(3) 1 Smith's L.C. 293.

(4) 3 Q.B. Rep. 734, n.

(5) 7 B. & C. 481; s.c. 6 Law J. Rep. K.B. 106.

persons. The argument of the plaintiff's counsel that the effect of the deed was exhausted by the creation of the rent may make this doubtful; and it is not necessary to decide it, for, giving the covenant this effect, it will not make this a good plea. The covenant, at most, is to be construed as an agreement that all goods belonging to Leedham, at the time of the distress and then upon the land, might be seized. This would affect his own goods when seized. Up to the seizure, the whole is contingent, and gives no lien on specific goods. Before the distress was made Leedham became bankrupt; at that time the whole of the goods which were his property and then upon the land, were contingently liable to be seized, but no specific portion was liable more than the rest. There was, therefore, no lien on any portion of the goods according to the principle of the decision in *Carvalho v. Burn* (6). Then, at the moment of the distress, the goods had ceased to belong to Leedham, and became the property of the assignees, and, as goods not belonging to the covenantor, were not subject to the covenant. This is decisive of the case. The plea being bad in substance, and confessing without avoiding the cause of action in the declaration, there must be judgment *non obstante veredicto* for the plaintiffs.

ALDERSON, B., ROLFE, B. and PLATT, B. concurred.

*Rule absolute.*

1848. } ELLIOTT v. THE SOUTH DEVON  
June 28. } RAILWAY COMPANY.

*New Trial — Misdirection — Railway  
Clauses Consolidation Act, 8 & 9 Vict. c. 20.  
s. 11.—“Town.”*

*If a Judge in leaving to the jury a question partly depending upon the construction of an act of parliament, does not give the jury an explanation of the meaning of the act sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.*

*Therefore, where the issue was whether a railway was at a particular spot passing “through a town within the meaning of the Railway Clauses Consolidation Act, section*

(6) 4 B. & Ad. 382; affirmed in error, 1 Ad. & El. 883.

11,” and the Judge merely told the jury that “town” was in the act to be understood in its ordinary sense, the Court granted a new trial.

“Town” in the act means the space on which the inhabitants have permanently collected their dwellings so near to each other that they may be reasonably said to be contiguous. It includes all open spaces surrounded by a continuous line of houses; and, semble, all open spaces occupied as mere accessories to the congregated dwelling-houses, although not so surrounded.

This was an issue directed by the Vice Chancellor of England, to try whether the South Devon Railway in passing over land of which the plaintiff was the owner and occupier, was passing through a town within the meaning of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20. s. 11, which enacts, that “in making the railway it shall not be lawful for the company to deviate from the levels of the said railway, as referred to the common datum line described in the section approved of by parliament, and as marked on the same, to any extent exceeding in any place five feet, or in passing through a town, village, street, or land continuously built upon two feet, without the previous consent in writing of the owners and occupiers of the land in which such deviation is intended to be made.”

At the trial, before Wightman, J., at the Exeter Spring Assizes, 1848, it appeared that the plaintiff was the owner and occupier of some fields that a few years ago were unquestionably in the country. The town of Plymouth has been for some time rapidly increasing, and the land up to the plaintiff's was now covered with houses, so that his land on three sides was bounded by streets and houses now beyond all controversy town. On the fourth side the plaintiff's land was bounded by building land not yet actually built upon. The roads for some way beyond the plaintiff's land were lighted, paved, and watched by the authorities of Plymouth. The plaintiff's land, though likely to be built over very soon, and of great value as building land, was still used as pasture land.

By the Vice Chancellor's order, it was admitted, that the South Devon Railway, in passing over land of which the plaintiff was the owner and occupier, had deviated

from the level as referred to the datum line more than two and less than five feet, without the plaintiff's consent.

Wightman, J. told the jury that the word "town" as used in the act was to be understood in its ordinary and popular sense; that it was for them to decide where the town ended and the country began; and that the lighting, &c. was a circumstance, not a test. The jury found that the railway on the plaintiff's land was passing through a town within the meaning of the act.

A rule having been obtained calling on the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection, on the part of the learned Judge, in not properly explaining to the jury the term "town,"—

*Cockburn* and *M. Smith* now shewed cause.—"Town" is not confined to land covered with houses; it may well extend to land like the plaintiff's, though still green fields.

[*ALDERSON, B.*—Certainly, a railway passing along St. James's Park or through the Temple Gardens would, in every sense of the word, be passing through a town, though it would be passing along land never built upon. But the Judge, one would think, ought in leaving to the jury a question on the construction of an act of parliament to give them some guide. Should he not have told them what was the idea of a town within the meaning of the act?]

He did enough when he told the jury that it was to be understood in the ordinary and popular sense of the word. Had there been any part of the act that controuled the meaning of the word and gave it a different sense, it is conceded the Judge should have told them so; but when the word has its ordinary meaning the jury are as capable of understanding it as the Court. The jury know what the word "town" means, and the Judge could only have defined it by using equivalent terms, which the jury would no more be bound to understand than the original word "town."

[*ROLFE, B.*—The case is somewhat analogous to *Baddeley v. Gingell* (1), where we had to determine what houses were "within the street." But where the terms used in a

statute are so difficult to apply, the Judge should give the jury a guide. It certainly would be no misdirection if he were to define "town" in a way which would be very inaccurate as applied to other circumstances, if it was accurate as far as related to the circumstances to which the jury were to apply it; but I think it is a misdirection to give no definition at all.]

[*PLATT, B.*—If a railway were passing over Primrose Hill would it be passing through town or not? That seems very near indeed to the facts. How should the question be left to the jury in that case?]

[*ALDERSON, B.*—A few years ago a railway passing over Primrose Hill would not have been passing through the town; I think, now, as a jurymen, I should say it was. But if a place like Primrose Hill was not town before certain streets were built, and becomes town after they are built, though itself untouched, a reason must exist why the building of these streets should make the difference. To that extent the Judge should define the word "town." He should tell the jury in what state the surrounding land must be before the place ceases to be in the country.]

*Kinglake, Serj.*, in support of the rule.—The word "town" in the act is coupled with "village, street, or land continuously built upon." It means, therefore, something different from these, and the Judge ought to have told the jury what it meant. No doubt it means, in the act, something differing from the legal definition of "town," given in *Co. Litt.*, p. 115 *b*, where it is said that a place cannot be a town, in law, unless it hath, or in time past hath had, a church, and celebration of Divine service, sacraments and burials. It is no answer to say that a definition would have been difficult; there was the more reason to direct the jury. The railway here does not touch a single house or cross a street till after it has left the plaintiff's land; and it is submitted that the Judge should at least have told the jury that the railway was not passing through the town till it entered the space on which the inhabitants have permanently collected their dwellings. That direction would have given the defendants a verdict, though if the action had been concerning St. James's Park or Primrose Hill,

(1) 1 Exch. 319; a. c. ante, p. 63.



the jury would probably find the fact to be that the railway had entered the space on which the inhabitants have permanently collected.

PARKE, B.—I think that there must be a new trial. The learned Judge was certainly not bound to give a complete definition of the word "town," embracing every possible case, yet he should have given the jury a definition sufficiently comprehensive and accurate to be a guide to enable them to decide the particular question before them, which was, whether the railway in passing over these fields was passing through a town within the meaning of the 11th section. The word "town" in the act does not mean a town in the legal sense of the word,—a place with a constable, or a church, but a town in the sense of the space where the dwelling-houses of the inhabitants are contiguous; it means the space covered by the collected mass of houses. The question then is, could the railway be brought over the fields in question, without coming through the contiguous dwelling-houses? A space, though not built upon, may be part of the town, if surrounded by continuous houses, as, for instance, the green part of Grosvenor Square. So long then as the railway continues in the fields, without entering the continuous line of houses, it is not passing through the town; but when it has entered the continuous mass of houses, it continues to pass through the town till it passes out across the continuous line of houses on the other side. I do not mean by the continuous line that the houses are to be touching each other, but the line where the houses are so near that, in a rough and popular sense of the word, they may be called continuous.

ALDERSON, B.—I think so too. What the wall was to towns, in ancient times, the continuous line of buildings is now as a boundary. By continuous I do not mean touching, but so near that the inhabitants may reasonably be said to dwell together. When the railway passes this boundary it begins to pass through the town.

ROLFE, B.—I think there should be a new trial, because the learned Judge did not give a definition sufficient for the decision of the particular case. He was not

bound to give a definition embracing every case. Even that given by my Brother Parke, which at first struck me as perfect, is not complete. There are in foreign towns what they call a "place,"—a parallelogram of ground, with houses on three sides only, cultivated and adorned for the sake of these houses, but opening, on the fourth side, into the country; such a spot would not be within my Brother Parke's definition, yet I think it would be town.

PLATT, B.—I concur in thinking that there should be a new trial, because the Judge has not expounded the word comprehensively enough, for the purpose of enabling the jury to decide this particular issue on the evidence before them. I do not think he was bound to do more, but that he ought to have done.

ALDERSON, B. added, I think such a "place" as my Brother Rolfe alludes to would be in the town if it was occupied as a mere accessory to the convenience of the dwelling-houses, otherwise if it was an inlet to the country.

PARKE, B.—I think so too; and probably a garden attached to a house, and occupied along with it, should be reckoned as part of the house in considering whether the houses are continuous.

*Rule absolute.*

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1848. } TURNER v. THE METROPOLITAN  
June 16. } LIVE STOCK COMPANY.

*Joint-Stock Company—Execution—7 & 8  
Vict. c. 110.*

*The returns of the names of shareholders under the 7 & 8 Vict. c. 110, are sufficient prima facie evidence that the parties named in them are shareholders, to justify the Court in issuing execution against them under the 7 & 8 Vict. c. 110. s. 68.*

*Notice under that section need not be personally served.*

The defendants in this case were a company completely registered under the 7 & 8 Vict. c. 110.

The plaintiff had obtained judgment against the company; and a rule had been

obtained calling on a party to shew cause why execution should not issue against him as a shareholder, under the 68th section of the 7 & 8 Vict. c. 110.

*Bramwell* now shewed cause.—The act renders a suggestion or *scire facias* unnecessary, and if the Court allow execution to issue against the party their decision is final. He has no opportunity of traversing or disputing the facts. It is, therefore, incumbent on the plaintiff to shew everything requisite to complete his liability, and here he fails to shew that the party is a shareholder. The affidavits have annexed to them a certified copy of the return of the names of the shareholders. The name of the party in question appears on that return; it is sworn that the name is his, and it must be taken to be so. That is all that is shewn, and this is no evidence that he really was a shareholder. Unless it appears that he in some way sanctioned the return, it is no evidence against him. The Banking Act, 7 Geo. 4. c. 46. s. 6, contains a provision, that the returns under that act shall be evidence that the persons named therein as members of the banking company were members of it at the time of the return, but there is no such provision in the 7 & 8 Vict. c. 110. The certified copy is by the 18th section made evidence that the return was made, but no more.

It also appears that the notice given in this case was not personally served on the party.

[*ALDERSON, B.*—The return is made in pursuance of a public duty; and the question is, whether the fact that a party's name appears on that return as a shareholder, is not a sufficient *prima facie* case to induce the Court to act as if the party was a shareholder, when he has an opportunity of denying it, and does not do so. It is not as if the question was whether it was evidence for a jury. We often act on information and belief. As for the notice, the party must have ten days' notice so brought home to him as to enable him to appear, but the act is silent as to its being personal notice.]

*Gray* was stopped by the Court.

*Per Curiam*—

*Rule absolute.*

1848. }  
June 13. } BUTLER v. CORNEY.

*Costs—Suggestion on the Roll—County Court—9 & 10 Vict. c. 95. s. 129.—Affidavit, negating Exceptions.*

*The defendant does enough to obtain leave to enter a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95. s. 129, if by his affidavits he brings the case within sections 128. and 129; he need not negative any grounds for refusing the suggestion not mentioned in these sections. Such grounds, if they exist, are to be shewn by the other party.*

*If a prima facie case be made out for entering a suggestion, the Court will not inquire into a doubtful point of law, which may be raised upon the record after the suggestion is entered.*

*The Court gave leave to enter a suggestion to deprive the plaintiff of costs in an action on a bill of exchange in which he had recovered less than 20l., without expressing any opinion as to whether bills of exchange were within the jurisdiction of the county courts.*

In this case a rule had been obtained to enter a suggestion on the roll to deprive the plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95. s. 129.

The affidavits on which the rule was obtained stated, that the action was on a contract and for a cause for which a plaint might have been levied in the county court; that the plaintiff recovered only 19l. 15s.; that the plaintiff and the defendant dwelt within twenty miles of each other at the time the action commenced, and that neither party was an officer of the court.

*Needham* now shewed cause, and contended, that the defendant ought to have shewn by his affidavit that the plaintiff was not an attorney, as an attorney might still sue in the superior court—*Jones v. Brown* (1); also that the contract on which the action was brought was not a contract of marriage, and that the cause of action was not one of those over which the county court, by section 58, has no jurisdiction.

[*PARKE, B.*—The sections on which the defendant grounds his application are the

128th and 129th. These deprive the plaintiff of costs under certain circumstances, and the defendant does enough if he brings the case within these; the onus of shewing that the case is within some provision not mentioned in these sections lies on the other side. If the plaintiff was an attorney, or the action was for breach of contract of marriage, the plaintiff may shew it by affidavit. The defendant was not bound to negative it.]

He then relied on his affidavits, which shewed that part of the cause of action was on a bill of exchange.

[PARKE, B.—It has been said that the Chief Justice of the Common Pleas and my Brother Maule have expressed a doubt whether a bill of exchange is within the jurisdiction of the county court. I should like to hear the grounds for that doubt, as I do not know them. The question now before us is, whether a suggestion should be entered: that is not final, but it generally practically decides the question, and I should like to learn what are the grounds for the doubt said to have been thrown out in the Common Pleas. It is an important point if bills of exchange are really not within the statute.]

A bill does not give a cause of action arising within any jurisdiction. There are numerous cases relating to the change of venue deciding this—*Mondel v. Steele* (2), in which all the cases are reviewed.

[ALDERSON, B.—Is not the meaning of the 128th section, that the superior court shall not have concurrent jurisdiction when any material part of the cause of action arises within the jurisdiction of the county court?]

It is clear that the acceptance of the bill or its presentment, which are material parts of the cause of action, must have a locality, and may be within the jurisdiction of the county court.

*Manisty*, in support of the rule.—The affidavits shew that the action was not exclusively on the bill; it was partly for goods sold and delivered; and these were a material part of the cause of action.

[ALDERSON, B.—The section is awkwardly worded, and I am not certain that it does not mean "if no material part of the cause of action arises out of the jurisdiction," in-

stead of meaning, as I at first thought, "if any material part arises within it."]

The meaning seems to be, that if any material part arose *out* of the jurisdiction the superior courts have concurrent jurisdiction.

POLLOCK, C.B.—The rule must be made absolute, on the simple ground that the matter ought to be put on the record. By permitting the suggestion to be entered on the record, we decide nothing finally; for the plaintiff may traverse it or demur: whereas, if we refuse to allow it, we decide conclusively against the defendant. It is sufficient to say there is not such an answer given as to induce us to do that. I express no opinion on the question, as to whether the superior courts have concurrent jurisdiction with the county court over bills of exchange for less than 20*l.*, except that it is, at least, so doubtful a point as to render it our duty not to deprive the defendant of the power to raise it on the record.

ALDERSON, B. concurred.

ROLFE, B.—When it is once decided that a suggestion is the proper course, I think it is very inconvenient to try the merits upon affidavit. I doubt if there is any other reason why a party must come to us for leave to enter a suggestion than that the party has not the custody of the record; and if he makes a *prima facie* case, it seems almost a matter of right that the suggestion should be entered.

PARKE, B. had left the court.

*Rule absolute.*

1848. }  
June 21. } HORSFALL v. KEY.

*Stamp—Conveyance—Fixtures—Goods, Wares and Merchandise.*

*Any written instrument, operating as the record of a transfer of property, is a conveyance within the meaning of the Stamp Act.*

*Such an instrument, if it be "a memorandum, letter, or agreement, relating to the sale of goods, wares and merchandise," is exempted from all stamp duty, but if it operate as a transfer of anything else, it must be stamped as a conveyance.*

*The word "fixtures" means the right*

(2) 8 Mee. & Wels. 640; s. c. 11 Law J. Rep. (N.S.) Exch. 91.

of severance of chattels attached to the soil, but not part of the freehold. A transfer of "fixtures" is, therefore, at least the transfer of the right of severance; and whether a memorandum of the sale of fixtures transfers any interest in the chattels themselves, or not, it is a conveyance within the words of the Stamp Act, which include the "transfer of any right;" and as fixtures are not goods, wares and merchandise, it is not within the exemption. Therefore, a memorandum using words in the past tense, "*Memorandum that A. B. has sold the goods and fixtures in a shop to C. D., signed by both parties, was held to require an ad valorem stamp as a conveyance.*"

This was an action of trover.

Pleas—Not guilty; and not possessed.

At the trial, before Rolfe, B., at the Liverpool Spring Assizes, it became a part of the plaintiff's case to give in evidence a written instrument. The instrument was signed by both parties, and was expressed in the past tense as a memorandum that A. B. "*has sold to C. D. all the goods, stock in trade, and fixtures in a certain shop, for 50*l.**" It bore an agreement stamp, and the objection was taken that the instrument operated as a conveyance, and ought, therefore, to have borne an *ad valorem* stamp of 1*l.* 10*s.* The learned Judge gave the defendant leave to move to enter a nonsuit on this objection, and directed a verdict for the plaintiff.

Martin obtained a rule to shew cause accordingly.

Knowles and Atherton now shewed cause.—The sole question is as to the sufficiency of the stamp. In order to require a stamp as a conveyance an instrument must operate as one, and of itself vest the property in the transferee. This instrument purports to be, and is, a memorandum of a by-gone sale, which had vested the property in the transferee before the execution of the instrument. Such a memorandum of a by-gone transaction requires only an agreement stamp, and not a conveyance stamp. There is no exemption in the Stamp Act of conveyances relating to goods, wares, and merchandise; and if this instrument is a conveyance, every case in which a broker's bought and sold notes unstamped have been received in evidence is wrongly decided; but those cases are rightly decided, for

memoranda of a by-gone bargain are not conveyances, but memoranda which are evidence of a contract or agreement; and which, if they relate to the sale of goods, wares and merchandise, are exempted from all duty; and if they relate to other things as well, they are subject only to an agreement stamp. Had it not been for the word "fixtures" used in the instrument, it would have required no stamp at all: as it is, it is rightly stamped, for this is no conveyance of the fixtures; they are things fixed to the freehold. No instrument, not under seal, can operate as more than an agreement to transfer them, for they are, like a house, part of the freehold.

[PARKE, B.—No. How, if that were the case, would the sheriff be justified in seizing them? That shews that they are unquestionably chattels, though they are not goods, wares and merchandise. What is meant by fixtures is the right to remove certain things fixed to the soil. The law in favour of the creditor says, that the sheriff may, under a *f. fa.*, exercise this right of removal.]

If that be the nature of fixtures, this cannot be a conveyance, as far as they are concerned. It must operate as an agreement that the purchaser may enter and sever the things, and convert them into goods, wares, and merchandise, and that after they are converted the property shall pass. It therefore requires an agreement stamp only. The Court makes no intendment in favour of the Stamp Laws—*Phillips v. Morrison* (1).

Martin, in support of the rule.—The effect of the Stamp Laws upon evidence is productive of much injustice, and it is to be wished they were altered; but whilst the Stamp Act remains law, it would be absurd to enable parties to evade it, by wording instruments in the past tense, and then saying that they are not conveyances, but memoranda of by-gone transactions. "The general principle," says Parke, B., in *Jones v. Ryder* (2), "is, that every instrument ought to be stamped according to its legal operation."

[PARKE, B.—That is correct. You must

(1) 12 Mee. & Wels. 740; s. c. 13 Law J. Rep. (N.S.) Exch. 212.

(2) 4 Ibid. 35; s. c. 7 Law J. Rep. (N.S.) Exch. 216.

make out that if there was an act of parliament passed, enacting that the things to which the instrument refers could not be transferred without writing, an instrument in these terms would satisfy the act of parliament and transfer them, or the instrument is not a conveyance.]

*Sheppard's Touchstone*, p. 232, says, "The best way in grants is to grant by words in the present tense as well as in the preterperfect tense; but a grant by words of the preterperfect tense only, as by *dedi et concessi* only, without words of the present tense, is good." So Lord Coke says, "And he to whom such a deed, comprehending *dedi*, &c. is made, may plead it as a grant"—*Co. Litt.* 301, b. It is impossible, therefore, to say, that the use of the past tense prevents an instrument from operating as a conveyance. What was there to transfer the property if not this instrument? The very nonsuit proceeds on the ground that the plaintiff cannot prove the transfer by anything but the writing. Then, fixtures are not within the exemption in the Stamp Act, and are transferred by this writing—*Thompson v. Pettit* (3).—(He was then stopped by the Court.)

PARKE, B.—The question is, whether this instrument operates as a transfer within the meaning of the Stamp Laws. The words in the schedule to the 55 Geo. 3. c. 189. are, "Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property real or personal, heritable or moveable, or of any right, title, interest, or claim into or out of, or upon any lands, tenements, rents, annuities, or other property, that is to say, for or in respect of the principal or only deed, instrument, or other writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser." These are very large and comprehensive words, including not only transfers of all kinds of property, but also of any right or interest into or out of, or upon any property. Does, then, this instrument

come within these words?—It is termed a memorandum, but that can make no difference if it operates as a conveyance. Then the objection is made that it cannot operate as a conveyance, because the words are in the past tense. That, however, is immaterial. If the parties have so expressed themselves as to make it apparent on the face of the instrument that the writing was intended to be the record of the transfer, it is immaterial whether the words used be in the past tense or in the present. The passage in *Sheppard's Touchstone* shows this; and that passage, which must be considered as the language of Mr. Justice Doddridge, is entitled to very great weight as an authority, as every opinion of that very learned lawyer is. It is a very ingenious argument that if this operated as a conveyance all brokers' bought and sold notes, which unquestionably are meant to be records of the sale, were conveyances, and as such required a stamp, for, as the plaintiff's counsel contended, the exemption in the Stamp Act did not extend to conveyances of goods, wares and merchandise, but only to agreements relating to the sale of them. That made me pause, for we should occasion much confusion if we were now to decide that a memorandum amounting to a bargain and sale of goods, wares, and merchandise required a conveyance stamp. The exemption, however, in the Stamp Act is not so confined. It exempts from *all* stamp duties any "memorandum, letter, or agreement for or relating to the sale of goods, wares, or merchandise." So that though this memorandum is a conveyance of the goods, wares and merchandise, it would fall within the exemption, and require no stamp, if it did not also embrace fixtures. Then the plaintiff's counsel argued, that so far as related to fixtures, the instrument could only operate as an agreement to permit the party to enter and sever the fixtures, and could not transfer the property before severance from the soil. The instrument, however, operates at least as a transfer of the right of severance. In *Thompson v. Pettit*, the Court of Queen's Bench held, that a transfer of fixtures *eo nomine* transferred the right of severance, and more, for they held that it transferred such an interest in the chattels as to support trespass. This instrument is, then, the record of the transfer

of fixtures, and whether by that is understood a transfer of the chattels themselves, or only of the right of severance, it is a conveyance within the comprehensive words of the Stamp Act; and as fixtures, though chattels, are not goods, wares and merchandise, it is not within the exemption. If we held that the use of the past tense prevented an instrument from being liable to a stamp as a conveyance, though having the full effect of one, we should be opening a door for evading the Stamp Laws altogether. No one can doubt, that if there was an act of parliament that fixtures should not be transferred without writing, this instrument would satisfy it.

ALDERSON, B., ROLFE, B. and PLATT, B. concurred.

*Rule absolute.*

1848. }  
June 21. } HAGUE v. DANDESON.

*Deed, Construction of—Banking Company—Lien—Dividends.*

*By the deed of settlement of a joint-stock bank, it was provided, "that the directors should have a lien on the shares and stock of every shareholder for all debts due to the company, and that such lien should at all times be the paramount lien on the shares and stock of such shareholder; and the directors were empowered to cancel and declare forfeited the shares, or to sell and dispose of them, or otherwise deal with the same to obtain payment of the said debts":—Held, that the company had a lien against a shareholder who had overdrawn his account, not only on the shares, but also on the dividends arising from them.*

This was an action of assumpsit against the defendant as the registered public officer of the Barnsley Banking Company for money had and received, and on an account stated.

*Plea—Non assumpsit.*

At the trial, before Alderson, B., at the York Spring Assizes, 1848, it appeared that the action was brought by a shareholder to recover two dividends on his shares, amounting to 12*l.* each. On a dividend being declared, the course of business was for the directors of the bank to

issue a circular to the shareholders, stating to each shareholder the amount of the dividend payable to him, and giving notice of the day on which the amount would be payable at the bank on demand. The plaintiff was a shareholder in the bank; and two successive half-yearly dividends having been declared, on each occasion the directors sent him a letter stating that the amount of the dividends on his shares was 12*l.*, and that that amount would be paid to him on demand at the bank on a future day therein stated. The plaintiff demanded the amount of each dividend, respectively, at the bank after the day named for payment had elapsed, and was refused on the ground that he had overdrawn his account as a customer of the bank, and that the bank had a lien on the dividends for the balance of his private account. The deed of settlement of the company was in evidence as part of the plaintiff's case. It appeared that, in fact, his private account was overdrawn, and that the balance against him exceeded 24*l.* The learned Judge nonsuited the plaintiff, with leave to move to enter a verdict for 24*l.*

*Baines* having obtained a rule accordingly,—

*Martin and Hugh Hill* now shewed cause. —The nonsuit was right; for by the terms of the deed (1), the bank had a lien on the

(1) The clauses of the deed referred to in the course of the argument by the counsel on both sides were the 8th, 33rd and 49th, which were as follows:—

8th clause. "That each shareholder shall be entitled to and interested in the profits, and shall be subject and liable to the losses of the company, rateably and in proportion to his shares in the capital fund or joint stock thereof."

33rd clause. "That the directors for the time being shall have a lien on the shares and stock of every shareholder of the said company, for and in respect of all debts, liabilities, and engagements, due to and subsisting with the company, by or on the part of such shareholder, either in respect of cash advances, or any balance or balances, or running bills or notes, or on any account generally, and whether such debts, liabilities, or engagements be those of such shareholder individually, or jointly, or as surety for or in partnership with any other person or persons; and such lien shall at all times and in all cases, be the first and paramount lien on the shares and stock of every such shareholder; and such directors may and they are hereby empowered to cancel and extinguish and declare forfeited, or to sell and dispose of the shares of such shareholder, either wholly or in part, or otherwise deal with the same, as the case may seem to

dividends; and even if it had not, money had and received will not lie for dividends. (The Court, without expressing any opinion on this latter objection, desired him to confine his argument at present to the question, whether by the deed the bank had a lien on the dividends.)

He then read the 33rd clause of the deed.

[PARKE, B. — There never was a time antecedent to the demand and refusal of the money at which the plaintiff was entitled to

require, in order to obtain satisfaction or payment of all or any part of such debts, liabilities, or engagements."

49th clause. "That a general annual meeting of the shareholders of this company shall be held on the second Thursday in the month of February, in each and every year, during the continuance of this company, at eleven o'clock in the forenoon, at such convenient place in Barnsley as the directors for the time being shall appoint, of which meeting the directors for the time being shall cause fourteen days' previous notice to be given, by means of a circular letter, signed by the manager, or such other person or persons as they may appoint for that purpose, or by means of an advertisement in one or more of the neighbouring newspapers; and such meeting shall be called 'The Annual General Meeting'; and the shareholders, qualified according to the provisions contained in these presents to act and vote at such meeting, who may personally attend the same, shall and they are hereby invested with full power and authority to decide upon all such motions, questions, propositions, matters, and things as, by virtue of these presents, or any supplementary deed or deeds of settlement, shall or may be brought before such annual general meeting; and at every annual general meeting of the shareholders, the directors for the time being shall exhibit a true and accurate balance sheet, deduced from the transactions of the preceding year, of the profits and accumulations and losses of the company, and shall make a report for the preceding year of the state and progress of the affairs of the company, to the 31st of December last preceding such meeting, and also the result of such other accounts and statements as the directors shall deem expedient for the interests of the company to be made public; and the dividends of the profits of the then preceding year (except of the first year, as hereafter stated) shall be then declared by the directors for the time being; or such dividends may be declared half-yearly, if the directors for the time being shall consider it more desirable; and when any dividend shall have been declared, the directors shall, seven days before the day appointed for the payment thereof, give notice, by circular letter addressed to each of the proprietors, of the amount and time and place of payment of such dividend; but no proprietor, nor his executors, administrators, or other representatives, being in arrear in respect to any instalment or call, shall be entitled to receive any part of such dividend, until such arrear and all interest thereon shall have been fully paid."

it. Here, by the terms of the circular on which the plaintiff relies to make out his case, the money is to be paid on a demand being made at the bank. It is not, therefore, like the case of an ordinary debt where the debtor owes the money at once, and is bound to seek out the creditor and pay him; but here the creditor is to go to the bank and make a demand, and the money is not payable till he does so. Then, at the time he makes the demand, the balance of his private account is against him and exceeds the dividend; if therefore the bank have a lien, the refusal to pay is justified. The question, therefore, is reduced to this, whether the lien given on the shares extends also to the proceeds of those shares.]

That is so: and it is clear that there is a lien on the dividends, for the principal includes the accessory. A pledge of the cow is a pledge of the milk.—(He was then stopped by the Court.)

*Pashley*, in support of the rule.—The question which is meant to be raised is, whether the lien does extend to the dividends. It is not correct law that a lien on the principal is a lien on the accessory. The question must turn entirely on the construction of the deed; and it is to be observed, that where the framers of the deed intend to give a lien on the dividends as well as the shares for the calls in the 49th clause, they use express words to give a lien on the dividends, and in the 8th clause they make a distinction between the shares and the profits. The words in the 33rd section must be taken to be used, therefore, in their plain meaning. This Court, in *Fowler v. Churchill* and *Churchill v. the Bank of England* (2), held, that a charge on stock under the 1 & 2 Vict. c. 110. ss. 14, 15, did not prevent the debtor from recovering the dividends.

[PARKE, B.—There the decision was, that on the construction of the statute the charge was to be enforced in equity and not at law. The persons in whose names the stock stood were to receive the dividends from the bank, and be accountable for them afterwards. Lord Abinger there says: "When the Judge's orders are made absolute, the

(2) 11 Mee. & Wels. 323; s. c. 12 Law J. Rep (N.S.) Exch. 233.

executors are chargeable with the proper distribution of the fund, but the bank is bound to pay it to them;" and my Brother Rolfe says, "The Bank of England has nothing to do with questions between the parties, but is bound to pay over the dividends to the legal owner."]

At all events, by sending notice to the plaintiff that he might have the dividend, the bank have waived their lien.

PARKE, B.—I am of opinion that the nonsuit was right. There is no doubt that the circular gave the plaintiff no right to receive the dividends before demanding them at the bank; and it is no waiver of the lien, for the bank at the time of sending forth that circular did not know whether they should have to exercise their lien or not—*non constat* but that the shareholder may pay off the debt before he comes for the dividend. The question, therefore, is, whether the true construction of the deed is, that the bank shall have a lien upon the dividends as well as the shares, or not. The common law gives in an ordinary partnership a lien for the debts of an individual partner, not only on the debtor's share of the partnership capital, but also on his share of the profits; and in putting a construction on this deed we must bear in mind what the ordinary rights of partners are. Is there, then, anything in the words of this instrument to shew that the parties intended that a construction should be given to it which would deprive the bank of a lien which an ordinary partnership would have by the common law? There is nothing. On the contrary, the words authorize the directors "to sell and dispose of the shares, either wholly or in part, or otherwise deal with the same as the case may seem to require, in order to obtain payment of the debts." I can have no doubt, that if the directors instead of selling the shares choose to keep them, and work off the debt by retaining the dividends, they may do so. I think, therefore, the nonsuit was right.

ALDERSON, B., ROLFE, B. and PLATT, B. concurred.

*Rule discharged.*

1848. { MACHIN v. THE LONDON AND  
June 6, 8. { SOUTH - WESTERN RAILWAY  
COMPANY.

*Carriers* — 11 Geo. 4. & 1 Will. 4. c. 68. — *Railway Company* — *Servant* — *Felony* — *Estoppel*.

*If a carrier who contracts to deliver goods from A. to B. enters into a sub-contract with another party to convey those goods over a certain portion of the journey, such sub-contractor and every person employed by him in the performance of the contract, is "a servant in the employ" of the carrier within the meaning of the 8th section of the 11 Geo. 4. & 1 Will. 4. c. 68.*

*A delivery ticket issued by a railway company, as common carriers, in respect of goods they had undertaken to carry, described several persons, amongst others J, as porters in their employ. In an action brought by the bailor of the goods for their non-delivery, they having been stolen on their journey by J.—semble, that the company were not estopped from giving evidence that J. was not their servant.*

Case. The declaration stated, that the defendants were common carriers of goods and chattels for hire, and that the plaintiff, on the 23rd of November 1846, at the Andover Road station of the London and South-Western Railway, caused to be delivered to the defendants, and the defendants then accepted and received a certain bale of silk of the value of 150*l.*, to be safely and securely carried and conveyed by the defendants to London, and there safely and securely to be delivered to the plaintiff for certain reasonable reward in that behalf, &c. The declaration then went on to allege, that the defendants, not regarding their duty in that behalf, did not nor would safely or securely deliver the same to the plaintiff; but, on the contrary, the defendants so carelessly and negligently behaved and conducted themselves in the premises, that by and through the carelessness, negligence, and default of the defendants, &c., the said bale of silk, &c. became and was lost to the plaintiff, &c.

Pleas—First, not guilty. Second, that the said bale of silk was not delivered to the defendants *modo et formâ*. Third, that



the said bale of silk, in the declaration mentioned, and therein alleged to have been received by the defendants as such common carriers as aforesaid, contained only goods and chattels and property of a certain description, to wit, the silk in the said declaration mentioned, and exceeded in value the sum of 10*l.*; and that the said bale of silk was theretofore, to wit, on the day and year in the declaration mentioned, delivered by the plaintiff to the defendants, as common carriers by land of goods for hire, to be carried from and to the places in the declaration mentioned, at a certain office or receiving-house of the defendants for the receipt of goods to be carried by them as such common carriers as aforesaid, to wit, the said Andover Road station of the defendants; and that before and at the time when the said bale of silk was so delivered at the said office of the defendants as aforesaid, the defendants had caused to be affixed, and there was affixed, according to the form of the statute in such case made and provided, in legible characters in a public and conspicuous part of the said office, a notice whereby the defendants notified that a certain increased rate of charge therein mentioned was required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of, amongst other things, silk exceeding the value of 10*l.*; and that at the time of the delivery of the said bale of silk at the said office of the defendants as aforesaid, the value and nature thereof were not declared by the person sending or delivering the same; and that neither the increased charge nor any engagement to pay the same was accepted by the person receiving the said bale of silk at the said office. Verification.

Replication—Issue joined as to the first two pleas. As to the last, that whilst the said bale of silk was in the charge and possession of the defendants, as such common carriers as aforesaid, to wit, &c., the same was unlawfully and feloniously stolen, taken, and carried away by a certain then servant of the defendants, then in the employ of the defendants, to wit, one Thomas Johnson, whereby the same was not safely and securely carried, or conveyed, or delivered as aforesaid, and then was and now is wholly lost to the plaintiff, solely by reason of the

said felonious act of the said Thomas Johnson, &c.

Rejoinder, that whilst the said bale of silk was in the charge and possession of the defendants, as such common carriers, &c., the same was not unlawfully and feloniously stolen, taken, and carried away by a then servant of the defendants, then in the employ of the defendants, *modo et forma*.

The cause was tried, before Pollock, C.B., at the London Sittings, when it appeared that the bale of silk, the subject-matter of the action, had been delivered on the 23rd of November 1846, at the booking-office of the South-Western Railway Company, at the Andover Road station, and was directed to the residence of the plaintiff, in Bunhill Row, London. The silk was of greater value than 10*l.*; and although there was a notice stuck up in the booking-office, to the effect, required by the statute 11 Geo. 4. & 1 Will. 4. c. 8. s. 2, that an increased rate of charge was payable in respect of, amongst other things, silk exceeding in value 10*l.*, no such increased charge had been paid, or the value of the silk declared, but the ordinary charge upon parcels had only been paid. It appeared further, that on the following day the silk was forwarded up by train to the London terminus, where it was put into one of the vans belonging to Chaplin & Horne, who were employed by the railway company to deliver parcels to their various addresses in London. The silk, however, never reached its destination, having been stolen by one Thomas Johnson, who had the charge of the van into which the bale had been put. The delivery ticket of the bale, and which was in the form of those usually given, was as follows:—

(114) London and South-Western Railway Company.—Southampton, Gosport, &c. every morning before eight, and afternoon before six o'clock. From Hamburgh Wharf, Lower Thames Street, &c. (Here followed a notice from the company that they would not be liable for certain descriptions of articles except on certain conditions; and concluding thus:—"The delivery of the goods will be considered complete when the same are unloaded out of the waggon, dray, or cart, and placed at the door of the consignee, the cellaring or warehousing them afterwards will be at the owner's risk.") Any servant of the company taking more than is stated in this ticket will be dismissed.

Notice.—The company are not responsible for any parcel above the value of 10*l.*, unless declared as such at the time of booking, and entered and

paid for accordingly. It is requested that any irregularity may be notified immediately to

Cornelius Stovin, general manager of traffic.

Mr. Machin, Bunhill Row.

To South-Western Railway Company.

Nov. 26, 1846. 1 truss silk. Paid 2s.

James Burdy,  
Charles Goodwin,  
William Lee,  
George Clay,  
Thomas Johnson,  
George Fry,

Porters.

Goods conveyed to or from any part of London, by addressing a line to Mr. Riches, at the delivery office as above.

Chaplin & Horne, agents.

It also appeared in evidence, that Johnson was the servant of Chaplin & Horne; that he had been hired by them, and paid by them, and was subject to be discharged by them. At the close of the case it was submitted to the Judge, that Johnson could not be considered as the servant of the defendants, within the meaning of the 8th section of the 11 Geo. 4. & 1 Will. 4. c. 68. The learned Judge was of a different opinion, and the jury found a verdict for the plaintiff, leave, however, being reserved to the defendants to move to enter a verdict on the third issue, if the Court should think that Johnson was not the servant of the defendants within the meaning of that section. A rule to shew cause having been accordingly obtained,—

*Sir F. Thesiger* and *Woolrych* now shewed cause.—The 8th section of the 11 Geo. 4. & 1 Will. 4. c. 68. enacts, that “nothing in this act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant, in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.” The question, as to whether a party is the servant of a carrier within the meaning of this section, is one of fact. In the present case, there was abundance of evidence to warrant the finding of the jury, that Johnson was the servant of the railway company, and although some of the evidence at the trial went to shew that he was also the servant of Chaplin & Horne, there is nothing inconsistent in his

being the servant of both. The Court now called upon—

*Martin* and *M. Smith* to support the rule.

[*PARKE, B.*—You have two points to argue. It may be said, on behalf of the plaintiff, that the defendants, by their delivery ticket, in which Johnson was described as a porter in their employment, are estopped from denying that he was such servant, as against the plaintiff. If that document does not amount to an estoppel, then arises the point, whether, under all the circumstances of the case, Johnson was the servant of the company within the meaning of the 8th section (1).]

First, then, this document did not operate as an estoppel.

[*POLLOCK, C.B.* referred to *Pickard v. Sears* (2), *Gregg v. Wells* (3), and *Coles v. the Bank of England* (4).]

Those cases are not applicable to the present; they are authorities for the doctrine laid down by Lord Denman, in *Pickard v. Sears*, that “where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;” but in the present case, there is not the slightest evidence that the plaintiff was induced by the statements in this delivery ticket to enter into the contract. On the contrary, it had nothing to do with the terms of the contract. In the second place, then, was Johnson the servant of the defendants within the meaning of the 8th section of the statute? Was he “a porter or other servant in their employ”? It is submitted that he was not. The legislature only intended to make carriers answerable for the felonious acts of those who were their own servants, hired, paid, and liable to be discharged by them; and not for the acts of persons who were the servants of others, although employed in the delivery of the

(1) *Parke, B.* left the court at this stage of the case, and took no further part in the discussion or judgment.

(2) 6 Ad. & El. 469.

(3) 10 Ibid. 90; s. c. 8 Law J. Rep. (N.S.) Q.B. 193.

(4) Ibid. 437; s. c. 9 Law J. Rep. (N.S.) Q.B. 36.

goods. In the case of *Laugher v. Pointer* (5), Littledale, J., in deciding that the defendant was not liable for the negligent driving of a coachman provided by the person of whom the defendant hired horses, said, that it "was not the case of a man employing his own immediate servants, either domestic servants or others engaged by him to conduct any business or employment or occupation, carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired by the defendant; he had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman." And further on, in his judgment, his Lordship adds, "The cases referred to only shew, indeed, the owner of the horses to be liable, but it may be said the traveller is liable also. I think not. The coachman or postillion cannot be the servant of both. He is the servant of one or the other, but not the servant of one and the other. The law does not recognize a several liability in two principals who are unconnected." The doctrine laid down by Littledale, J., in *Laugher v. Pointer*, was confirmed by this Court in the subsequent cases of *Quarman v. Burnett* (6) and *Rapson v. Cubitt* (7), and by the Court of Queen's Bench in *Milligan v. Wedge* (8). Applying that doctrine to the present case, it appears to be clear that Johnson was the servant of Chaplin & Horne, and not of the defendants. He was hired by Chaplin & Horne, and was liable to be dismissed by them, and not by the defendants. And in *Coates v. Chaplin* (9), it was accordingly held, under similar circumstances to the present, that Chaplin & Horne were liable.

[ROLFE, B.—It did not appear in that case what were the particular terms of the contract entered into between the plaintiff

and the defendants. The only point taken was, whether the plaintiff was the proper person to maintain the action.]

It was not denied, however, that Chaplin & Horne were in that case liable to some one.

POLLOCK, C.B.—I am of opinion that this rule ought to be discharged. There was a serious question of law to be argued, which could not be disposed of by simply producing the document and saying that the defendants were estopped from denying that Johnson was their servant, but which has now been argued by the defendant's counsel not at greater length or with less industry and learning than the occasion demanded. That argument amounts in substance to this: that Chaplin & Horne had the conduct of that part of the business of the defendants which consisted in the delivery of goods sent up by the railway, from the terminus to different parts of London, and that not as servants of the company but as agents; that Johnson was the servant of Chaplin & Horne and not of the company; and that the effect of the act of parliament was to give an indemnity to the company as carriers from liability in respect of loss in case certain conditions had not been complied with; which liability was re-imposed by the 8th section in those cases only where the loss has been occasioned by the felonious act of an actual servant of the company. But giving full weight to that argument, believing also that it is our duty not to make acts of parliament, but simply to construe them, bearing in mind also the strong observations of Mr. Justice Littledale in giving judgment in *Laugher v. Pointer*, I am still of opinion that this rule should be discharged upon the ground that this was an employment of Johnson by the company as appears from the heading of the delivery ticket, without reference to that portion of it in which Johnson's name appears. For, what is written in the first part of that document proves that the company undertook to receive the bale of silk in question in the country, and to deliver it from thence to the plaintiff's residence in Bunhill Row; and it appears to me that for the purpose of that delivery Johnson was a porter in the employ of the company within the meaning of the 8th

(5) 5 B. & C. 547; s.c. 4 Law J. Rep. K.B. 309.

(6) 6 Mea. & Wels. 499; s.c. 9 Law J. Rep. (N.S.) Exch. 308.

(7) 9 Ibid. 710; s.c. 11 Law J. Rep. (N.S.) Exch. 271.

(8) 12 Ad. & El. 737; s.c. 10 Law J. Rep. (N.S.) Q.B. 19.

(9) 3 Q.B. Rep. 483; s.c. 11 Law J. Rep. (N.S.) Q.B. 315.

section of the statute. The object of that statute was, undoubtedly, to give protection to carriers in cases of small parcels of great value being delivered to them to carry; and the legislature has said that they shall not then be liable for loss unless an extra price by way of insurance is paid; but then by way of protection to the public the legislature has also said, that whether insured or not, the carrier shall still be liable if the loss has occurred through the "felonious act of a coachman, guard, book-keeper, porter, or other servant in his employ." Now, it appears to me, that that liability cannot be got rid of because those whom the carrier employs in carrying out his contract may bear the name of "agents," or "sub-contractors," or any other fanciful title, but that every person who is actually employed in the performance of the contract which the carrier has undertaken to perform are his servants within this section. In the present case, and for the purposes of this action, therefore, Chaplin & Horne must be considered as the servants of the company, and anybody whom Chaplin & Horne employed for the purpose of delivering these goods from the railway terminus to Bunhill Row were also the servants of the company; and it makes no difference that by reason of some contract between the company and Chaplin & Horne, the former have not the power of dismissing such servants. Upon the general question, therefore, turning on the mere construction of the act of parliament, when I find that the railway company undertook to receive these goods in the county of Hants and to deliver them in London, I think that everything done in that journey and in pursuance of that undertaking must be treated in law as done by the company and by their servants; and this rule therefore should be discharged. I may also add, that if I did entertain any doubt upon the general question, which I do not, I should be disposed to hold that when by this document Johnson is described as the servant of the company, and that by it the plaintiff is made debtor to them in respect of the whole matter, they cannot be allowed to substitute a different state of things from that which they so represent.

ROLFE, B.—I am of the same opinion as to the result of the present rule. Upon the ques-

tion as to whether the company by issuing a delivery ticket, describing Johnson as one of their porters, were either estopped from shewing that that was not the case, or that the evidence of the document was conclusive upon that point, it appears to me that the document was merely matter of evidence, and taking all the evidence given at the trial into consideration, it shews that with respect to the mere fact of service, Johnson was rather the servant of Chaplin & Horne than of the company. But in my view of the case that is altogether immaterial. The opinion which I have formed upon the main question is one not given upon the spur of the moment, but arrived at after much consideration since the last argument. It appears from the evidence in the case that the company undertook as common carriers to deliver parcels from the various stations on their line to different parts of London, and that it was the practice of the company to carry those parcels in their carriages to Vauxhall, and to employ Chaplin & Horne as their agents in the delivery of the parcels thence to the various parts of London; that Chaplin & Horne employed Johnson to deliver this particular parcel to its destination, and that Johnson instead of delivering it stole it. Is the company liable for the loss the plaintiff thereby incurred? Now, it is clear that independently of the statute the defendants would be liable for the loss as a breach of the duty they had undertaken to perform. The statute, however, limits their responsibility by saying that in certain cases, of which this would have been one, they shall not be liable for loss unless an increased price for the carriage shall have been paid. But then comes the 8th section, which provides "that nothing in the act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in their employ." Was Johnson then a porter or a servant in the employ of the company? I think that he was. I entirely adhere to the principles laid down by Mr. Justice Littledale in *Laugher v. Pointer*, and which were afterwards acted upon by this Court in *Quar-*

1848. } COOKE AND FARQUHAR v.  
June 29. } SEELEY AND ANOTHER.

*Contract, Privity of—Principal and Agent—Partners—Banker—Parties.*

*There is in general sufficient privity of contract to maintain an action if the party actually making the contract with the defendant was acting for the plaintiff, and intended at the time to make the contract for him, though the defendant was not aware that the contract was made for the plaintiff.*

*The name in which the contract is made is primâ facie evidence of the party for whom the contract was made; but it is not conclusive (except by the custom of trade in the case of bills of exchange). Therefore where two plaintiffs sue on a contract between them and the defendants as bankers, and it appears at the trial that the bank account was opened in the name of one only of the plaintiffs, it is competent for the plaintiffs to prove that the account was opened on behalf of them both; and it is sufficient to maintain the action if it is proved that the plaintiff who actually opened the account at the time intended it to be the account of the two, without shewing that the defendants had before the action any notice that he had so intended. It lies on the plaintiff to prove this intention affirmatively; and the fact that the plaintiffs were partners, and that the money paid into the account belonged to the partnership, is not alone sufficient evidence to go to the jury that the contract was intended to be made on behalf of the two.*

This was an action of assumpsit, containing counts on a special contract by the defendants to do their duty as bankers, and also counts for money lent and on an account stated.

Plea (amongst others)—Non assumpsit.

The action came on to be tried, before Platt, B., at the Spring Assizes, 1848, at Taunton, when the plaintiffs were nonsuited, on the ground that there was no evidence to go to the jury of the plaintiff Cooke being a party to the contract. The evidence on this point was, that the plaintiff Farquhar carried on business under the name of the

Bridgewater Coal Company. The plaintiff Cooke was proved to be a partner in this concern, but that fact was not known to the public or to the defendants. The defendants were bankers at Bridgewater, and for some years they had an account with Farquhar. The pass-book, which, as usual, was alternately in the custody of the customer and the bankers, was headed, "John Farquhar, Esq. B.C.C." It was proved that monies belonging to the Bridgewater Coal Company were paid into this account from time to time; and a letter was put in evidence from Farquhar to the defendants in an early part of their connexion, in which he spoke of withdrawing "the company's account." There was no evidence that the defendants ever knew of Cooke before the commencement of the action.

For the defendants it was objected that on this evidence the contract on which the action was brought was exclusively with Farquhar; and *Sims v. Brittain* (1) and *Sims v. Bond* (2) were cited. The learned Judge being of opinion that there was no evidence of a joint contract, nonsuited the plaintiffs.

Crowder obtained a rule calling on the defendants to shew cause why there should not be a new trial, against which

*Kinglake, Serj., Barstow, and Phinn*, on the 29th of June, shewed cause.

[PARKE, B.—The question in this case is one of fact, as to the intention of Farquhar at the time he made the contract with the defendants. If, when he lent the money (for each deposit with a banker is a loan), he meant to lend the money for himself, and not for himself and partner, the two cannot sue; and it does not matter that the money belonged to the two, for Farquhar might intend that the bankers should be responsible to him alone, and he himself to his partner. But if he meant, at the time he made the loan, to make it for himself and partner, the two may sue; and in that case it is no matter whether it was partnership money or not: so that the ownership of the money is not material, except as a circumstance affording an inference as to Farquhar's intention. It is no matter

(1) 4 B. & Ad. 375.

(2) 5 Ibid. 389.

other, by appointing sub-contractors to get rid of all responsibility from loss by theft, it would lead to very dangerous consequences indeed. With respect to the other point in the case, I agree with my Brother Rolfe in thinking that the delivery ticket did not amount to an estoppel as to the fact of Johnson being the servant of the company, but was merely evidence of that fact.

*Rule discharged.*

1848. }  
June 5. } RICHARDS v. JAMES.

*Set-off*—2 Geo. 2. c. 22. s. 13.—*Debt due after Action.*

*The defendant pleaded to the further maintenance of the action a set-off of a debt due from the plaintiff to the defendant, after the commencement of the suit and before plea:—Held, that the plea was ill.*

Debt on an indenture whereby the defendant covenanted to pay to the plaintiff the sum of 500*l.* on the 22nd day of January 1830.

Plea to the debt and damages other than the costs—that the plaintiff ought not further to maintain his action, because the defendant says, that *after* the commencement of this suit, and *before* the time of the pleading of this plea, he, the plaintiff, became and was and still is indebted to the defendant in 550*l.*, for money since the commencement of this suit and before the pleading of this plea paid by the defendant for the use of the plaintiff, at his, the plaintiff's request, which said money exceeds the said debt and all damages other than the said costs, which money, he, the defendant, offers to set off, &c.

Demurrer, assigning for causes, that the plea does not shew that the debt attempted to be set off was due to the defendant at the commencement of this suit, and that it appears by the said plea, that the debt became due after the commencement of this suit, and that by law a debt becoming due after the commencement of an action cannot be set off in such action.

*Butt*, in support of the demurrer.—The plea is bad. A debt which did not exist

at the commencement of the action cannot be made the subject of set-off. The 13th section of the 2 Geo. 2. c. 22. (1) relating to set-off, implies that the debt to be set off must be in existence at the time of the action brought. It can hardly be contended on the other side, that where the general issue is pleaded and a *notice* of set-off given, a defendant is confined to such grounds of set-off as existed at the commencement of the suit, but that under a *plea* of set-off he is enabled to give in evidence debts that accrued after action brought but before plea pleaded. *Evans v. Prosser* (2) and *Braithwaite v. Coleman* (3) shew that a plea of set-off that the plaintiff was indebted to the defendant "at the time of plea pleaded" is bad; and that it ought to state that the plaintiff was indebted "at the commencement of the action."

[POLLOCK, C.B.—There is certainly no precedent for a plea like the present.]

He cited *Le Bret v. Papillon* (4) and *Rogerson v. Ladbroke* (5).

*Phipson*, in support of the plea.—It must be conceded, on the part of the defendant, that no precedent can be found for a plea like the present; but the Court will determine the question by reference to the words of the statute. The act of parliament is remedial, very beneficial in its operation, and ought to receive a liberal construction. It enacts, that "where there are mutual debts between the plaintiff and the defendant," they may be the subject of set-off; and there are no words to shew that those debts must exist at the time of action

(1) That section enacts, "That where there are mutual debts between the plaintiff and the defendant, or if either party sue or be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue where any such debt of the plaintiff, his testator or intestate is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

(2) 3 Term Rep. 186.

(3) 4 Nev. & Man. 654; s. c. 4 Law J. Rep. (N.S.) K.B. 152.

(4) 4 East, 502.

(5) 1 Bing. 98; s. c. 1 Law J. Rep. C.P. 6.

brought. The statute then proceeds in these terms:—"One debt may be set off against the other, and such matter may be given in evidence upon the general issue or pleaded in bar as the nature of the case shall require." Those words do not mean that a set-off may be pleaded in bar of the whole action—*Le Bret v. Papillon*, but in such a manner as shall effectuate the object of the statute, and according to the forms in which the Courts allow anything to be pleaded in bar. The meaning of the statute would therefore be, that in some cases set-off might be pleaded to the further maintenance of the action. Here the nature of the case requires a plea like the present.

[ALDERSON, B.—A defendant cannot give notice of setting off any debts, except those existing at the commencement of the suit.]

The plea might be pleaded at *Nisi Prius*, *puis darrein continuance*.

[ALDERSON, B.—The ordinary mode of pleading a set-off has existed for 120 years.]

[POLLOCK, C.B.—And cases like the present must have occurred again and again, and yet we find no form of plea like the present.]

POLLOCK, C.B.—The plaintiff is entitled to judgment. There is no precedent to warrant such a plea as the defendant has attempted to introduce. The defendant cannot, in this mode, set off a debt that has arisen since the commencement of the action.

ALDERSON, B.—I am of the same opinion. The present case must have arisen again and again, and would have found its way into the books, but that every one must have thought there was no doubt upon the subject.

ROLFE, B. and PLATT, B. concurred.

*Judgment for the plaintiff.*

1848. }  
June 5. } BROWN AND WIFE v. HARTILL.

*Covenant, Construction of—Notice.*

*A declaration in covenant, after reciting an agreement, dated the 27th of April 1840, between the plaintiffs and the defendant, and that the defendant was indebted to the plaintiffs in 60l., to be repaid*

*with interest, stated the agreement thus:—That the sum of 60l. shall remain in the hands of J. H. (the defendant) from the date hereof for one whole year; that at the expiration of that period (if the interest shall be then paid, and no notice be then given to call in the same,) the 60l. shall continue in the hands of the said J. H. for another year, and so on from year to year, until notice in writing shall be given by the said W. B. (the plaintiff) to call in the same; that twelve calendar months' notice in writing shall be given to call in the said 60l., and that at the expiration of the said notice, the same shall be paid by instalments of 10l. every third month, until the whole amount be paid, the first payment of 10l. to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount of 60l. shall be paid by the end of two years and six months from the date of the said notice. The declaration then stated, that on the 29th of May 1846, a notice in writing of that date was served upon the defendant, to call in the sum of 60l., and alleged, that although twelve calendar months from the date of service of the notice had elapsed before the commencement of this suit, and although six months from the expiration of the said twelve calendar months had also elapsed before the commencement of this suit, and although two instalments had become due and payable from the defendant, yet the defendant had not paid the said two instalments:—Held, (Platt, B. dissentiente,) that the notice to pay the principal sum might be given at any period of the year, and that the payment of the instalments was to be calculated from the date of the notice, and not from the end of the current year under the agreement.*

*Covenant.* The declaration stated the making of an agreement, under seal, dated the 27th day of April 1840, between the defendant of the one part, and the plaintiffs of the other; and after reciting, amongst other things, that the defendant was indebted to the plaintiff in 60l., which he agreed to repay, with interest, at 5l. per cent., the deed proceeded thus: "that the said sum of 60l. shall remain in the hands of the said John Hartill, at and after the rate of interest aforesaid, from the day of the date hereof until the full end and term of

one whole year. That at the expiration of that period (if the interest hereinbefore mentioned shall be then paid, and no notice *be then given* to call in the same) the said sum of 60*l.* shall continue in the hands of the said John Hartill for another year, and so on from year to year until notice in writing shall be given by the said W. Brown or Leah his wife to call in the same. That twelve calendar months' notice in writing shall be given to call in the said principal sum of 60*l.*, and that at the expiration of the said notice the same shall be paid by instalments of 10*l.* every third month, until the whole amount be paid; the first payment of 10*l.* to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount or sum of 60*l.* shall be paid by the end of two years and six months from the date of the said notice, the interest to be paid upon such amount only as shall remain unpaid." The declaration then stated that on the 29th of May 1846, notice in writing of that date was served by the plaintiffs upon the defendant to call in the principal sum of 60*l.*, and that, at the expiration of twelve months from that date, the principal sum of 60*l.* would be required to be paid by instalments of 10*l.* every third month until the whole amount thereof should be paid, and that the first payment of 10*l.* was to be made at the expiration of fifteen months from the date of the notice last aforesaid, so that the whole of the said amount or sum of 60*l.* should be paid at the end of two years and six months from the date of the said last-mentioned notice, nevertheless although twelve calendar months from the date of the said last-mentioned notice and from the service thereof on the defendant had elapsed before the commencement of this suit, and although six months from the expiration of the said twelve calendar months had also elapsed before the commencement of this suit, and although two instalments of 10*l.* and 10*l.* of the said principal sum of 60*l.* had become due and payable from the defendant before the commencement of this suit, under and by virtue of the said memorandum of agreement, and of the said notice so given thereunder as aforesaid, yet the defendant hath never at any time paid to the plaintiffs, or either of them, the said two instalments of 10*l.*, and 10*l.*, or either of them, but the

same still remain and are wholly due from and unpaid by the defendant. The declaration then alleged the non-payment of the interest due upon the said sum of 60*l.*

Demurrer. The causes assigned were that it did not appear that any sufficient notice to repay the principal money had been given, as it did not appear that such notice had been given at the expiration of any second or subsequent year, calculated from the *date of the contract*. That as the declaration shewed that the notice to call in the principal money was given after the expiration of the first year, the plaintiff should have made it appear clearly, by his declaration, that a period of fifteen months from the time of the giving of such notice had elapsed after the expiration of some second or subsequent year, calculated from the date of the alleged contract. Joinder in demurrer.

*Crowder*, in support of the demurrer.—The defendant contends that the notice, in order to be a valid one, must expire at the end of some year terminating at the date of the contract. The plaintiffs on the other hand contend that, after the end of the first year, a year's notice may be given to expire at any time. By the terms of this deed a *quasi* tenancy from year to year of this money is created.

[ALDERSON, B.—How do you explain the proviso at the end of the deed, that "the sum of 60*l.* shall be paid by the end of two years and six months from the date of the said *notice*"? Suppose a notice is given a week after the expiration of the year, under the agreement; according to your argument it would not expire until the end of two years all but a week, and then there would be the eighteen months for the payment of the instalments.]

That circumstance is in favour of the defendant, as it shews that the requisitions of the deed could be complied with only by a notice given at the exact end of each year.

[ALDERSON, B.—Your argument gives no effect to the words at the end of the deed "from the date of the said *notice*."] ]

Although the parties speak of the date of the notice, they mean the 27th of April, the time when the current year expires under the agreement. If this be not so, no effect is given to the expression that the money is to be held from year to year. The



words in the covenant are "from year to year until notice in writing *shall be given*," not "*shall have been given*."

*T. Jones, contra.*—The pleader, in framing this declaration, has put a correct construction upon the instrument. Every difficulty would be removed if the word "unless" were substituted in the covenant for the word "until."

*Crowder* replied.

**POLLOCK, C.B.**—I think the plaintiffs are entitled to the judgment of the Court. The question is, whether the notice to pay the principal sum is to expire at any period of the year, or at some year ending with the date of the agreement. The language of the deed is, that the money shall remain in the hands of the defendant for one whole year. It then proceeds, "that at the expiration of that period if the interest hereinbefore mentioned shall be then paid, and no notice be then given to call in the same." Those terms are ambiguous—they may mean if no notice shall then *have been* given, or they may have reference to the then present state of things. The deed then states that the money shall remain in the hands of Hartill "for another year, and so on from year to year, until notice in writing shall be given by the said William Brown, or Leah his wife, to call in the same, and that twelve calendar months' notice in writing shall be given to call in the said principal sum of 60*l.*, and that, at the expiration of the said notice, the same shall be paid by instalments of 10*l.* every third month until the whole amount be paid, the first payment of 10*l.* to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount or sum of 60*l.* shall be paid by the end of two years and six months from the date of the said notice;" according to these terms the notice may be given on any day throughout the year, and when that is done the whole amount will be paid within the two years and six months. That explains the ambiguity, and shews that the words "until notice in writing *shall be given*" mean until notice in writing *shall have been* given.

**ALDERSON, B.**—I am of the same opinion. We must give a reasonable construction to this contract, with a view to effectuate its

object if possible. The agreement is, that the defendant is to have the money for a year; and if, at the end of that time, interest is paid and no notice is given to call in the amount, the money is to continue in the defendant's hands for another year, and so on from year to year, unless notice in writing to pay the principal *shall have been* given. If at the expiration of the first year no notice has been given, and the interest has been paid, the defendant may hold it for another year. Now if the case stood there, the party entitled to the money might be put to some inconvenience, as the notice is to be of a particular length, namely, twelve months, and at the end of that time the payments are to be only by instalments. But then there is a stipulation that the entire sum shall be paid by the end of two years and six months from the date of the notice; so that, if the notice is dated on a particular day, and the instalments begin to be paid fifteen months after that date, the principal sum will be paid off within two years and a half from the date of the notice; whereas, if the defendant's counsel is correct in his argument, it is possible that three years and a half may elapse before the entire sum is paid off. Notice to pay the principal may be given at the end of the first year, subsequently to which time, if notice is not given within the year, the defendant is to hold the money from year to year. That view of the case gives effect to the whole instrument.

**ROLFE, B.**—The point has been argued as if there existed an analogy between this case and a tenancy from year to year, but the analogy is by no means complete, and does not assist the defendant in his argument. It appears to me, that a valid notice may be given at any time, and I should feel no doubt whatever on the point, but for the view entertained by my Brother Platt. It is argued on the part of the defendant, that the meaning of the covenant is, that if interest is paid, and no notice to pay the principal is given on the last day of the year under the agreement, the money is to go on from year to year. That, however, appears to me to be a forced construction, and to involve an absurdity. If interest is paid and no notice is given, the whole is consistent; the defendant then retains the money for another year; but if notice is given, that notice will regulate the

terms on which the money is to be held. It seems to me, that according to the true construction of this instrument the plaintiffs may give notice at any time.

PLATT, B.—I regret that I am compelled to differ from the rest of the Court, but it appears to me that the defendant is entitled to judgment. Let us look at the instrument itself, and endeavour to ascertain when notice to pay the principal sum is to be given. The words of the deed are, that the sum of 60*l.* shall remain in the hands of Hartill for the term of one whole year. —[His Lordship then read other portions of the agreement.]—It appears to me from this instrument, that the parties intended that three years and a half should expire before payment of this money. Two years were to expire before the instalments at three months were to begin to run. On the whole, it appears to me that notice was intended to be given on some 27th day of April, the date of the deed. I must add, that I express my opinion with some distrust, seeing that it is at variance with that of my learned Brothers.

*Judgment for the plaintiffs.*

1848. } MOUNSEY AND ANOTHER v.  
June 5. } PERROTT.

*Pleading — Contract — Non assumpsit, Plea amounting to.*

*The declaration stated, that it was agreed between the plaintiffs and the defendant, that the plaintiffs should sell to the defendant 1,000 barrels of flour, to arrive at Liverpool by the Hottinguer, from New York; that should the vessel be lost before arriving at Liverpool the sale should be void. Averment, that the vessel was not lost, but did arrive at Liverpool from New York, having on board 1,000 barrels of flour. Breach, that the defendant did not accept the said flour. Plea, that the Hottinguer was one of a line of packet ships sailing from New York to Liverpool at fixed periods, published and known beforehand amongst merchants at Liverpool; that the Hottinguer was to have set sail from New York for Liverpool three weeks before the said agreement, and was,*

*at the time of the agreement, expected to arrive at Liverpool within a week after; that it had been published and believed, amongst merchants at Liverpool, that the vessel was to arrive there in the course of the said voyage, which voyage was the voyage in this plea mentioned; that the plaintiffs had notice of the premises, and made the agreement with reference to the said voyage, and under the belief that the Hottinguer had sailed from New York; that the said vessel had not, at the time of the agreement, nor did she at any time set sail upon the said voyage in this plea mentioned, but that another vessel had been substituted for her, by reason whereof the defendant refused to accept and pay for the said flour: —Held, that the plea stated a different contract from that alleged in the declaration, and was therefore bad, as amounting to non assumpsit.*

*Assumpsit.* The declaration stated, that it was agreed between the plaintiffs and the defendant, that the plaintiffs should sell to the defendant 1,000 barrels of flour, to arrive at Liverpool by a vessel, called the *Hottinguer*, from New York, at a certain price; that should the vessel be lost before arriving at Liverpool, the sale should be void; that although the vessel was not lost before arriving at Liverpool, and afterwards did arrive at Liverpool from New York, having on board 1,000 barrels of flour, yet the defendant did not nor would accept the said flour.

*Fifth plea*—That the said vessel, called the *Hottinguer*, at the time of the making of the said agreement, was one of a line of packet ships sailing from New York to Liverpool, and from Liverpool to New York, at certain fixed periods, published and known beforehand amongst merchants and traders at Liverpool, and that the *Hottinguer* was, according to the ordinary course and times of sailing of the said line of packet ships, to have set sail from New York for Liverpool, a certain time, to wit, three weeks before the time of the making of the said agreement, and was at the time of the making of the said agreement expected to arrive at Liverpool within one week after the time of the making of the said agreement, and that at the time of the making of the

said agreement it had been published and was believed amongst merchants and traders at Liverpool that the said vessel was to arrive at Liverpool in the course of the said last-mentioned voyage, and that the said vessel was then performing such voyage, and that the voyage in the course of which the said vessel was to arrive as in the said agreement mentioned, was the voyage of the said vessel in this plea mentioned, and not any other or different voyage; that at the time of the making of the said agreement between the plaintiffs and the defendant, the plaintiffs and the defendant had notice of all the premises in this plea aforesaid, and made the said agreement with reference to the said voyage in this plea mentioned, and under the belief that the *Hottinguer* had then sailed from New York to Liverpool on the said voyage; that the *Hottinguer* had not, at the time when the said agreement was so made, set sail, nor did she at any time set sail upon the said voyage, but on the contrary thereof the proprietors of the said line of packet ships had, without the knowledge of the plaintiffs or the defendant, before the time of the making of the said agreement, to wit, on &c., being the day when the *Hottinguer* was so to have set sail from New York, substituted another vessel for the *Hottinguer*, for the performance of the said voyage, which was so as aforesaid expected to be performed by the *Hottinguer*, and then caused the said other vessel to set sail from New York for Liverpool instead of the *Hottinguer*, and which same vessel afterwards, and within a short time after the making of the said agreement, to wit, on &c., duly arrived at Liverpool; that at the time of the making of the said agreement, the *Hottinguer* was at New York, without having any of the said barrels of flour on board, and did not take the said barrels of flour, or any of them, on board, until a long time after the making of the said agreement, to wit, until &c., when the *Hottinguer* took the said barrels of flour on board, and set sail from New York to Liverpool, on another and different voyage from the voyage in the course of which the said vessel was expected to arrive, as in the said agreement mentioned, and afterwards, to wit, on &c., arrived at Liverpool with the said barrels

on board, in the course of the said last-mentioned voyage, and by reason of the premises the defendant became entitled to refuse to accept and pay for, and did refuse to accept and pay for the said barrels of flour. Verification.

Demurrer, assigning for causes, amongst others, that it was not stated in the plea how the agreement was made with reference to the voyage in the plea mentioned, and that the plea amounted to a denial of the agreement and promise alleged in the declaration, and amounted to the general issue. Joinder.

*Cowling*, in support of the demurrer.—The plea is bad, as amounting to the general issue, for it states an agreement which if proved would establish a different agreement from that which is stated in the declaration. The essence of the plea is, that the parties made an agreement with reference to a contract that the vessel had already sailed on a particular voyage. Secondly, the plea is bad in not shewing that the agreement was made with reference to that particular state of things. Thirdly, it is not a condition precedent to the plaintiff's right to enforce this contract, that a particular voyage should have been in the contemplation of the parties, and that the vessel should have sailed on that voyage. There are, indeed, cases in which contracts of that description have been made, and *Alewyn v. Pryor* (1) is an example of such a contract; but the present case differs materially from that. *Lowell v. Hamilton* (2) affords another instance of such a contract. *Johnson v. Macdonald* (3) is also in point.

[ALDERSON, B.—If the plea means that the flour was to arrive by a vessel then on her voyage, it is not the contract set out in the declaration.]

*Crompton*, contra.—The declaration shews that the vessel is to arrive on a voyage from New York to Liverpool, and before the plaintiffs can recover they must shew that she arrived on the voyage on which she sailed.

[ALDERSON, B.—The question is, whether any existing voyage is meant.]

(1) Ry. & Moo. 406.

(2) 5 Mee. & Wels. 639.

(3) 9 Ibid. 600; a. c. 12 Law J. Rep. (u.s.) Exch. 99.

The plea shews that the voyage on which the vessel did arrive is not the same voyage the parties meant. The plea may indeed be bad on special demurrer, as amounting to an informal traverse of the arrival, but that defect is not specially pointed out. The plea shews what voyage the parties to the contract intended. The plaintiffs must be confined to some voyage; they cannot be allowed to substitute a voyage two or three years afterwards. *Johnson v. Macdonald* is in point.

[PLATT, B.—The contract in the declaration is general, and is not confined to the particular voyage.]

[ALDERSON, B.—The plea refers to a voyage in which the vessel was then engaged, and then it is a different contract from that stated in the declaration.]

*Per Curiam* (4).—There must be  
*Judgment for the plaintiffs.*

1848. }  
June 22, 23. } KING v. COLE.

#### *Guarantie, Construction of—Evidence—Admissions.*

The defendant signed an instrument, addressed to the plaintiff in the following terms:—"In consideration of your having, by indenture, agreed to accept payment of the debt owing to you by A. B, by the following instalments, that is to say, 10s. in the pound, on the 18th day of August next, &c., I promise to guarantee the payment of the instalments;" and delivered it to the plaintiff in exchange for an indenture executed by the plaintiff:—Held, that the true construction of the instrument was, that the defendant made his promise in consideration that the plaintiff would execute an indenture, and release A. B; and, consequently, that the execution of the instrument was not an admission by the defendant that the plaintiff had released A. B, and furnished no evidence in support of an issue taken on an allegation in the declaration that the plaintiff had released A. B.

(4) Pollock, C.B., Alderson, B., Rolfe, B., and Platt, B.

This was an action of assumpsit on a guarantie. The declaration stated that one Joseph Wilkinson was indebted to the plaintiff; and, thereupon, in consideration that the plaintiff would agree to accept payment by instalments of the said debt from the defendant, and would execute an indenture, purporting to be made by and between &c. (describing it), and thereby release unto the said J. Wilkinson the said debt, the defendant promised to pay the debt by instalments. The declaration then averred that the plaintiff did agree to accept payment, by instalments, of the debt, and did execute the said indenture, and did thereby release the said J. Wilkinson. Breach, non-payment of the instalments.

The defendant pleaded, first, *non assumpsit*; and, secondly, a traverse of the averment that the plaintiff executed the said indenture, and thereby released J. Wilkinson. (There were other pleas, which it is not necessary to notice.)

At the trial, before Rolfe, B., at the Liverpool Spring Assizes, 1848, this cause, and another of *Hassall v. Cole*, came on together. *Hassall v. Cole*, which was in the Queen's Bench, and in which the pleadings were the same as in the present case, was taken first. The plaintiff having, in support of the second issue, produced an indenture, called the attesting witness, who, on cross-examination, proved that he had counted the words in the indenture, and that they were somewhat above the number of words covered by the stamp on it. The indenture was, consequently, rejected. The plaintiff then produced and proved the guarantie in question, which was in the case of *Hassall v. Cole*, in the following terms:—"Mr. John Hassall. In consideration of your having, by indenture bearing date the 18th day of February 1847, agreed to accept payment of the debt owing to you by J. Wilkinson of Birkenhead, amounting to the sum of 650*l.*, by the following instalments, that is to say, the sum of 325*l.*, part thereof, being at the rate of 10s. in the pound, on the 18th day of August 1847, and the sum of 325*l.*, the residue of the said debt, on the 18th of February 1848, and of your having, by the same indenture, released the said J. Wilkinson from such debt, I do hereby guarantee to you the

payment of such debt or sum of 650*l.*, at the times and in manner aforesaid. Dated this 18th of February 1847.

"William Cole."

It was proved that Cole signed agreements in this form, addressed to each of Wilkinson's creditors, and delivered them to his attorney, who carried them, with the indenture, to the creditors; each of whom, as he executed the deed, received his signed guarantie from the attorney at one and the same time.

For the plaintiff it was contended that the guarantie was an admission by the defendant that the plaintiff had released Wilkinson, and was original evidence of such release, though the indenture was not read. For the defendant it was objected that the guarantie was no admission of a past release, but rather a statement that one was intended to be made, and also that if it was an admission of a past release, the consideration being in that case bygone, would not, under *non assumpsit*, prove the promise laid in the declaration. It was also objected that there was a variance, inasmuch as the guarantie did not admit such an indenture as was described in the declaration.

The learned Judge gave leave to move to enter a nonsuit on any or all of these objections, and directed a verdict for the plaintiff, reserving power to amend the declaration if the Court should think fit.

The present case of *King v. Cole* was then called on, and it being agreed that the pleadings and facts in all respects were the same as those in *Hassall v. Cole*, a similar verdict was directed, with similar leave to move. The evidence in *Hassall v. Cole* to be taken as evidence in *King v. Cole*.

*Knowles* moved accordingly, and obtained a rule, on the ground that there was no evidence to support the averment of the release. On the other grounds the Court refused a rule.

On the 22nd of June (1),—

*Martin* and *Tomlinson* shewed cause.—The point as to the amendment does not arise in this cause, for though it was not noticed at the trial, there was an admission in the cause of *King v. Cole* that the plaintiff "had executed the indenture in the

declaration mentioned." This puts an end to one part of the difficulty; and the only question remaining is whether there was evidence that the plaintiff "thereby released Wilkinson." The guarantie is an admission by the defendant of "his having released Wilkinson by the indenture;" and though the indenture could not be read, yet an admission by the party in the cause of the legal effect of an instrument is original evidence—*Slatterie v. Pooley* (2), *Howard v. Smith* (3). If the indenture had been destroyed, this memorandum would surely have been secondary evidence to go to the jury as to its contents; and unless *Slatterie v. Pooley* is to be overruled, whatever admission by the party in the cause is secondary evidence of a lost deed, is also original evidence of the effect of the deed, though it be not lost.

*Knowles*, in support of his rule.—The words of the guarantie must be construed to mean "in consideration that he would release;" that is the sense in which the pleader who drew the declaration has understood them, and, unless they be so understood, the writing discloses no consideration; and the plaintiff should be nonsuited under *non assumpsit*. It is true that the Court refused to grant a rule to shew cause on the issue of *non assumpsit*, but that was only because Mr. Baron Parke was afraid that it might be thought that the Court entertained some doubt upon the construction of the writing when none was entertained; and it is clear that the construction of the writing is that the consideration was executory. The evidence shewed that the defendant signed the memorandum, and handed it over to his attorney, and that the attorney, some days afterwards, got the indenture executed.

[*ROLFE, B.*—Yes; but the effect of his handing the agreement to his attorney merely was to make him his agent, with authority to hand it over to the plaintiff; and the agent having done so, it must be considered as if the defendant himself had at that moment handed it over. It is clear there was no admission until the memoran-

(2) 6 Mee. & Wels. 664; s. c. 10 Law J. Rep. (N.S.) Exch. 8.

(3) 3 Man. & Gr. 284; s. c. 10 Law J. Rep. (N.S.) C.P. 245.

(1) Before Alderson, B., Rolfe, B., and Platt, B.

dum passed out of the hands of the defendants' agent. I think the way I put it at the trial was, that the words "in consideration of your having" meant "as soon as you shall have released," and that the jury might, on the evidence, construe the handing over the agreement in exchange for the executed indenture, as a statement, not that the plaintiff had released Wilkinson before the handing over of the agreement, in which case there was no evidence to prove the declaration under *non assumpsit*, nor that the plaintiff was about to release Wilkinson, in which case there was no evidence to support the other issue, but as a statement that at the same instant the release was contemporaneously executed, in which case there was evidence to go to the jury on both issues.]

ALDERSON, B.—The whole question depends upon what is the true construction of the words in the guarantie? If entirely future, it was no evidence to prove the release. If entirely past, it does not support the declaration. If neither past nor future, but contemporaneous, it does both. We will consult my Brother Parke as to what passed when the rule was moved for.

*Cur. adv. vult.*

ALDERSON, B. (June 23) delivered the judgment of the Court.—The question in this case is, whether there is any evidence of the averment in the declaration that the plaintiff by the indenture, dated &c., released the debt due to him from J. Wilkinson. The admissions put in prove that the indenture described in the declaration was executed, but they go no further; they do not shew what the operation of that indenture was. The only evidence of this, suggested by the counsel for the plaintiff, was the guarantie itself. That guarantie was as follows.—[He then read the guarantie, which was in the same terms as that in *Hassall v. Cole* above set forth.]—This guarantie was signed by the defendant at an antecedent period, but being delivered to his attorney to be handed over to the plaintiff, we think that it must be considered as an admission made by the defendant on the day on which it was so handed over, and is the same as if it had been written or spoken by the defendant at

that time. And, if it be so, it is clear that an admission, either verbal or in writing, by him of the contents of a deed would be sufficient proof against him of those contents.

What then is the true construction of the guarantie? If by the words "having released" we are to understand an admission by the defendant that at some antecedent period the plaintiff had released, the guarantie will shew the truth of the averment. But then the declaration would not be proved if this were the true construction. On the other hand, the Court may treat those words as meaning, that if at some future time the plaintiff shall have released the debt the defendant will guarantee the same to him. If this be so, the declaration indeed will be supported; but the admission will not prove the averment that, in fact, such a release was executed by the plaintiff. We think this is the true construction of this guarantie under all the circumstances of this case. It would be sufficient, however, to say that an admission offered by the plaintiff in evidence, but capable equally of either construction, would not be sufficient proof of an averment in a case in which the onus lies on the plaintiff. We think, therefore, that there must be a nonsuit entered.

PARKE, B.—I was not present when cause was shewn against the rule, but I perfectly concur in the judgment now given. The truth is, the plaintiff was in a dilemma. If the construction was put upon the instrument which was necessary to support the declaration, there was no evidence to prove the issue on the release; and if the construction was put upon it that would make it evidence of the release, it would not prove the declaration under *non assumpsit*, so that the plaintiff must fail either way. But there is no doubt that this instrument did support the declaration, and that the pleader has put the true construction upon it. The word "having" does not refer to the time when the instrument was signed, but to the time when the instalment was to be paid.

*Rule absolute to enter a nonsuit.*

1848. } COOKE AND FARQUHAR v.  
June 29. } SEELEY AND ANOTHER.

*Contract, Privity of—Principal and Agent—Partners—Banker—Parties.*

*There is in general sufficient privity of contract to maintain an action if the party actually making the contract with the defendant was acting for the plaintiff, and intended at the time to make the contract for him, though the defendant was not aware that the contract was made for the plaintiff.*

*The name in which the contract is made is prima facie evidence of the party for whom the contract was made; but it is not conclusive (except by the custom of trade in the case of bills of exchange). Therefore where two plaintiffs sue on a contract between them and the defendants as bankers, and it appears at the trial that the bank account was opened in the name of one only of the plaintiffs, it is competent for the plaintiffs to prove that the account was opened on behalf of them both; and it is sufficient to maintain the action if it is proved that the plaintiff who actually opened the account at the time intended it to be the account of the two, without shewing that the defendants had before the action any notice that he had so intended. It lies on the plaintiff to prove this intention affirmatively; and the fact that the plaintiffs were partners, and that the money paid into the account belonged to the partnership, is not alone sufficient evidence to go to the jury that the contract was intended to be made on behalf of the two.*

This was an action of assumpsit, containing counts on a special contract by the defendants to do their duty as bankers, and also counts for money lent and on an account stated.

Plea (amongst others)—Non assumpsit.

The action came on to be tried, before Platt, B., at the Spring Assizes, 1848, at Taunton, when the plaintiffs were nonsuited, on the ground that there was no evidence to go to the jury of the plaintiff Cooke being a party to the contract. The evidence on this point was, that the plaintiff Farquhar carried on business under the name of the

Bridgewater Coal Company. The plaintiff Cooke was proved to be a partner in this concern, but that fact was not known to the public or to the defendants. The defendants were bankers at Bridgewater, and for some years they had an account with Farquhar. The pass-book, which, as usual, was alternately in the custody of the customer and the bankers, was headed, "John Farquhar, Esq. B.C.C." It was proved that monies belonging to the Bridgewater Coal Company were paid into this account from time to time; and a letter was put in evidence from Farquhar to the defendants in an early part of their connexion, in which he spoke of withdrawing "the company's account." There was no evidence that the defendants ever knew of Cooke before the commencement of the action.

For the defendants it was objected that on this evidence the contract on which the action was brought was exclusively with Farquhar; and *Sims v. Brittain* (1) and *Sims v. Bond* (2) were cited. The learned Judge being of opinion that there was no evidence of a joint contract, nonsuited the plaintiffs.

Crowder obtained a rule calling on the defendants to shew cause why there should not be a new trial, against which

*Kinglake, Serj., Barstow, and Phinn*, on the 29th of June, shewed cause.

[PARKE, B.—The question in this case is one of fact, as to the intention of Farquhar at the time he made the contract with the defendants. If, when he lent the money (for each deposit with a banker is a loan), he meant to lend the money for himself, and not for himself and partner, the two cannot sue; and it does not matter that the money belonged to the two, for Farquhar might intend that the bankers should be responsible to him alone, and be himself to his partner. But if he meant, at the time he made the loan, to make it for himself and partner, the two may sue; and in that case it is no matter whether it was partnership money or not: so that the ownership of the money is not material, except as a circumstance affording an inference as to Farquhar's intention. It is no matter

(1) 4 B. & Ad. 375.

(2) 5 Ibid. 389.

what the defendants knew or intended; for it is well settled law that when an agent makes a contract for an unknown principal, either the principal or the agent may sue. If the defendants believed Farquhar to be the sole contractor, they may have any equities of set-off as if he were the sole contractor; but subject to that, the two may sue. The question for us, therefore, is, whether there was any evidence that the loans were intended to be made on behalf of both the plaintiffs.]

The plaintiff Cooke was, on this evidence, utterly unknown to the defendants up to the time of the commencement of the action. Farquhar only was known to them: and he by the form in which the pass-book is headed, has, in effect, said to the defendants "Know me, and me only, in this matter." He cannot now join with Cooke, in an action contradicting this written assertion. *Lucas v. De la Cour* (3) was decided on that principle.

[PARKE, B.—Mr. Justice Bayley puts that case on its true ground, that it was evidence; and no doubt the form of the heading of the pass-book in the present case is evidence, and strong evidence, that the contract was intended to be with Farquhar alone, but it is not conclusive.]

In *Trueman v. Loder* (4) Lord Denman, in delivering judgment, says, "Some cases were quoted in which the question whether an agent or a partner bound himself only, or his principal or firm, has been held to depend on his intention to deal for himself or his partner; but, on examining all those cases it will be found that the contracting party was carrying on two different concerns, one for himself, the other for his principal or firm. The world would know him in two different characters, and each party dealing with him was bound to inquire in which he appeared on any particular occasion." In the present case, Farquhar was known to the world and to the defendants in only one character. And this is an action against a banker on a contract made with him according to the custom of bankers. It would be most inconvenient if a banker was held to contract with any one

but the person in whose name the account was opened. If a cheque had been presented, drawn by Farquhar & Cooke, could the bankers have been bound to honour it because Farquhar, in opening an account in his own name, intended to open it for himself and Cooke, though the bankers never heard of him?

[PARKE, B.—No: the contract of the bankers would be to honour cheques drawn in the name of Farquhar. But is there any difficulty in making a contract with the two to honour the drafts of one only?]

In bills of exchange the persons in whose names the contract is made, and those only, are parties to the contract—*Emly v. Lye* (5), *Siffkin v. Walker* (6). And here one count is on the contract implied by the commercial usage of bankers, which ought to be construed in the same way as the contract in a bill of exchange, as exclusively personal; and the other is for money lent, which, perhaps, does not lie against a banker at all—*Pott v. Clegg* (7).

[PARKE, B.—The Chief Baron doubted it, but the majority of the Court held that deposits at a banker's were money lent, creating a present debt from the banker, with a superadded contract to pay the cheques of the customer whilst the banker continued indebted.]

At all events, the contract on which this money was lent was a contract between banker and customer, which is peculiarly personal, as much depends on the individual character of the customer. A banker may have good reasons for being ready to open an account with A. and not willing to open it with B. He should, therefore, have an option, and not be held to have opened an account with one person when he believes himself to be opening an account with another.

[PARKE, B.—I do not think there is any authority for that as a proposition of law: it is a strong observation to a jury, no doubt. Both in *Sims v. Brittain* and in *Sims v. Bond* the Court thought that the real customer might sue if he could prove that the account was opened for him. *Sims v. Bond*

(5) 15 East, 7.

(6) 2 Campb. 308.

(7) 16 Mea. & Wels. 321; s.c. 16 Law J. Rep. (N.S.) Exch. 210.

(3) 1 Mau. & Selw. 249.

(4) 11 Ad. & El. 589; s.c. 9 Law J. Rep. (N.S.) Q.B. 165.



decides that the ownership of the money deposited is not sufficient to prove this.]

And there is no more evidence here than in *Sims v. Bond*. The letters "B.C.C." after Farquhar's name, in the pass-book, were quite unexplained, and may have been inserted for any purpose.

*M. Smith*, in support of the rule.—It is a general rule that where a contract is made with a partnership in which there is a dormant partner he may be joined as a plaintiff; and though there is an exception in the case of negotiable instruments not made in the name of the partnership, no authority has been cited for saying that a similar exception extends to contracts with bankers. Here there was evidence to go to the jury that the account was opened for the partnership. The letters "B.C.C." placed after Farquhar's name in the pass-book were placed there for some purpose. The plaintiffs say that it was for the purpose of marking that the account was that of the Bridgewater Coal Company; and they prove further by a letter that early in the transactions between Farquhar and the defendants he called it "the account of the company." If it were necessary to prove that the defendants knew that it was the account of the company, that affords some evidence of it; and the fact that the money belonged to the partnership, though not sufficient by itself, strengthens the other evidence.

*PARKE, B.*—I think that the nonsuit must be set aside. The general rule is not disputed to be that a principal may sue on the contract made in the name of his agent; and I cannot help thinking that there was evidence to go to the jury that Farquhar, in opening this account with the defendants, acted for both the plaintiffs. The case of *Sims v. Bond* decided that the fact of the money which was paid into a banker's account belonging to particular persons is not evidence that the account was opened for them; but here, in addition to that, there are the letters B.C.C. in the pass-book. I think a jury should decide whether these letters after his name do not shew that in opening the account Farquhar acted for both the plaintiffs; and there is also the letter

which was evidence the same way. Then one of the defendant's counsel argued that there is a peculiarity in the contract of a banker which, like the contract in a bill of exchange, is exclusively with those named in the contract. I perfectly agree that very distinct and satisfactory evidence must be given to enable the plaintiffs to prove that what is apparently the contract of the one is really the contract of the two. The name at the head of the bankers' pass-book is not, however, conclusive, as the name in a bill of exchange by the custom of merchants is. *Sims v. Bond* is an authority that the banking account may be opened, and that it may be shown who is the real customer, though the same case decides that must be proved by more than the mere ownership of the money. Here, I think, there is some evidence to go to the jury, though very probably the defendants on this evidence would have obtained the verdict.

*ALDERSON, B.*—I agree in thinking that there is a case to go to the jury, though a slight one. The letters B.C.C. are ambiguous. They may have meant Bridgewater Coal Company, and yet have been placed there by Farquhar as a memorandum to enable him to keep his accounts with Cooke, and not showing any intention to open the account for the company. But I think that the writing of "B.C.C." in the pass-book is a fact that should have been left to the jury as evidence whether Farquhar was really acting as agent for both the plaintiffs in opening this account. If he was, the two may sue upon the contract, subject to any equities the defendants may have against Farquhar alone.

*PLATT, B.*—The letters B.C.C. were not explained at the trial at all. They might have been added merely as a designation to Farquhar. I therefore thought that they afforded no evidence, and I still think there was no case to go to the jury; but I dare say I am wrong, as my two Brothers are of a different opinion, and there must be a new trial.

*Rule absolute.*

1848. }  
May 20. } VARLEY AND OTHERS v. LEIGH.

*Debt—Freehold Rent—3 & 4 Will. 4. c. 27. s. 36.*

*By a local act of parliament, overseers of a parish were authorized to grant the fee simple of certain plots of land to certain parties, subject to the payment to the said overseers and their successors of certain yearly chief rents, and also subject to certain covenants, amongst which covenants were, that the grantee for himself, his heirs, &c. covenanted with the said overseers and their successors, "that he would duly pay the said yearly chief rent to the said overseers," &c. In an action of debt brought by the overseers against a grantee holding under a conveyance containing such covenant, for arrears of rent,—Held, on general demurrer, that debt would lie.*

*Quære—Whether since the passing of the statute 3 & 4 Will. 4. c. 27. s. 36. an action of debt lies for the recovery of the arrears of a rent in fee.*

**Debt.** The declaration stated that the plaintiffs before, &c., were, &c. overseers of the poor of the township of Newton, in the parish of Manchester, in the county palatine of Lancaster, &c.; and that theretofore, to wit, &c., by a certain deed or instrument in writing then made under and by virtue of and according to the provisions of a certain act of parliament passed in the 5th year of the reign of George the Fourth, intituled, 'An Act for confirming certain leases and a conveyance in fee of certain lands, allotted by an act made in the 42nd year of the reign of King George the Third for dividing, allotting, and inclosing the common or waste situate in the manor of Newton, in the county palatine of Lancaster, to the overseers of the poor in the township of Newton,' and for enabling the said overseers to sell and convey in fee other plots of land, all formerly part of the said waste, for building upon, in consideration of yearly chief or ground rents, to be reserved for the same, which said deed or instrument sealed with the respective seals of W. B. J. R. P. L. T. L. J. W. W. H. H. I. A. T. and the defendant, the plaintiffs

now bring here into court, the date whereof is the day and year aforesaid, the said W. B. J. R. and P. L. then being the overseers of the poor of the said township of Newton, at the request and by the direction of the said H. I. T. L. J. W. W. H. and A. T. then being five of the trustees acting under and by virtue of the said first-mentioned act of parliament, for and in consideration of the rents and covenants thereafter reserved and contained, did thereby, in exercise of the powers or directions contained in the said first-mentioned act, grant, bargain, sell, and convey unto the defendant, his heirs and assigns a certain plot, piece or parcel of land, with the appurtenances, in the said deed particularly mentioned and described, and being parcel of the plot or parcels of land mentioned and comprised in the schedule to the said first-mentioned act annexed; to have and to hold the said premises, with the appurtenances, unto and to the use of him, the said defendant, his heirs and assigns for ever, subject, nevertheless, to and charged and chargeable with the payment for ever thereafter to the overseers of the poor of the said township of Newton aforesaid, for the time being, of the yearly chief or ground rent of 27*l.* 19*s.*, free from all taxes, charges, and deductions, payable half-yearly on the 24th day of June and the 25th day of December in every year, and the first half-yearly payment thereof to be made on the 25th day of December then next; and also subject to and charged with such powers and remedies for and concerning the recovery thereof as were contained in the said first-mentioned act. And the said defendant for himself, his executors, administrators, and assigns, did thereby covenant himself with the said overseers and their successors, that he, the defendant, and his heirs or assigns, should and would at all times thereafter duly pay to the said overseers and their successors the said yearly chief or ground rent of 27*l.* 19*s.*, at the times and in manner aforesaid, free from all present and future taxes, charges, rates, and assessments whatsoever, as by the said deed or instrument in writing, reference being thereunto had will more fully and at large appear. Nevertheless, the plaintiffs, in fact, say that after the making of the said deed, and whilst the plaintiffs

were overseers as aforesaid, to wit, on the 24th day of June in the year of our Lord 1847, a large sum of money, to wit, the sum of 41l. 18s. 1d. of the said yearly chief or ground rent for one year, and the half of another year then last elapsed, became and was due and payable from the defendant to the plaintiffs as overseers as aforesaid, and still remains in arrear, contrary to the force and effect of the said deed and of the said covenant of the said defendant, whereby an action hath accrued, &c.

General demurrer and joinder. The ground of demurrer was, that an action for debt would not lie for the arrears of a rent in fee.

*Cowling*, in support of the demurrer.—The declaration is bad in substance. Debt does not lie under the circumstances disclosed by this declaration. At common law, it is clear that debt does not lie to recover arrears of a freehold rent, or of an annuity arising out of land—*Webb v. Jiggs* (1), *Kelly v. Clubbe* (2). Neither does it lie by reason of the act of parliament, 5 Geo. 4. c. cxxxv. It is true, that by the 17th section of that act (3) a form of conveyance is given, by which the lessees are to enter into the covenant set forth in this declaration; but the effect of this is not to substitute the action of debt for the remedies at common law: and section 19. would appear to shew that no remedy by way

of action was intended to be given; but that the remedy was to be by way of distress upon the land itself.

*Crompton*, contra.—The obligation of the defendant to pay the chief rent to the plaintiffs as overseers for the time being is an obligation created by and dependent upon the act of parliament. This action, therefore, is virtually an action upon the act of parliament, the form of covenant being given by the act; this is, therefore, properly an action of debt. This case does not fall within either of the two technical rules under which it has been held that debt will not lie to recover arrears of a freehold rent. The obligation of the defendant to pay the amount does not arise out of the relation between the parties, or from the permanency of the profits of the estate; it arises out of the express covenant entered into by the defendant with the plaintiffs. This distinguishes the present case from that of *Webb v. Jiggs*, which has been cited. Secondly, it is submitted, that as the reason formerly given why debt would not lie for the arrears of a rent in fee,—that the law would not suffer a real injury to be remedied by an action merely personal, but that the party must be left to his remedy by action real,—no longer exists, and inasmuch as such actions real are now abolished, the remedy by action of debt is now in force.

*Cowling* replied.

(1) 4 Mau. & Selw. 113.

(2) 3 Brod. & Bing. 130.

(3) The 17th section enacts, That the overseers of the poor of the parish of Newton shall when called upon or requested by the trustees, grant and convey the fee simple and inheritance of and in all the plots of land comprised in the schedule, unto all persons to whom the trustees, or five or more of them shall have previously contracted to convey them, "subject to and charged and chargeable with the payment to the said overseers and their successors for ever thereafter of such yearly chief rent or chief rents, ground rent or ground rents, for or in respect of the same, as the said trustees shall have contracted for in that behalf, and with such powers and remedies for the recovery thereof when in arrear as are hereinafter contained; and also subject to such covenants, clauses, conditions, &c. as the trustees shall think fit to impose, &c., and which conveyances may be in form following." [Here followed the form of conveyance, which was similar to that described in this declaration.]

By sect. 19. a power of distress was given if the rents should be in arrear for the space of twenty days.

POLLOCK, C.B.—I am disposed to think that even upon the last ground suggested by the plaintiff's counsel, this declaration may be supported. It appears to me, that since the statute 3 & 4 Will. 4. c. 27. s. 36. has abolished actions real so far as they are applicable to the recovery of a rent in fee, and inasmuch as there must be a remedy at law in its place, debt would be the proper form of action for that purpose. But it is sufficient for the decision of the present case to say, that inasmuch as the defendant has expressly covenanted with the present plaintiffs to pay them the rent, debt clearly lies for its non-payment.

ROLFE, B.—I quite concur with the Lord Chief Baron in thinking that upon the last ground the judgment of the Court should be in favour of the plaintiffs; but I wish to

guard myself from expressing an opinion, that in consequence of the statute 3 & 4 Will. 4. c. 27. an action of debt can be brought to recover the arrears of a rent in fee.

*Judgment for the plaintiffs.*

1848. }  
June 28. } ALLEN v. EDMUNDSON.

*Bill of Exchange—Notice of Dishonour—Pleading.*

*The holder of a dishonoured bill is entitled to recover against an indorser, if he has sent the bill in due time to the place of business of the indorser, for the purpose of giving notice of dishonour, and found it closed and no one there, although no written notice of dishonour was left by him. Such facts do not, however, prove an issue that notice of dishonour was given, for their legal effect is not to give notice, but to dispense with the necessity for giving it, and the pleading must be according to the legal effect.*

*Semble—That the holder may, if he pleases, elect to treat the absence of the indorser from his place of business as extending the time for giving notice; and that a notice of dishonour given at the place of business, is in time, if given at the first reasonable opportunity afterwards, and that proof of its having been so given will support an averment of due notice having been given.*

This was an action of debt. The defendant pleaded that he had drawn a bill, and indorsed it to the plaintiff on account of the debt, that the bill was dishonoured, and that he had not due notice of its dishonour at the time when such notice ought to have been given.

The plaintiff replied, traversing the want of notice, on which issue was joined.

At the trial, before Rolfe, B., at Liverpool Spring Assizes, 1848, it appeared, in evidence, that the plaintiff and the defendant both resided in Manchester. The bill was dishonoured in London, and it was returned to the plaintiff in proper time, on the morning of Tuesday. The plaintiff sent it during business hours on that day to the defendant's counting-house. The messenger

found it shut up. He knocked, and no one answering he came away. On the Wednesday he went again, and, according to his account, found nobody there but a boy playing at marbles. No notice was left with this boy. On the Monday following the defendant received formal notice of dishonour, which he said was too late. That was the plaintiff's case. The defendant's counsel, with a view of disproving it, called the defendant's son, a boy, who swore that his father had left Manchester on Tuesday night, and returned on Monday morning, but that the witness remained in charge of the office, and was there constantly during business hours, till his return; and he said that if any notice had been left with him he would have forwarded it. The plaintiff's counsel relied on the knocking at the door on the Tuesday, as being equivalent to notice of dishonour, and cited *Crosse v. Smith* (1). The learned Judge gave the defendant leave to move to enter a nonsuit if this was no evidence of notice of dishonour; and he left it to the jury to find for the plaintiff, if they believed that the plaintiff sent the bill for the purpose of giving notice of dishonour to the place of business of the defendant, and the messenger, during business hours, knocked and found no one there. The jury found for the plaintiff.

*Martin* obtained a rule to enter a nonsuit, pursuant to the leave reserved.

*Atherton* now shewed cause.—The objection taken is, that there is no evidence to prove the averment that notice was given. It is not disputed that the plaintiff did, on the Tuesday, all that, as holder of the bill, he was bound to do; but it is contended, that though the plaintiff was entitled to recover on the bill against the defendant, in consequence of his having sent in proper time to his place of business, and found no one there, yet that should be pleaded as an excuse for not giving notice, not as being notice. This would be so, if, in order to prove notice of dishonour, it was necessary to prove that the notice came to the party; but that is not so. If the holder has discharged his duty by taking the customary steps to send information to the party to the bill, he has "*given notice*" to him, even

(1) 1 Mau. & Selw. 546.

though it should be proved affirmatively that the information never did reach him. Thus a letter posted in due time is notice of dishonour, though it miscarry.

[ALDERSON, B.—In a case tried before me, it was proved that the letter containing notice was posted in due time, but that by a mistake of the post-office, the letter was carried to Norwich instead of Warwick, I think, but, at all events, by a circuitous route, so that the defendant did not receive it till three or four days too late, yet that was held to be notice in due time.]

Notice of dishonour is proved by proving facts which shew the holder has done what the law merchant requires him to do in order to make the previous party liable. If the messenger in this case had thrust a written notice through the door, it would have been notice, though it had been proved by the clearest evidence that a stranger had afterwards destroyed the writing, and the defendant never received it. In *Crosse v. Smith*, Lord Ellenborough, in delivering a considered judgment, says, "That brings it to the question, whether sending the bill by a clerk after ten o'clock, and knocking and waiting at the counting-house door was sufficient notice in point of law, and we think that it was. The period from ten till eleven was a time during which a merchant's counting-house ought to be open, and some person expected to be met with there. The counting-house is a place where all appointments concerning the joint business, and all notices should be addressed, and it is the duty of the merchant to take care that a proper person be in attendance. It has however been argued, that notice in writing left at the counting-house, or put in the post, was necessary; but the law does not require it, and with whom was it to be left? Putting a letter in the post is only one mode of giving notice; but where both parties are residing in the same town, sending a clerk is a more regular and less exceptional mode. The case of *Goldsmith v. Bland* (2), before Lord Eldon, supports this doctrine. The only notice of the dishonour of the bill was by a clerk of the indorsee, who went to the counting-house of the indorser, found the counting-house shut up,

and no person there, saw a servant girl, who said nobody was in the way, and he then returned without leaving any message. Lord Eldon told the jury, that if they thought the indorser was bound to have somebody there, the notice was regular. The jury were satisfied that the hour was a proper hour, and that the defendant ought to have had a clerk there." It may be said that the question in *Crosse v. Smith* arose under the old general issue, as to whether the bill was satisfaction, and that consequently the decision might be supported without deciding whether what took place was, in legal effect, notice or dispensation from notice; but the remark will not apply to *Goldsmith v. Bland*, where the plaintiff, in his declaration, must have averred notice, and Lord Eldon have ruled that the averment was proved. And in *Crosse v. Smith* it is clear that Lord Ellenborough means to say, that the facts there are notice in point of law.

[PARKER, B.—It is necessary to consider whether the precise averment traversed is proved; and if the evidence had stopped at what took place on the Tuesday it would be necessary to decide whether what then took place was in legal effect a dispensation from giving notice of dishonour or notice of dishonour itself. But, assuming it not to be notice of dishonour, and that the plaintiff had a right to treat it as discharging him from taking any further steps, he might also have a right to elect to treat it as giving him further time in which to give notice, and if he did so elect, the formal notice given on the Monday may be notice given in due time within the meaning of the issue.]

[PLATT, B. referred to *Firth v. Thrush* (3).]

*Martin*, in support of the rule.—The case was never put at the trial in the way now suggested by the Court. If it had been the opinion of the jury would have been asked for as to whether the plaintiff had not an opportunity of delivering notice between the Tuesday and the Monday, by leaving it with the defendant's son, at his counting-house; and though there was some insinuation that he was such a child as to be unfit to receive notice, no doubt the jury would

(2) Bailey on Bills, 224, n. 100.

(3) 6 B. & C. 367; s. c. 6 Law J. Rep. K.E. 366

have found for the defendant on that point; but the plaintiff's counsel relied on what took place on Tuesday, and on that alone: and on the motion to enter a nonsuit the Court will consider only the points made at the time leave was given.

[*Atherton* admitted that he did not take the point at the trial.]

Then as to the point actually made. The common sense of mankind revolts at the notion that circumstances shewing that no notice was given, because it could not be given, prove that notice was given. *Burgh v. Legge* (4) which is a clear authority to that effect, and *Carter v. Flower* (5). In *Crosse v. Smith* it was not necessary to consider whether the facts proved amounted to notice of dishonour, or merely shewed that no notice was required, for either would have supported the verdict for the plaintiff there, and so would either here, if the old general issue had been pleaded, but the form of the issue here raises the question. It is said that notices in writing sent, but not received, is notice. That may be so when the writing contains the information which, since *Solarie v. Palmer* (6), is considered requisite to make a good notice, but not otherwise. It is too absurd for a serious argument to say that knocking at the door of an empty room is notice conveying any information at all; or that the neglect of the defendant in not having a person there is more than an excuse to the holder of the bill for not giving the notice containing that information, which otherwise he must have given. It is an abortive attempt to give notice which, when given, might very likely have been defective. Who can say what the clerk would have said to the defendant if he had found him in?

**PARKE, B.**—We are agreed that a nonsuit must be entered, but that the plaintiff may have a new trial on payment of costs. The question raised at the trial was, whether what took place on the first day was due notice of dishonour within the meaning of

the issue. My Brother Rolfe, on the authority of *Crosse v. Smith*, thought that it was, but gave leave to move to enter a nonsuit. The case of *Solarie v. Palmer* has been followed by many other cases, though the strictness of the rule laid down in it has been much modified, particularly by this Court, in the case of *Bailey v. Porter* (7). Still it is clear that the notice must be such as to convey particular information. That, being so, we must see what was notified, in order to see if it was notice of dishonour. Both *Crosse v. Smith*, and *Goldsmith v. Bland* referred to by Lord Ellenborough in his judgment, were decided before this was settled, and in *Crosse v. Smith* the form of the pleadings was such as not to make the distinction between notice and such circumstances as dispense with notice material, though the same remark does not apply to *Goldsmith v. Bland*. We agree with the Judges who decided *Crosse v. Smith* in thinking, that the holder had done all that was requisite to enable him to recover on the bill. A person engaged in trade, who has put his name on a bill by the usage of trade, engages to be in person or by proxy at his place of business during business hours for the purpose of receiving notice of dishonour of the bill, and if the holder goes or sends there in due time for the purpose of giving notice he has done all that he is bound to do; if no one is there to receive notice it is the fault of the other party. But no one being there and no notification being given, the issue that the defendant had notice is not proved. If the plaintiff had sent a writing containing a notification by post, or had left it at the defendant's place of business, it would have been notice of dishonour though it had never been received. But the facts here proved are not notice of dishonour, but merely prove a dispensation from the obligation to give notice.

As the point was not taken at the trial, it is not necessary to decide whether the holder had a right to elect to treat this either as a dispensation from giving notice altogether, or at his option as authorizing him to give notice afterwards. If the holder choose to go again and deliver a notice, it may be that

(4) 5 Mee. & Wels. 418; s.c. 8 Law J. Rep. (N.S.) Exch. 258.

(5) 16 Ibid. 743; s.c. 16 Law J. Rep. (N.S.) Exch. 199.

(6) 1 Bing. N.C. 194.

(7) 14 Mee. & Wels. 44; s.c. 14 Law J. Rep. (N.S.) Exch. 244.

such a notice would prove this issue, as being a notice delivered in due time; but then it would be a question for the jury, whether during the interval he might have delivered notice at the defendant's place of business, but omitted to do so. So that if the plaintiff elected to treat this as a dispensation altogether from giving notice there is an answer to the plea, but it is not rightly pleaded. If he elected to treat it as an excuse for delay, which from the analogy of the cases in which the party could not be found he probably had a right to do, he may treat the subsequent notice as a good one if he had not an opportunity of giving earlier notice; but that point was not taken at the trial. There must, therefore, be a nonsuit; but the plaintiff may have a new trial on payment of costs, if he thinks he can satisfy a jury that the second notice was in time, or he may amend his replication, which is probably the more prudent course.

ALDERSON, B.—*Solarie v. Palmer*, in effect, decides this case; for as soon as it is settled that a notice of dishonour must be such as to notify some definite matter, it follows that knocking at the door of an empty room cannot be notice.

ROLFE, B.—Since *Solarie v. Palmer* a notice of dishonour must contain a demand as well as a notice. It is clear that knocking at the door cannot be a demand.

PLATT, B. concurred.

*Rule absolute for a new trial on payment of costs of the trial by the plaintiff within a week, the plaintiff to have leave to amend his replication on payment of the costs of the amendment, otherwise to enter a nonsuit.*

1848. }  
April 15.\* }

ESDAILE v. TRUSWELL.

*Abatement, Plea in—Affidavit of Verification—Signing Judgment.*

*A declaration in scire facias stated that J. E., the public officer of a banking co-partnership called the L. and W. Bank,*

*recovered against G. S., the public officer of a banking co-partnership called the L. and W. R. Banking Company, the sum of 51,373l. 12s. 7d., and that the defendant was a member of the said last-mentioned banking company. The defendant pleaded in abatement, that at the very same time when the writ issued, and before the said J. E. declared, the said J. E., public officer, &c. issued a writ of sci. fa. (selling it out). The writ stated that the said J. E., public officer, &c. had recovered judgment from the said G. S., public officer, &c. for the sum of 51,373l. 12s. 7d.; and that one J. D. was at the time of such judgment a member of the last-mentioned banking co-partnership. The plea then stated a declaration in sci. fa. by the said J. E. against the said J. D.; and that the judgment issued against J. D. and that issued against the present defendant were one and the same judgment; that at the time of the judgment against J. D. and the issuing of the writ of sci. fa. against the defendant, J. D. was a member of the banking co-partnership; and it then averred the identity of the two companies described in the two writs as the L. and W. R. Banking Company, and that G. S. was the public officer of the latter company at the time of the judgment; that J. D. was still living, and that the writ and the suit against J. D. were still depending against him.*

*The affidavit in verification of the plea stated that the paper writing thereunto annexed was a true copy of the issue in the action between J. E. and J. D.; and that judgment was signed in such action by the said J. E. against the said J. D. on &c. for 51,373l. 12s. 7d.:—Held, that a judgment signed by the plaintiff on this plea was regular.*

This was a rule calling upon the plaintiff to shew cause why the judgment signed herein and all subsequent proceedings should not be set aside, and why an order of Platt, B. should not be rescinded under the following circumstances:—The plaintiff having, on the 8th of June, delivered a declaration in *scire facias*, and the defendant having demurred thereto, the demurrer was disallowed, and the defendant had leave to amend. He then obtained an order for two days' time to plead, and pleaded in

\* Decided in the previous term.

abatement. The plaintiff signed judgment on these grounds:—first, that the order for time to plead did not authorize the defendant to plead in abatement; secondly, that the affidavit verifying the plea in abatement was insufficient. The declaration in *scire facias*, dated the 8th of June 1847, stated that Joseph Esdaile, a public registered officer of a co-partnership carrying on their business of bankers within sixty-five miles from London, under the style of the London and Westminster Bank, recovered against George Smith, one of the registered public officers of a banking co-partnership, under the style of the Leeds and West Riding Banking Company, who had been summoned to answer the said plaintiff in the sum of 51,373*l.* 12*s.* 7*d.*, which were adjudged to the said plaintiff for his damages and costs, whereof the said G. Smith was convicted, and that R. Truswell was a member of the said co-partnership. The declaration then stated the command to the sheriffs in the usual way, the return of the sheriffs that the defendant had nothing in their bailiwick, and the plaintiff's prayer of execution.

The defendant pleaded in abatement (on the 29th of November), that at the very same time when the said writ issued, and before the said J. Esdaile declared thereupon, to wit, on, &c., the said J. Esdaile being one of the registered public officers of the co-partnership in the declaration mentioned, &c. issued a writ of *sci. fa.* in the words following. [The writ was then set out at length, and stated that J. Esdaile, registered officer of, &c. had recovered against G. Smith, the registered public officer of the Leeds and West Riding Banking Company, who had been summoned to answer the said plaintiff in the sum of 51,373*l.* 12*s.* 7*d.*, which was adjudged to the said plaintiff, and that John Dawson, of Pudsey, near Leeds, at the time of such judgment was, and hitherto hath been and still is a member of the said co-partnership—then followed the usual command to the sheriffs to make known to the said J. Dawson, &c.] The plea then stated the sheriffs' return of *nil*, and set out at length the declaration in *scire facias* by J. Esdaile against J. Dawson. The plea then proceeded in these terms, "and the said R. Truswell further says, that the judgment

mentioned in the last-mentioned writ of *sci. fa.*, and the judgment mentioned in the said writ of *sci. fa.* so issued against the said R. Truswell, are one and the same judgment, and not other and different judgments; and that at the time of the recovery of the said judgment, and thence continually up to and at the time of the issuing of the said last-mentioned writ of *sci. fa.* against the defendant, the said J. Dawson was a member of the said co-partnership, and that the said co-partnership in the said writs of *sci. fa.* described as the Leeds and West Riding Banking Company were one and the same co-partnership; that at the time of the recovery of the said judgment the said G. Smith was one of the registered public officers of the said co-partnership, and the said co-partnership was a co-partnership of persons united in co-partnership for the purpose of carrying on and then carrying on, the trade or business of bankers in England, according to the provisions of the statute made and passed in that behalf, under and by the style or title of the Leeds and West Riding Banking Company, and that at the time of the recovery of the said judgment the said G. Smith had then been duly nominated and appointed, and then was such registered public officer as aforesaid, by virtue of the statute in that case made and provided; that the said J. Dawson is still alive, and that the said writ of *sci. fa.* against the said J. Dawson, and the suit so thereby commenced against the said J. Dawson are still depending in the Court of Exchequer, and still are undetermined. Verification and prayer of judgment.

The affidavit in verification of the plea in abatement was as follows:—"In the Exchequer of Pleas, between J. Esdaile, one of the registered public officers of certain persons united in co-partnership for the purpose of carrying on and carrying on the trade or business of bankers in England, under and by the style or title of the London and Westminster Bank, plaintiff, and Richard Truswell, defendant. Andrew Duncan, Clerk to Andrew Duncan, of No. 3, South Square, Gray's Inn, in the county of Middlesex, gentleman, agent for the said defendant in this cause, maketh oath and saith that the paper writing hereto annexed marked (A), is a true copy of the



issue wherein the said J. Esdaile as such public officer as aforesaid is the plaintiff, and J. Dawson, of Pudsey, near Leeds, in the county of York, is defendant. And the deponent further saith, that judgment was signed in the last-mentioned cause by the said J. Esdaile as such public officer against the said J. Dawson in this honourable court, on the 15th day of November inst., for the sum of 51,373*l.* 12*s.* 7*d.* damages, and 33*l.* 11*s.* costs, as appears by the judgment book of this honourable Court, which deponent has inspected. Sworn, &c. A. Duncan, jun."

The plaintiff having on the delivery of this plea signed judgment, the defendant, on the 9th of December, obtained a summons to set aside the same for irregularity, which summons was heard by Platt, B. and dismissed. The present rule was then obtained, against which

*Bovill* shewed cause.—First, the rule to plead gave the defendant no authority to plead in abatement. Secondly, there is no proper affidavit of verification in this case. Great strictness is required in an affidavit in support of a plea in abatement—*Onslow v. Booth* (1); but the present affidavit is defective and irregular in many particulars.

[PARKE, B.—An affidavit is sufficient that satisfies the conscience of the Court as to the truth of the plea.]

The present affidavit does not effect that object. It does not state in terms or in effect that the judgment recovered against J. Dawson is a judgment in the same action which is now brought against the present defendant, but merely that the names and sums of money are the same. There is nothing to identify either the defendant or the banking company. Then, with respect to the plea in abatement, the first allegation is, that at the time the writ issued, and before Esdaile declared, he issued a writ against a person named Dawson, and then follows an allegation that the sheriff certified that Dawson had nothing in his bailiwick. Neither the plea nor the affidavits shew that the banking companies and the public officers mentioned therein are the same parties.

*T. Jones*, contra.—The plea is framed on the ground that a writ of *sci. fa.* may be

issued against one or against all the members of a banking co-partnership, but that concurrent writs cannot issue against different persons who were members of the company at the time of judgment obtained—*Esdaile v. Lund* (2). The defendant contends that he has by his affidavit made out the proposition, that at the time of issuing the writ against the defendant Truswell a writ of the same kind had issued against Dawson, another member of the company. The plea in abatement need not be verified in terms: it is enough if the Court can see from all the facts that are stated, that the actions are identical. The rule on this subject depends on the statute 4 Anne, c. 16. s. 11, which enacts "that no dilatory plea shall be received in any court of record unless the party offering such plea do by affidavit prove the truth thereof, or shew some *probable matter* to the Court to induce them to believe that the fact of such dilatory plea is true." Adverting to the second branch of this section, the defendant has shewn "probable matter to the Court to induce them to believe" that the fact of the plea is true. The identity of the parties and of the firms is sufficiently shewn on the plea and affidavit.

[PARKE, B.—The defendant has to establish that an action similar to the present has been brought against another party who was a member of the co-partnership, and this he has not shewn. The foundation of his plea is that the writs issued on the same day.]

The defendant has laid before the Court probable cause for believing that the actions are the same.

POLLOCK, C.B.—I think this rule must be discharged and with costs. The defendant will not swear that he believes the causes of action to be the same, and if so why should the Court draw that inference?

PARKE, B., ROLFE, B. and PLATT, B. concurred.

*Rule discharged, with costs.*

(2) 12 Mee. & Wels. 607; s. c. 13 Law J. Rep. (n.s.) Exch. 117.

1848. } FAVIELL v. THE EASTERN COUNTIES RAILWAY COMPANY.  
May 26. }

*Arbitration—Corporation—Railway Company—Attorney, Authority to refer Cause.*

*An attorney appeared for a corporation in an action of debt, and consented to a Judge's order, referring "all claims made in the action" to an arbitrator. The arbitrator having awarded to the plaintiff a sum actually claimed in the action,—Held, that the question, whether that sum was a debt or not was submitted to the arbitrator, and that his decision on the point was final, even if erroneous.*

*Held, also, that an attorney authorized to appear for a party in a suit has incidentally authority to refer it without any fresh authority to that effect, and that the attorney having appeared for the corporation, to the knowledge of the directors, the corporation were bound by his acts as attorney, though he was not authorised to appear by an authority under seal.*

In this case, the plaintiff had issued a writ in debt against the Eastern Counties Railway Company, who had appeared by an attorney. No further proceedings were taken in the action, but the attorney, who had appeared for the company, consented to a Judge's order, referring "the claims in that action" to an arbitrator. It appeared, by the affidavits, that the plaintiff sought to recover, before the arbitrator, sums between 3,000*l.* and 4,000*l.*, which, it was admitted, were debts, and a sum of 10,307*l.*, which the railway company contended, if recoverable at all, was to be recovered as unliquidated damages, and not as a debt; and consequently, as they contended, this was not included in the submission. The arbitrator made his award, directing the company to pay the plaintiff 14,410*l.* 7*s.* It appeared, by the affidavits, that the directors of the company were aware that the attorney had appeared for the company; but that he had no authority under seal to appear, and was not expressly authorized by the directors to refer the action.

In last term, a rule had been obtained, under the 1 & 2 Vict. c. 110, calling on the company to shew cause why they should

not pay to the plaintiff 14,410*l.* 7*s.*, the amount awarded to him.

*Martin, Willes, and Prentice* now shewed cause.—The Court in last term refused to set aside this award (1), but the company are desirous of raising the questions on the record; and the Court will not decide a question involving so large an amount in a summary manner, without appeal, but will rather put the plaintiff to bring his action.

[*POLLOCK, C.B.*—The decision of this Court is an authority against you; but if, notwithstanding that, you can raise any doubt in any one member of the Court as to whether you may not plead with success a defence to an action on this award, we ought not to decide in this summary manner without an appeal.]

The reference in this case was solely of the action, which was in debt, and gave the arbitrator no authority to decide on anything which was not a debt. The decision of the arbitrator, though erroneous, is conclusive on all matters submitted to him, but he cannot enlarge his jurisdiction by an erroneous decision as to what his jurisdiction is. Suppose that an action of debt, and only an action of debt, being referred to him, he had adjudicated on an action for an assault, and had decided that that was a debt, could it be said that the parties were to be bound by such an award? The arbitrator is, in this respect, like an inferior court, which cannot give itself jurisdiction by its erroneous finding—*Roberts v. Humby* (2). On this principle the Court of Queen's Bench quashes convictions, when the Justices have acted without jurisdiction, though they have erroneously decided that they have jurisdiction, or grants a mandamus to compel them to entertain a complaint, though they have erroneously decided that they have no jurisdiction, yet the decision of a Justice on a matter within his jurisdiction is as conclusive as an award on matters within the submission.

[*ALDERSON, B.*—The arbitrator must, no doubt, come to a determination as to whether a matter is within the submission or

(1) Since reported, *Faviell v. Eastern Counties Railway Company*, *ante*, p. 223.

(2) 3 Mee. & Wels. 120: a. c. 7 Law J. Rep. (N.S.) Exch. 46.

not; but that depends on the construction of the submission, which is also for the Court; and it is not competent for the arbitrator to exclude the power of the Court to construe the submission by the way he draws up his award, not stating the point on the face of it.]

And that is matter for a plea to the action on the award. The defendants may plead that facts not stated on the face of the award exist, and avoid it either by shewing, as in *Mitchell v. Staveley* (3), that he has not decided all that he ought, or as here, that he has decided more than he ought, and that the bad and the good part of the award cannot be separated. This appears to be old law—*Vin. Abr. 'Arbitrament,' D, 6 and 7*. Besides, the remedy here sought is substituted for that of attachment, and the Courts have held that it is to be governed by the same rules, and an attachment could not have gone against a corporation.

[ALDERSON, B.—The discretion of the Court is guided by the same rules in granting or refusing such an order as in granting or refusing an attachment; but it would be a very literal application of that rule to say such an order could not go against a corporation.]

Secondly, there was no submission to bind the company: it is a corporation, and can only submit by an instrument under seal, and cannot even appoint an attorney save by instrument under seal—*The King v. the City of Chester* (4); and even if he were duly made their attorney, he is not as such authorized to refer a cause. The only authority for saying he is, is a dictum in *Filmer v. Delber* (5); and it is contrary to all principle that an agent should have power to bind his principal in spite of him.

[PLATT, B.—As between attorney and client it may be so; but surely the attorney, if duly constituted, has authority to bind his client as to third persons. If he has properly appeared he needs no fresh authority to take proper and ordinary steps in the cause.]

But he cannot properly appear without a warrant under seal. *Biddell v. Dowse* (6)

shews that a submission by an attorney, who appeared for an infant, is void.

[ALDERSON, B.—An infant cannot in any way appoint an attorney; and in such a case the plaintiff knows, or ought to know this, and cannot be deceived. But a corporation can appoint an attorney; and if we permitted a corporation to set aside proceedings on this ground we should enable them to cheat all round. In *Bayley v. Buckland* (7) this Court laid down the rule, that where a defendant had notice of an action having been brought against him, he should be bound by an attorney who appeared in his name, though without authority: otherwise where there is no notice. Here the corporation had ample notice.]

*The Attorney General*, *contra*, called the attention of the Court to the terms of the submission, which was "of all claims in the action," and to part of the affidavits, shewing that the sum in dispute was claimed in the action, so that the question referred was really debt or no debt. (He was then stopped by the Court.)

POLLOCK, C.B.—If the point, as to whether the arbitrator has gone out of his jurisdiction or not, really arose, the Court would probably not decide the question in a summary proceeding; but it does not arise. The arbitrator has decided the point referred to him, which was the question whether this claim was a debt or not. As to the other point made, that an attorney appearing for a corporation cannot bind it by submitting to a reference, without an authority under seal, the Court would grasp at anything rather than sanction a doctrine so mischievous and unjust.

ALDERSON, B.—I was at first much struck by the argument that the arbitrator could not conclusively decide what was the extent of his jurisdiction; and I still think he could not. But on looking at the terms of the submission it appears to have been of all claims in the action of debt; and from the affidavits it appears that this sum of 10,307*l.* was claimed in the action, and that the company attended the reference before the arbitrator after this claim was made and

(3) 16 East, 58.

(4) Skin. 154; s.c. 2 Show. 365.

(5) 3 Taunt. 486.

(6) 6 B. & C. 255.

(7) 1 Exch. 1; s.c. 16 Law J. Rep. (N.S.) Exch. 204.

entertained before him. Then was the time for them to apply to a Judge to revoke his authority, on the ground that he was exceeding his authority, if he really was doing so, which must depend on the construction of the submission, which gives him authority. Instead of doing so, they lie by, and take the chance of an award in their favour. The arbitrator has decided that this "claim" is a debt, and that was the very point submitted to him, on which, therefore, his decision is final. As to the other point it would be monstrous if parties suing a corporation were bound to seek for an authority under seal given to the attorney for each step. They would be grievously injured if that was the case.

ROLFE, B. concurred on both points.

PLATT, B.—I think that an attorney who has been duly authorized to appear for a litigant has incidentally authority to conduct the cause, and to refer it. If he does wrong he may be responsible to his client; but his client is bound. In the present case the attorney in fact appeared for the company; the company had notice that he had done so, and did not interfere, but suffered the proceedings to go on; and I think they are now estopped from denying that he was duly authorized to appear for them. As to the other point I concur.

*Rule absolute.*

1848. }  
May 31. } PRATT v. PRATT AND OTHERS.

*Pleading—Trespass to Goods—Conversion—Matter of Aggravation.*

*A declaration in trespass to goods charged the defendant with taking and carrying them away, and also with converting them to his own use:—Held, that such conversion was merely matter of aggravation, and a plea to the whole declaration justifying the taking the goods and carrying them away, but omitting to justify their conversion, was a good plea.*

**Trespass.** The declaration alleged that the defendants, on &c., with force and arms, &c., broke and entered a certain dwelling-house of the plaintiff, and then in the plaintiff's occupation, and then made a

great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long time, to wit, &c., and then forced and broke open, broke to pieces and damaged divers, to wit, two windows of the plaintiff, &c. of great value, &c., and also during the time aforesaid, &c., with force and arms seized and took divers goods and chattels of the plaintiff, to wit, &c., then found and being in the said dwelling-house, &c., and carried away the same, and converted and disposed thereof to their own use. By means of which several premises the plaintiff and his family were during all the time aforesaid not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the plaintiff, but the plaintiff was also during all that time hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, &c.

The defendants pleaded, thirdly, to the whole declaration, that the said dwelling-house in which, &c., at the said time when, &c., was the dwelling-house, soil and freehold of one T. P, whereupon the defendants as the servants of the said T. P. and by his command broke and entered the said dwelling-house in which, &c., at the said time when, &c., and because the goods and chattels in the declaration mentioned, and every part thereof, at the said time when, &c., were and was in and upon the said dwelling-house in which, &c., incumbering the same, they, the defendants, as the servants of the said T. P. and by his command, in order to remove the said incumbrances, seized and took the said goods and chattels in the declaration mentioned, and then carried and conveyed the same away from and off the said dwelling-house in which, &c., to a small and convenient distance in that behalf, and there left the same for the plaintiff as they lawfully might for the cause aforesaid, which were the said alleged trespasses in the declaration mentioned. Verification.

Special demurrer, assigning for cause that the plea professed in the commencement thereof to be an answer to the whole declaration, yet that, although the declaration alleged that the defendants converted and disposed of the said goods and chattels to

their own use, the said plea did not state or shew any answer to that part of the declaration.

*Pigott*, in support of the demurrer.—The plea affords no answer to that part of the declaration which charges the defendants with having converted the plaintiff's goods. The facts alleged in the plea only justify the seizing them and carrying them away; not the conversion.

[*PLATT, B.*—But is not the conversion mere matter of aggravation?]

In this declaration it is treated as a distinct act of trespass; and as the plea professes to answer all the trespasses alleged in the declaration, it should have in terms justified the conversion. The taking away a party's goods is not necessarily a conversion—*Fouldes v. Willoughby* (1).—He also cited *Smith v. Edge* (2), *Oxley v. Watts* (3), *Gregory v. Hill* (4), *Woods v. Durrant* (5), *Davison v. Wilson* (6).

*Phipson*, contra, was stopped by the Court.

*POLLOCK, C.B.*—We are all agreed that this plea is sufficient. The only trespasses in the declaration which required an answer were the breaking into the dwelling-house, and the taking and carrying away the plaintiff's goods. The conversion of the goods was merely matter of aggravation.

*Judgment for the defendants.*

1848. }  
June 6. } *SAYER v. GLOSSOP.*

*Evidence—Coverture—Marriage Register—Identity.*

*In support of a plea of coverture, alleging the marriage of the defendant with one J. G.*

(1) 8 Mee. & Wels. 540; s.c. 10 Law J. Rep. (N.S.) Exch. 364.

(2) 6 Term Rep. 562.

(3) 1 Ibid. 12.

(4) 8 Ibid. 299.

(5) 16 Mee. & Wels. 149; s.c. 16 Law J. Rep. (N.S.) Exch. 313.

(6) 17 Law J. Rep. (N.S.) Q.B. 196.

*a copy of the marriage register was put in evidence, and a witness was called who stated that he was acquainted with one J. G., that he had inspected the original register, and that one of the signatures to it was in the handwriting of the J. G. whom he knew:—Held, that this was evidence of the identity of J. G., without the original register being produced.*

This was an action by the drawer against the acceptor of a bill of exchange.

The defendant pleaded coverture.

At the trial, before *Parke, B.*, at the last Middlesex Sessions, the defendant's case was proved by putting in evidence an examined copy of the register of a marriage between the defendant and one *Joseph Glossop*, and by the evidence of a witness who knew a *Joseph Glossop* and his handwriting, and who having seen the original marriage register, swore that the signature to it was in the handwriting of the *Joseph Glossop* with whom he was acquainted, and who was then alive. The counsel for the defendant objected that the original register should have been produced, but the learned Judge overruled the objection, and the jury accordingly found a verdict for the defendant.

*M'Mahon* now moved for a new trial.—The original register ought to have been produced. The only mode by which the witness could speak to the fact of the defendant having married *Joseph Glossop* was by the signature to the original register. Without its production the jury could have no means of being satisfied of the accuracy of the witness's testimony.

[*POLLOCK, C.B.*—The party who has the lawful custody of the register could not be called upon to produce it.]

On the trial of indictments for bigamy the original register is produced.

[*PARKE, B.*—I have tried, perhaps, more cases of bigamy than any other Judge, and I do not recollect one in which the original register was produced at the trial.]

*POLLOCK, C.B.*—We are all of opinion that this rule should be refused, upon the ground that the person who has the legal charge of the register cannot be called upon

to produce it, and that in his absence it is for the jury to say what degree of weight and value they can give to the evidence of a witness who speaks to the handwriting of a document which is not before them. Suppose the question was, whether a certain person was at a particular place on a given day, and a witness was called, who said, "I know that person; he is the churchwarden of my parish, and on that day I saw a notice stuck on the church door, the signature to which was in his handwriting." That would be evidence, because the notice itself not being able to be removed could not be produced in court. Now if in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were a physical impossibility.

ROLFE, B.—I am of the same opinion, and, using a similar illustration to that given by my Lord, will suppose that seditious or treasonable placards had been posted up, and a witness were to state that the handwriting of these placards was that of A. B.; that would clearly be evidence against A. B, upon the ground that the thing itself could not be produced. .

PLATT, B.—The only difficulty which arises in the case is this, that suppose the signature to the register to be a forgery, the plaintiff would have no means of shewing that to be so, unless the original register were produced. That is certainly some inconvenience; but, on the other hand, as the production of the document was not possible, I think the evidence given was admissible.

PARKE, B.—For the purpose of preserving parochial registers, the law allows parties to prove their contents by producing in evidence an examined copy, and dispenses with the production of the original register. Now, to prove the identity of a person, you may shew that in consequence of a particular mark, B, appearing upon the register, such a person was present at the time the entry in question was made upon it. In the present case a witness swore that he had seen the original register, and that one of the signa-

tures to it was that of a James Glossop, whom he knew: that was evidence that this James Glossop was the person who then married the defendant. In all cases it is doubtful whether the party who has the custody of the register will produce it; and I take it to be quite clear that he is not bound to produce it under a *subpœna duces tecum*. But in any event its absence is only matter of observation to the jury as to the degree of weight to be attached to the evidence of a witness who speaks to a mark existing upon a document which is not before the jury.

*Rule refused.*

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[IN THE EXCHEQUER CHAMBER.]

1848. }  
Feb. 6. } CURLING v. WOOD.

*Case — Duty — Wharfinger — Mooring Vessels.*

*A declaration in case for damage done to the plaintiff's vessel, stated that the defendant possessed a wharf on the Thames, near which there was a wood-work, placed there by the defendant, and being at the bottom of the river, and over which the after-mentioned ship at certain states of the tide would float, but not at other states of the tide; that the plaintiff was possessed of a ship then being by sufferance of the defendant at and alongside the wharf for reward to the defendant in that behalf; that the defendant had the management and controul of the wharf, and the mooring and stationing of ships at and near it whilst they were at the wharf for the purpose of using it. Breach, that the defendant unskilfully, &c. placed, moored and stationed the plaintiff's ship in the river, near the wharf and over the wood-work, and detained it there for a long and improper time, and until the ship, on the fall of the tide, struck against the wood-work, and thereby was greatly injured. Plea, that the defendant had not the management and controul of the wharf, and the mooring and stationing of ships, &c. modo et formâ.*

*After a verdict for the plaintiff, a rule nisi for arresting the judgment was refused.*

*On error, the judgment of the Court below was affirmed; and it was held, that the declaration sufficiently shewed a duty on the part of the defendant safely to moor and station the vessel, and a breach of it.*

Error from the Court of Exchequer.

Case. The declaration stated that before and at the time when, &c. the defendant (the plaintiff in error) was possessed of a certain wharf for the loading and unloading of ships and vessels on the banks of the river Thames, near to which said wharf there then was certain wood-work before then by the defendant placed, and then being at and upon the bottom of the said river, over which said wood-work, at certain states of the tide of the said river, the ship or vessel hereinafter mentioned would float, but at other states of the said tide the said ship or vessel would not float, of all which premises the defendant before and at, &c. had notice; that at the time when, &c., and while the defendant was so possessed of the said wharf as aforesaid, the plaintiff was possessed of a certain ship or vessel of great value, to wit, &c., then being by sufferance and permission of the defendant at and alongside the said wharf for reward to the defendant in that behalf, and the defendant then had the management and controul of the said wharf, and the mooring and stationing of ships and vessels at and near the same, whilst such ships and vessels were at the said wharf for the purpose of using the same; yet the defendant, to wit, on &c., unskilfully, negligently and improperly placed, moored and stationed the said ship or vessel of the plaintiff in the part of the said river near the said wharf, and over the said wood-work, and unskilfully, negligently and improperly detained the said ship or vessel there over the said wood-work for a long and improper time, and until the said ship or vessel on the day and year aforesaid, upon the natural and usual fall of the tide in the said river, came, fell, and lodged upon and struck against the said wood-work at the bottom of the said river, and there remained and continued upon and striking against the said wood-work for a long time, to wit, &c. and thereby then became and was greatly strained, bilged, broken and injured, &c.

Third plea, denying that the defendant had the controul of the wharf, and of the mooring and stationing of vessels.

At the trial, before Platt, B., at the London Sittings after Easter term, 1846, the jury found a verdict for the plaintiff on the third plea. A rule nisi for arresting the judgment having been refused by the Court of Exchequer (1), the defendant below brought a writ of error on the judgment.

*Cleasby*, for the plaintiff in error (the defendant below), Feb. 6th, 1848 (2).—The declaration which charges the wharfinger with unskilfully mooring a vessel at an improper place, discloses no duty for the breach of which he is responsible. The question is an important one; and it is quite a new thing to attempt to make a wharfinger liable for an accident which has happened to a ship in the river when moored at his wharf. There is a well-known distinction between docks and wharves. Ships in dock are in the custody and under the charge of the dock-owners; but ships moored at a wharf are not under the charge or custody of the wharfinger.

[WIGHTMAN, J.—The declaration states that the defendant below had the management and controul of the wharf, and the mooring and stationing of vessels at and near the same.]

It is not stated that the defendant was employed to moor or station the ship, or that there was any reward to him for so doing; but that the vessel was alongside the wharf for reward to the defendant. This statement does not involve any duty on the part of the defendant to do any act relative to mooring. The object for which wharves are constructed is not the mooring of vessels. Wharfage is chargeable for laying goods upon the wharf — *Stephen v. Coster* (3).

[WILDE, C.J. — The declaration must mean that the defendant had the management of the wharf in respect of loading, &c.]

There is no allegation of any duty except that of a wharfinger. There was no del-

(1) *Wood v. Curling*, 15 Mees. & Wels. 626.

(2) Before Wilde, C.J., Coleridge, J., Wightman, J., Erle, J. and Williams, J.

(3) 1 W. Black. 413, 423.

very over of the ship into the care of the defendant.

[WILDE, C.J.—It appears that the plaintiff parted with his controul as to mooring the ship.]

It cannot be urged that by virtue of the defendant's employment as a wharfinger, the duty of mooring was cast upon him. It can only be argued, that the allegation as to the mooring implies an employment by the plaintiff of the defendant for the purpose of mooring.

[WILDE, C.J.—The declaration states, and the verdict finds, that the defendant had the management of the mooring and stationing. That excludes everybody else.

[ERLE, J.—And it implies an undertaking to use ordinary care in doing it.]

[WILLIAMS, J.—If we can give a construction to the allegation which will support the verdict, that construction must be given to it after verdict.]

The statement of negligence in the declaration is nothing of itself, unless the relation of the parties raised a duty binding on the defendant to use due care—*Priesley v. Fowler* (4).

*Martin*, for the defendant in error, was not called upon.

WILDE, C.J.—There is little doubt that the declaration is perfectly sufficient. What is it that is alleged as evidence of the claim for indemnity against the wrong which the plaintiff suffered? It is stated that the wharf was used for profit, that it was prepared in a certain manner, and that the vessel was alongside for reward to the defendant. It may be that wharfingers are not generally bound to moor ships. Different wharfingers may carry on their business in different manners. They may gain a profit from the mooring. The declaration here states that the defendant had the management and controul of the wharf and the mooring and stationing of vessels at or near it. What can be the meaning of having the stationing but controuling the place where the ship was to be placed? Then it is stated that the defendant unskillfully,

negligently, and improperly placed and stationed the vessel in a part of the river near the wharf, and over the wood-work which had been placed there by the defendant; and then that he unskillfully, negligently, and improperly detained the vessel over the said wood-work for an improper time, till the vessel, upon the fall of the tide, lodged and struck upon it, and so was damaged. The effect of the whole statement in the declaration is, that the defendant, being proprietor of the wharf, the plaintiff came to use it for the profit of the defendant; that the defendant, who knew the condition of the wharf, placed the plaintiff's vessel where it was greatly injured. Is not that a state of things which creates the right to indemnity stated in the declaration? If such right is denied, the declaration might have been demurred to; but after the verdict how are we to construe it? Are we to look out for difficulties in the construction? It would be doing violence to language not to support the verdict. I think there is a good statement of such a relation between the parties as brought a responsibility on the defendant. The declaration states that he had the controul, and chose to place and station the vessel where it received an injury. I cannot see any just foundation for the doubt that wharfingers are not bound safely and securely to moor. That may be the case generally; but in this case the defendant chooses to moor for profit, and in doing so he unskillfully does that which causes the damage. I think, therefore, that he is responsible for that damage, and that the judgment of the Court below was correct.

*Judgment affirmed.*

1848. } WEBSTER v. CROUCH AND  
June 9. } ARROWSMITH.

*Pleading—Demurrer—Certainty.*

*A declaration stated that the plaintiff had divers dealings with the defendants, and that divers accounts remained unsettled between them; that the plaintiff had, for the accommodation of one of the defendants, accepted divers bills of exchange, and thereupon, in consideration that the plaintiff then delivered*

(4) 3 Mee. & Wels. 1; s. c. 7 Law J. Rep. (N.S.) Exch. 42.



to the defendants three acceptances as follows:—16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.* at three months, and 26*l.* 7*s.* 11*d.*, dated the 7th of April, at five months, as full settlement of debts, the defendants promised the plaintiff to return to him the acceptances drawn by the said defendant as follows:—28*l.* 15*s.* and 28*l.* Breach, that the defendants did not return the acceptances:—Held, on special demurrer, that the declaration was ill for want of certainty.

Assumpsit. The declaration stated that the plaintiff had divers dealings with the defendant Crouch alone, and also with Crouch and the defendant Arrowsmith; that divers accounts remained unsettled between the plaintiff and the defendants; that the plaintiff had, for the accommodation of Crouch, accepted divers bills of exchange, and thereupon, to wit, on &c. in consideration that the plaintiff, at the defendants' request, then delivered to the defendants three acceptances as follows:—16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.* at three months, and 26*s.* 7*s.* 11*d.*, dated the 7th of April, at five months, as full settlement of debts, the defendants promised the plaintiff to return to him the acceptances drawn by the said Crouch, as follows:—28*l.* 15*s.* and 28*l.*, and to pay to the plaintiff the sum of 15*l.* towards a bill of exchange, drawn by the defendant Crouch, for 30*l.* 4*s.* 6*d.*, which would become due on the 10th of May 1846. Breach, that the defendants did not, nor would return the said acceptances, or pay to the plaintiff the said sum of 15*l.*

Demurrer, assigning for causes that no sufficient consideration was shewn for the defendants' promise; that the acceptances delivered to the defendant may have been worthless; that the declaration was defective in certainty in not stating the names of the parties whose acceptances were delivered to the defendant. Joinder therein.

*J. Brown*, in support of the demurrer.—The declaration is bad. First, there is no valid consideration for the defendants' promise. The consideration is not connected with the inducement; it does not appear whose "accounts" remained unsettled, nor whether the "debts" mentioned in the declaration were those of the plaintiff

or of third parties. Again, assuming the debts to be those of the plaintiff, sufficient facts are not stated to shew that the giving of the acceptances operated as a settlement of debts. It does not appear whether the bills of exchange equalled the debts, or whether the bills were negotiable. The authorities in support of this portion of the argument are *Cumber v. Wane* (1), *Sibree v. Tripp* (2), and *James v. Williams* (3). Secondly, the declaration is not sufficiently certain. It does not even state who are the acceptors of the bills. *Appelmans v. Blanche* (4) shews that the omission of the christian names of persons mentioned in pleading, unless it be excused by averment, is bad on special demurrer. He cited, as to another point, *Lynn v. Bruce* (5) and *Reeves v. Hearne* (6).

*Manning, Serj.* contrà.—The declaration is good. First, there is a valid consideration for the defendants' promise. Whatever may be the nature of the acceptances, the parties have treated them as a settlement of debts; and whether they be of any value or not the mere delivery of them to the defendants is an act of labour sufficient to support the declaration.

[*ALDERSON, B.*—Are the statements in the declaration made with convenient certainty? The plaintiff does not state whose debts they are. The plaintiff may amend, or judgment will be given against him.]

The other Barons concurring,—

*Manning, Serj.* elected to amend.

*Judgment accordingly* (7).

(1) 1 *Stra.* 426.

(2) 15 *Mee. & Wels.* 23; s. c. 15 *Law J. Rep.* (N.S.) *Exch.* 318.

(3) 13 *Ibid.* 828; s. c. 14 *Law J. Rep.* (N.S.) *Exch.* 220.

(4) 14 *Mee. & Wels.* 154.

(5) 2 *H. Black.* 317.

(6) 1 *Mee. & Wels.* 323; s. c. 5 *Law J. Rep.* (N.S.) *Exch.* 156.

(7) Per *Pollock, C.B.*, *Alderson, B.*, *Rolfe, B.* and *Platt, B.*

1848. } CHERRY v. HEMING AND AN-  
June 9. } OTHER.

*Covenant, Construction of.*

*A declaration stated that, by an indenture between the plaintiff and the defendants, the plaintiff sold certain letters patent to the defendants, and that the defendants covenanted to pay the price by instalments: provided, that if within twelve months from the date of the indenture the defendants should disapprove of the patent, and of their disapprobation and intention to sell it they should give notice to the plaintiff, the payment of the instalments should be suspended; and if the defendants should within six months after notice sell the said patent, and retaining to themselves 246*l.* pay over the surplus to the plaintiff, the covenant for payment of the entire sum should cease. But if the defendants having given such notice should neglect or refuse to observe all the other matters or things in the proviso, the covenant for payment of 840*l.* should stand. Averment, that the defendants gave due notice of their disapprobation and of their intention to sell, and that the defendants had not sold the letters patent. Breach, non-payment of the instalments. Plea, that the defendants were ready and willing and endeavoured to sell the letters patent, but that no *bonâ fide* sale could be effected:—Held, that the defendants not having sold the letters patent were liable to pay the instalments.*

**Covenant.** The declaration stated that by indenture, dated the 1st of March 1836, made between the plaintiff of the first part, G. W. of the second part, G. R. of the third part, and the defendants of the fourth part, the parties of the first, second and third parts bargained, sold, and assigned to the defendants certain letters patent; that the defendants covenanted with the plaintiff to pay to her 840*l.* by instalments as thereafter mentioned, that is to say, 120*l.*, the first instalment, on the 1st of April 1837, 60*l.* on the 1st of April 1838, and an instalment of 60*l.* yearly on the 1st of April in each year; provided always, that if at the expiration of twelve months from the date of the said indenture the defendants should not approve of the working of the said patent and of such their disapprobation and of their intention to sell the same as thereafter mentioned they

should give notice in writing to the plaintiff, such notice not to be given before the 1st of March 1837 or after the 31st of March 1837, then and in such case the payment of the first instalment should be suspended; and if having given such notice the defendant should within six months after the date thereof *bonâ fide* sell and dispose of the said letters patent to any person willing to purchase the same for the best price that could be reasonably obtained, and out of the produce of such sale pay the costs of such sale, and retain to themselves 246*l.* and pay over to the plaintiff the net surplus, if any, then and in such case the covenant and agreement for payment of 840*l.* should cease and determine. But if the defendants should neglect to give such notice, or having given such notice should neglect or refuse to observe all the other matters and things in the said proviso contained, then the covenant for payment of 840*l.* as aforesaid should be and stand in full force, and the said first instalment of 120*l.*, in case the same should have been suspended by the notice, should, at the expiration of the six calendar months from such notice, revive and be payable. Averment, that the defendants gave due notice of their disapprobation of the said letters patent and of their intention to sell the same; that six months from the date of the notice elapsed before the suit; and that the defendants had not *bonâ fide* sold the said letters patent or rendered the plaintiff an account of the sale, or of the costs, or of the net surplus. Breach, the non-payment by the defendants of any portion of the said sum of 840*l.*

The defendants pleaded, lastly, that after the giving the notice in writing to the plaintiff of the defendants' disapprobation of the said letters patent, and of their intention to sell the same, and within and during the period of the said six months after the expiration of the notice, the defendants were ready and willing, and endeavoured and offered *bonâ fide* to sell the said letters patent for the best price that could be reasonably obtained by public auction, but that no person would become the purchaser, and no *bonâ fide* sale could be effected; that during the said six months, and since, the defendants have been unable to sell the same; that the said letters patent have remained unsold without any default and against the will of the defendants;

that the same have been and always were valueless and useless, and it has been impossible to sell and dispose of the same.

Demurrer, assigning, amongst others, the following causes—that although by the covenant the defendants bound themselves to make the payments, except in the events specified in the proviso, yet the plea does not allege the happening of those events, but admits that those events failed, and merely alleges that the failure did not arise from the negligence or default of the defendants. Joinder therein.

*T. Jones*, in support of the demurrer.—The defendants not having sold the letters patent within the six months are liable to pay the instalments, and it is no answer for them to say that they endeavoured to sell them, but were unsuccessful.

*C. E. Pollock*, contra.—It is a sufficient answer for the defendants to shew that they endeavoured to sell the letters patent, but were unable to do so. The construction contended for by the other side leads to an absurdity, for it tends to shew that if the defendants had sold the letters patent for the small sum of 50*l.* they would have discharged themselves from their liability to the instalments, and might have retained to their own use the produce of the sale. Again, the words of the proviso are: if the defendants should “neglect or refuse to observe” the matters or things in the proviso they shall pay 840*l.*, that means if they shall wilfully neglect or refuse; but here they have not been guilty of any wilful neglect or refusal, as they have used their best endeavours to sell the patent.

*T. Jones* was not called on to reply.

*POLLOCK, C.B.*—The plea is bad, and the plaintiff is entitled to judgment. The defendants contend that it is to be considered as implied in the bargain, that if the patent cannot be sold it is the same thing as if it were sold. That indeed might be so if the patent had been repealed by *scire facias* by means of a third person, or if it were the case of a chattel that had been destroyed, because it is an implied condition in such a case that the thing shall remain *in specie*. But the plea in this case states merely, that notwithstanding the defendants’ efforts the article remained unsold. We cannot extract from the plea those facts which are neces-

sary to give effect to the argument of the defendant’s counsel. The defendants have given notice of their intention to sell the letters patent, and so far have suspended their liability to pay the first instalment. But they have not complied with the rest of the agreement. It is said, indeed, that they have not been guilty of a wilful neglect or refusal to sell the patent, because they have used their best endeavours to dispose of it. But, in my opinion, the meaning of the covenant is that they shall actually sell it; and as they have not sold it, they have rendered themselves liable to pay the instalments.

*ALDERSON, B.*—I am of the same opinion. The defendants have bound themselves by indenture to pay a certain sum for a patent. The indenture of sale contains a proviso that the payments are not to be absolute if the defendants give a certain notice and do certain acts; but if they neglect to do those acts, they are liable to pay the instalments. The condition of their ceasing to pay the instalments is that they do the acts. Here, however, they aver, not that they did the acts, but merely that they endeavoured to do them. The plaintiff is entitled to judgment.

*ROLFE, B.*—I am of the same opinion. It is contended, on behalf of the defendants, that the plaintiff’s construction of this covenant is productive of hardship on the defendants. I do not assent to that, but I think that the hardship lies on the other side. It is consistent with this covenant that the day after the expiration of the six months’ notice, the defendants may sell this patent for 10,000*l.*, in which case the plaintiff would not be entitled to the net surplus after payment of the expenses. It is argued that the defendants are liable to pay the instalments only in the event of their being guilty of a wilful neglect to give notice or to sell; but the word “neglect” means “omit,” and therefore the defendants having omitted to sell are liable to pay the instalments.

*PLATT, B.*—The indenture contains a proviso, that if the defendants do certain acts they shall not be liable to pay the instalments: they have not done the acts, therefore they are liable to pay.

*Judgment for the plaintiff.*

1848. }  
Feb. 7. } WAIT AND ANOTHER v. BAKER.

*Contract—Sale of Goods—When Property passes—Delivery under Bill of Lading—Appropriation.*

An "appropriation" of goods under a contract of sale may mean a mere election by the vendor, where he has the right himself to choose what articles he will supply in performance of his contract, in which case the property does not pass; or it may mean that both parties to the contract have agreed that particular goods shall be the articles to be supplied, and yet the appropriation may not operate so as to pass the property. But where both parties have agreed that particular goods shall be the article contracted for and shall become the property of the vendee, and nothing further remains to be done in order to transfer the goods, that is an appropriation which operates in law so as to vest the property in the vendee.

Under a contract for the sale of goods, to be selected by the vendor, a selection and a delivery to a common carrier for the vendee is a delivery to the vendee, whose agent the carrier becomes; and if there is a binding contract, and the article agrees with it, such delivery is such an appropriation as leaves nothing more to be done in order to transfer the goods, and therefore the property passes. But in the case of a delivery on board a ship under a bill of lading the captain is in possession of the goods, and carries for and on behalf of the vendor, and the delivery does not operate as in the case of a common carrier, though the ship be expressly hired for the vendee: it is an appropriation only in the sense of an election, and does not vest the goods in the vendee.

Under a contract for the sale and delivery of barley, to be according to sample, for cash on receipt of bill of lading, the vendor at the request of the vendee procured a ship for him, and sent him the charter-party, and he insured the ship. The vessel was loaded and the captain gave a bill of lading to the vendor, who had written to the vendee—"I hope to be able to send you the invoice and bill of lading on Wednesday." A day or two after, the vendor called and left the invoice and unindorsed bill of lading with the vendee; but afterwards, upon the vendee expressing himself

dissatisfied with the samples from the cargo, though he did not refuse to accept it, and tendered the price, the vendor took away the bill of lading and indorsed it to other parties. The vendee having on the arrival of the ship obtained part of the cargo,—Held, that the property in the barley had not passed to the vendee, and that the indorsees of the bill of lading were entitled to recover the value in an action of trover against the vendee.

Trover for 500 bushels of barley.

Pleas—First, not guilty; and second, not possessed.

The cause was tried, before Williams, J., at the Somersetshire Spring Assizes, 1847, when the following appeared to be the facts of the case:—The defendant, who was a corn-factor at Bristol, having occasionally had dealings with a corn-factor at Plymouth, of the name of Lethbridge, wrote to him there from Bristol, on the 5th of December 1846, as follows—"I hear that the crop of barley in the south of Hampshire is good this year, and that at Kingsbridge the price is low compared with the markets further eastward. If you are doing anything in the article this season, and can make me an offer of a cargo, I have no doubt but we may have a transaction. Let me hear from you in due course. Send me sample in letter describing weight, &c." On the 9th Lethbridge wrote, in answer—"I beg to inform you I have not yet commenced buying barley in the Kingsbridge market, farmers there standing out for 10s. a bag. After Saturday's market I will send you a sample and an offer, if possible." On the 14th Lethbridge wrote to the defendant as follows—"I herewith hand you samples of common and chevalier barley of the neighbourhood of Kingsbridge, and will engage to sell you from 400 to 500 quarters f. o. b. at Kingsbridge or neighbouring port, at 40s. per quarter common, and 42s. per quarter chevalier, in equal quantities, for cash on handing bills of lading, or acceptance at two months' date adding interest at the rate of 5l. per cent. per annum, subject to your reply by course of post." On the 16th the defendant replied—"I beg to accept your offer of 250 quarters of chevalier barley at 42s. per quarter, and 250 quarters common at 40s. per quarter, f. o. b., for cash payments on receipt of bill of lading

and invoice, the quality of which to be equal to the samples received from you to-day." On the 18th Lethbridge wrote to the defendant—"Your favour of the 16th is duly to hand, and note by it your acceptance of my offer of barley. I suppose I am to take up a vessel at the least possible freight I can get her for; please instruct me in this, and say if for Bristol or any other port." On the 19th the defendant wrote in answer—"I took it for granted that you would get a vessel for the barley I have bought of you, f. o. b., and therefore did not instruct you to seek one. I trust that you will be particular to select a good ship, and at the lowest possible freight for this port, and, above all, take care that the quality of the barley is fully equal to sample. A party who will take part of it is extremely particular in these matters, and the samples are sealed and held in the custody of a third party. Please to advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly." After some further correspondence respecting the amount of freight, Lethbridge wrote on the 23rd to the defendant, saying, "I now send you copy of charter-party of the *Emerald*, which vessel will sail for the port of loading to-day or to-morrow, and I will lose no time in getting her loaded." The defendant, by letter, dated the 24th, acknowledged the receipt of the charter-party, which was dated on the 22nd, not under seal, and was in the name of Lethbridge, to load at Dartmouth, a portion to be filled up at Salcombe, to proceed to Bristol, and deliver on payment of freight. On the 28th Lethbridge wrote to the defendant—"the *Emerald* will commence loading to-day. I hope to hand you bill of lading in the course of the week." And, again, on the 1st of January 1847—"I hope to be able to send you invoice and bill of lading of *Emerald* on Tuesday or Wednesday." Also on the 6th of January he wrote to the defendant—"The *Emerald* is nearly loaded; expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you." The vessel was loaded with chevalier and common barley; and on the 7th of January Lethbridge received from the master the bill of lading of the cargo, which was therein expressed to be deliver-

able at Bristol to the order of Lethbridge, on assigns paying the freight as per charter. On the 8th Lethbridge was at Bristol, and called upon the defendant at his office there, and left with him the invoice and unindorsed bill of lading. He returned in about four hours, when after objection made by the defendant to take the cargo at the contract price, because he considered the samples produced from the cargo were of inferior quality to those previously sent, a tender of the contract price was made under protest; but Lethbridge asserting the quality of the samples from the bulk to be equal to the previous sample, declined the money unless it was to be in final settlement. The defendant expressed himself dissatisfied with the barley, but said "I accept the cargo," and he tendered Lethbridge the price in money. Lethbridge, however, said he would not settle with the defendant on those terms, refused to indorse the bill of lading, and took it away, saying he considered the transaction at an end. The defendant did not object to Lethbridge taking the bill of lading. There had been a considerable rise in the market; and the same day Lethbridge went to the plaintiffs, who were corn-factors at Bristol, and indorsed the bill of lading to them, receiving the usual advances. Upon the *Emerald* arriving at Bristol the defendant went on board, and representing himself as the merchant owning the cargo, began to discharge it, and obtained 1,240 bushels of the barley, value 422*l.* 14*s.*, when the plaintiffs coming on board and presenting the bill of lading to the captain, the remainder was delivered to them, and they paid the freight.

The jury found that the defendant did not refuse to accept the cargo, and that he had made an unconditional tender of the price to Lethbridge; but they found that Lethbridge was not an agent intrusted with the bill of lading by the defendant. His Lordship thereupon directed a verdict for the plaintiff for 422*l.* 14*s.*, with leave to the defendant to move to enter a verdict for him.

*Crowder* (*Barstow* and *Greenwood* with him) appeared to shew cause (Feb. 5), but the Court, after the reading of the Judge's notes of the trial, called on—

*Butt* and *M. Smith*, in support of the rule (Feb. 5 and 7).—The first question is, whether, having regard to the particular trans-

action and the terms of the original contract, it was not the intention of the parties that the property should pass by the delivery on board. The contract was for the sale of 500 quarters of barley, to be delivered free on board the ship of the vendee, and not of the vendor. As between the vendor and the vendee the transfer of the bill of lading was not necessary to pass the property. If the ship had gone down during the voyage the loss would have been the vendee's.

[PARKE, B.—Surely the party who had the bill of lading was entitled to the cargo.]

The vendee writes and instructs the vendor to select a vessel for him, and the delivery on board the *Emerald* was, in truth, a delivery on board a vessel which was hired for the vendee, and was at his risk. The case is the same as though Lethbridge were suing; for though generally it may be necessary that the bill of lading should be indorsed in order to pass the property, that is not the only mode in which as between vendor and vendee property passes. Payment is not a condition precedent to the passing of the property. In this case the property passed as much as if there had been an express contract that it should do so, but there was no bill of lading indorsed. Though the charter-party is in the name of the vendor, yet the vendee might be sued for the freight; for although the contract for freight was made by the vendor, yet as it was made by him for and as the agent of the vendee it is the same as if made by a third party employed by the vendee. The defendant wrote for information as to the vessel's port of loading that he might, as he expressly said, get the insurance done; so that it is clear the risk after delivery on board was to be the defendant's. Suppose he had had his own ship at the port of lading.

[PARKE, B.—The question is, when according to this contract was the property intended to vest?]

But, further, on the 8th of January the bill of lading and invoice were left at the defendant's counting-house, and the invoice was never taken away. Subsequently, after some dispute as to the quality of the barley, the money was tendered, and then Lethbridge took up the bill of lading and carried it away. This was a fraud, for there had been an appropriation of the cargo, an offer and acceptance, and the transfer was complete.

[PARKE, B.—The original contract might be satisfied by the delivery of *any* cargo answering to the samples. When then was the acceptance of the cargo complete? "Appropriation" may mean selection, or an agreement that the particular cargo shall be the thing transferred. If the terms of the contract are such as to shew that the parties intended that the property should pass by the mere agreement for sale, then by the law of England it passes, though by the Roman law it does not.]

If the property had not previously passed by the delivery on board, it vested by what took place at Bristol. The vendor there offered the cargo, which the vendee accepted.

[PARKE, B.—It is quite clear that the vendee reserves to himself the bill of lading; and the question is, for what purpose? Clearly to keep a lien on the cargo, and if so, when did the property pass?]

It passed as soon as the vendee agreed to take it. An unpaid vendor has a lien; but here there was a tender of the price, which was equivalent to payment, and the lien was at an end. Suppose Lethbridge had taken the money and not indorsed the bill of lading.

[PARKE, B.—The goods are put on board to be carried for Lethbridge, and not as the defendant's goods.]

[ALDERSON, B.—Is it clear that the defendant did accept the cargo without some condition as to the quality of the corn?]

[PARKE, B.—He must accept it as agreeing with the sample.]

The jury found there was no refusal to accept.

[ROLFE, B.—They did not find there was an unconditional acceptance.]

[PARKE, B.—As soon as Lethbridge said there was an end of the matter, it clearly could not pass.]

It had previously passed at Plymouth.

[ALDERSON, B.—Suppose Lethbridge had delivered on board wheat instead of barley, would the defendant have been bound to take it?]

Lethbridge never intended to keep the bill of lading. He says, I shall send you (the defendant) the bill of lading.

[PLATT, B.—When was the time when both parties agreed that that particular barley should be the subject of the contract?]

The case of *Ogle v. Atkinson* (1) is in point. There, A. being indebted to the plaintiff, accepted an order to purchase goods for him at R, and put them on board the plaintiff's vessel, sent for them, as the plaintiff's goods, advised him of the shipment for the plaintiff's risk and on his account, and remitted him the invoices. He procured the master to sign the bill of lading to the order of blank. It was held, that the property in the goods was changed by the delivery on board, and that a subsequent indorsement of the bill of lading to another party was inoperative. A conditional appropriation is not uncommon. Lethbridge here wrote, and said, I shall send you the bill of lading; and the subsequent taking and parting with it to another was in fraud of that contract. What passed between them in the defendant's counting-house amounted only to a discussion as to the quality, and the jury have negatived the idea of the defendant's having refused the cargo.

PARKE, B.—I am of opinion in this case, that the rule ought to be discharged. It is clear, the original contract between the parties was not for a specific chattel, but would be satisfied by the delivery of any 500 quarters of corn answering to what were agreed to be delivered. Therefore, by the original contract no property passed. That does not admit of the least doubt. Then, in order to deprive the original owner of the property, you must shew in this form of action (which is an action for the property, because the plaintiffs' claim is under the original contract) that at some subsequent period the property passed. It may be admitted, if a person orders goods, although they are to be selected by the vendor, and to be delivered to a common carrier and sent to the vendee, that as soon as the vendor has selected the goods and means to deliver them in performance of his contract, and delivers them to the carrier, the carrier becomes the agent of the vendee, and such a delivery of goods is a delivery by the vendor to the vendee; and if there is a binding contract between them, either by note in writing or by part payment, or subsequently by part acceptance, then there is no doubt that

the property passes by the delivery to the carrier, provided the article agrees with the contract. Now, in this case it is said, the delivery on board ship is equivalent thereto, because the ship was engaged by Lethbridge as agent for the defendant. But assuming that were so, the actual delivery on board was not a delivery to the defendant, but a delivery to the captain to be carried under a bill of lading. Now, the bill of lading indicates for whom the master of the vessel is to carry the goods: he agrees thereby to carry them as agent for and on account of Lethbridge, and to deliver them to Lethbridge if he does not make an assignment of the bill of lading, and to deliver to the assignee of the bill of lading if it is afterwards assigned. Then the master continues in possession of the property, not as in the case of an ordinary common carrier, but as a person carrying on behalf of Lethbridge. Then you find by looking at the contract, that for some purpose or another (and there is no breach of duty or improper act on the part of Lethbridge) he stipulates that the price is to be paid on the delivery of the bill of lading, and the bill of lading is clearly contemplated by that contract to be a bill of lading by which Lethbridge is to preserve the controul over the property. I think it follows that the 500 quarters of corn being delivered to the captain to be carried for Lethbridge are not in the same situation that 500 quarters of corn delivered to a common carrier by order of the consignee would be; and, therefore, that the act of delivery did not pass the property in this case. Then what other subsequent act was there to pass the property; because it is admitted by the defendant's counsel that unless there was a subsequent appropriation of the 500 quarters the property did not pass? Now, the word "appropriation" may be understood in different senses. It may be understood to mean an election on the part of the vendor, where he has a right to choose the article which he will supply in performance of his contract; that may be called an appropriation, and the context will shew when the word is used in that sense; or it may mean that both parties have agreed that a particular thing shall be the article to be delivered in pursuance of the contract; and yet the property may not pass, as, for instance, in the case of an

(1) 5 Taunt. 759.

1848. } FAVIELL v. THE EASTERN COUN-  
May 26. } TIES RAILWAY COMPANY.

*Arbitration—Corporation—Railway Company—Attorney, Authority to refer Cause.*

*An attorney appeared for a corporation in an action of debt, and consented to a Judge's order, referring "all claims made in the action" to an arbitrator. The arbitrator having awarded to the plaintiff a sum actually claimed in the action,—Held, that the question, whether that sum was a debt or not was submitted to the arbitrator, and that his decision on the point was final, even if erroneous.*

*Held, also, that an attorney authorized to appear for a party in a suit has incidentally authority to refer it without any fresh authority to that effect, and that the attorney having appeared for the corporation, to the knowledge of the directors, the corporation were bound by his acts as attorney, though he was not authorized to appear by an authority under seal.*

In this case, the plaintiff had issued a writ in debt against the Eastern Counties Railway Company, who had appeared by an attorney. No further proceedings were taken in the action, but the attorney, who had appeared for the company, consented to a Judge's order, referring "the claims in that action" to an arbitrator. It appeared, by the affidavits, that the plaintiff sought to recover, before the arbitrator, sums between 3,000*l.* and 4,000*l.*, which, it was admitted, were debts, and a sum of 10,307*l.*, which the railway company contended, if recoverable at all, was to be recovered as unliquidated damages, and not as a debt; and consequently, as they contended, this was not included in the submission. The arbitrator made his award, directing the company to pay the plaintiff 14,410*l.* 7*s.* It appeared, by the affidavits, that the directors of the company were aware that the attorney had appeared for the company; but that he had no authority under seal to appear, and was not expressly authorized by the directors to refer the action.

In last term, a rule had been obtained, under the 1 & 2 Vict. c. 110, calling on the company to shew cause why they should

not pay to the plaintiff 14,410*l.* 7*s.*, the amount awarded to him.

*Martin, Willes, and Prentice* now shewed cause.—The Court in last term refused to set aside this award (1), but the company are desirous of raising the questions on the record; and the Court will not decide a question involving so large an amount in a summary manner, without appeal, but will rather put the plaintiff to bring his action.

[*POLLOCK, C.B.*—The decision of this Court is an authority against you; but if, notwithstanding that, you can raise any doubt in any one member of the Court as to whether you may not plead with success a defence to an action on this award, we ought not to decide in this summary manner without an appeal.]

The reference in this case was solely of the action, which was in debt, and gave the arbitrator no authority to decide on anything which was not a debt. The decision of the arbitrator, though erroneous, is conclusive on all matters submitted to him, but he cannot enlarge his jurisdiction by an erroneous decision as to what his jurisdiction is. Suppose that an action of debt, and only an action of debt, being referred to him, he had adjudicated on an action for an assault, and had decided that that was a debt, could it be said that the parties were to be bound by such an award? The arbitrator is, in this respect, like an inferior court, which cannot give itself jurisdiction by its erroneous finding—*Roberts v. Humby* (2). On this principle the Court of Queen's Bench quashes convictions, when the Justices have acted without jurisdiction, though they have erroneously decided that they have jurisdiction, or grants a mandamus to compel them to entertain a complaint, though they have erroneously decided that they have no jurisdiction, yet the decision of a Justice on a matter within his jurisdiction is as conclusive as an award on matters within the submission.

[*ALDERSON, B.*—The arbitrator must, no doubt, come to a determination as to whether a matter is within the submission or

(1) Since reported, *Faviell v. Eastern Counties Railway Company*, *ante*, p. 223.

(2) 3 Mee. & Wels. 120; a. c. 7 Law J. Rep. (N.S.) Exch. 45.



1848. } ADAMS AND ANOTHER v. FREE-  
June 2. } MANTLE AND OTHERS.

*Prerogative — Revenue — Removal of Cause.*

*A vessel, having a quantity of fire arms on board, was seized by the officers of the Board of Customs, and after being detained for some time, was delivered up, unconditionally, to the owners. An action of trespass having been commenced in the Court of Common Pleas, for such seizure and detention, this Court made a rule absolute in the first instance, upon the application of the Attorney General, for the removal of the cause into this court.*

This was an action of trespass, commenced in the Court of Common Pleas by the plaintiffs the registered owners of a vessel called the *Black Cat*, against the defendants, officers of the Board of Customs, for seizing and detaining that vessel. It appeared that the vessel was, on the 22nd of January 1847, cleared outwards at the Custom House in the usual way for Gibraltar, with a cargo consisting of a quantity of fire-arms and other military accoutrements. The vessel was seized by the Customs on the alleged ground, as the plaintiffs believed, that the exportation of this cargo was in contravention of the Foreign Enlistment Act, but after the vessel had been detained for some time, she was delivered up unconditionally, and proceeded on her voyage. Two months afterwards this action was commenced. Notice having been given by the solicitor to the Customs that counsel on behalf of the Crown and of the defendants would move this Court that the said action be removed out of the Court of Common Pleas into the office of pleas in this court,—

*The Attorney General* now moved accordingly.—He had no affidavit, but stated the facts as Attorney General.

*Greenwood*, for the plaintiffs.—It is submitted that the Court ought not to grant this application. In the first place, there ought to be an affidavit on the part of the defendants, from which the Court may see that the revenue of the Crown will be affected by this action. The course of authorities, almost without exception, shew that such an affidavit is necessary. In

*Manning's Exchequer Practice*, p. 194, it is laid down thus: "Where the state of the pleadings sufficiently discloses the question intended to be raised, no affidavit of a motion to remove the proceedings seems to be necessary. In other cases an affidavit is required from which it must appear that the matters in dispute relate to the revenue." *The Attorney General v. Hallett* (1) is the only case in which a motion of this nature was allowed to be made without affidavit, and there matter appeared on the face of the pleadings to shew that the Crown was interested. He cited *In re Kingsman* (2), *The Attorney General v. Kingston* (3), — v. — (4), *Beningfield v. Stratford* (5).

[PARKE, B.—The Court always give the Attorney General credit for stating the truth.]

[*The Attorney General* stated that he had an affidavit of the facts if the Court had thought it necessary that one should be used.]

Secondly, in point of fact the circumstances of the case are such that the revenue of the Crown cannot be affected; if it ever could have been so, it cannot now, for long before the present action was brought the vessel and cargo had been delivered up unconditionally to the plaintiff. In the note to *Bereholt v. Cundy* (6) it appears the Court refused to remove an action brought against an officer of the Customs for the seizure of a ship, where an information having been laid against the plaintiff, a verdict had been found for him, for the Crown had no longer any interest in the matter. He cited *Bishop v. Warner* (7), *Cantborne v. Campbell* (8), *Beningfield v. Stratford*.

POLLOCK, C.B.—I have no doubt at all about the matter. In my opinion, the cause should be removed into this court.

PARKE, B.—There is nothing in the facts of the case to shew that the vessel in question may not have been forfeitable at the

- (1) 15 Mee. & Wels. 97; s. c. 15 Law J. Rep. (n.s.) Exch. 246.
- (2) 1 Price, 206.
- (3) 8 Mee. & Wels. 163; s. c. 11 Law J. Rep. (n.s.) Exch. 72.
- (4) Anstr. 205.
- (5) 8 Price, 584.
- (6) Bunbury, 54.
- (7) Hardres, 193.
- (8) Anstr. 205, n.

entertained before him. Then was the time for them to apply to a Judge to revoke his authority, on the ground that he was exceeding his authority, if he really was doing so, which must depend on the construction of the submission, which gives him authority. Instead of doing so, they lie by, and take the chance of an award in their favour. The arbitrator has decided that this "claim" is a debt, and that was the very point submitted to him, on which, therefore, his decision is final. As to the other point it would be monstrous if parties suing a corporation were bound to seek for an authority under seal given to the attorney for each step. They would be grievously injured if that was the case.

ROLFE, B. concurred on both points.

PLATT, B.—I think that an attorney who has been duly authorized to appear for a litigant has incidentally authority to conduct the cause, and to refer it. If he does wrong he may be responsible to his client; but his client is bound. In the present case the attorney in fact appeared for the company; the company had notice that he had done so, and did not interfere, but suffered the proceedings to go on; and I think they are now estopped from denying that he was duly authorized to appear for them. As to the other point I concur.

*Rule absolute.*

1848. }  
May 31. } PRATT v. PRATT AND OTHERS.

*Pleading—Trespass to Goods—Conversion—Matter of Aggravation.*

*A declaration in trespass to goods charged the defendant with taking and carrying them away, and also with converting them to his own use:—Held, that such conversion was merely matter of aggravation, and a plea to the whole declaration justifying the taking the goods and carrying them away, but omitting to justify their conversion, was a good plea.*

**Trespass.** The declaration alleged that the defendants, on &c., with force and arms, &c., broke and entered a certain dwelling-house of the plaintiff, and then in the plaintiff's occupation, and then made a

great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long time, to wit, &c., and then forced and broke open, broke to pieces and damaged divers, to wit, two windows of the plaintiff, &c. of great value, &c., and also during the time aforesaid, &c., with force and arms seized and took divers goods and chattels of the plaintiff, to wit, &c., then found and being in the said dwelling-house, &c., and carried away the same, and converted and disposed thereof to their own use. By means of which several premises the plaintiff and his family were during all the time aforesaid not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the plaintiff, but the plaintiff was also during all that time hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, &c.

The defendants pleaded, thirdly, to the whole declaration, that the said dwelling-house in which, &c., at the said time when, &c., was the dwelling-house, soil and freehold of one T. P, whereupon the defendants as the servants of the said T. P. and by his command broke and entered the said dwelling-house in which, &c., at the said time when, &c., and because the goods and chattels in the declaration mentioned, and every part thereof, at the said time when, &c., were and was in and upon the said dwelling-house in which, &c., incumbering the same, they, the defendants, as the servants of the said T. P. and by his command, in order to remove the said incumbrances, seized and took the said goods and chattels in the declaration mentioned, and then carried and conveyed the same away from and off the said dwelling-house in which, &c., to a small and convenient distance in that behalf, and there left the same for the plaintiff as they lawfully might for the cause aforesaid, which were the said alleged trespasses in the declaration mentioned. Verification.

Special demurrer, assigning for cause that the plea professed in the commencement thereof to be an answer to the whole declaration, yet that, although the declaration alleged that the defendants converted and disposed of the said goods and chattels to

their own use, the said plea did not state or shew any answer to that part of the declaration.

*Pigott*, in support of the demurrer.—The plea affords no answer to that part of the declaration which charges the defendants with having converted the plaintiff's goods. The facts alleged in the plea only justify the seizing them and carrying them away; not the conversion.

[PLATT, B.—But is not the conversion mere matter of aggravation?]

In this declaration it is treated as a distinct act of trespass; and as the plea professes to answer all the trespasses alleged in the declaration, it should have in terms justified the conversion. The taking away a party's goods is not necessarily a conversion—*Fouldes v. Willoughby* (1).—He also cited *Smith v. Edge* (2), *Oxley v. Watts* (3), *Gregory v. Hill* (4), *Woods v. Durrant* (5), *Davison v. Wilson* (6).

*Phipson*, contra, was stopped by the Court.

POLLOCK, C.B.—We are all agreed that this plea is sufficient. The only trespasses in the declaration which required an answer were the breaking into the dwelling-house, and the taking and carrying away the plaintiff's goods. The conversion of the goods was merely matter of aggravation.

*Judgment for the defendants.*

1848. }  
June 6. } SAYER v. GLOSSOP.

*Evidence—Coverture—Marriage Register—Identity.*

*In support of a plea of coverture, alleging the marriage of the defendant with one J. G.*

(1) 8 Mee. & Wels. 540; a.c. 10 Law J. Rep. (N.S.) Exch. 364.

(2) 6 Term Rep. 562.

(3) 1 Ibid. 12.

(4) 8 Ibid. 299.

(5) 16 Mee. & Wels. 149; a.c. 16 Law J. Rep. (N.S.) Exch. 313.

(6) 17 Law J. Rep. (N.S.) Q.B. 196.

*a copy of the marriage register was put in evidence, and a witness was called who stated that he was acquainted with one J. G., that he had inspected the original register, and that one of the signatures to it was in the handwriting of the J. G. whom he knew:—Held, that this was evidence of the identity of J. G., without the original register being produced.*

This was an action by the drawer against the acceptor of a bill of exchange.

The defendant pleaded coverture.

At the trial, before Parke, B., at the last Middlesex Sessions, the defendant's case was proved by putting in evidence an examined copy of the register of a marriage between the defendant and one Joseph Glossop, and by the evidence of a witness who knew a Joseph Glossop and his handwriting, and who having seen the original marriage register, swore that the signature to it was in the handwriting of the Joseph Glossop with whom he was acquainted, and who was then alive. The counsel for the defendant objected that the original register should have been produced, but the learned Judge overruled the objection, and the jury accordingly found a verdict for the defendant.

*M'Mahon* now moved for a new trial.—The original register ought to have been produced. The only mode by which the witness could speak to the fact of the defendant having married Joseph Glossop was by the signature to the original register. Without its production the jury could have no means of being satisfied of the accuracy of the witness's testimony.

[POLLOCK, C.B.—The party who has the lawful custody of the register could not be called upon to produce it.]

On the trial of indictments for bigamy the original register is produced.

[PARKE, B.—I have tried, perhaps, more cases of bigamy than any other Judge, and I do not recollect one in which the original register was produced at the trial.]

POLLOCK, C.B.—We are all of opinion that this rule should be refused, upon the ground that the person who has the legal charge of the register cannot be called upon

to produce it, and that in his absence it is for the jury to say what degree of weight and value they can give to the evidence of a witness who speaks to the handwriting of a document which is not before them. Suppose the question was, whether a certain person was at a particular place on a given day, and a witness was called, who said, "I know that person; he is the churchwarden of my parish, and on that day I saw a notice stuck on the church door, the signature to which was in his handwriting." That would be evidence, because the notice itself not being able to be removed could not be produced in court. Now if in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were a physical impossibility.

ROLFE, B.—I am of the same opinion, and, using a similar illustration to that given by my Lord, will suppose that seditious or treasonable placards had been posted up, and a witness were to state that the handwriting of these placards was that of A. B.; that would clearly be evidence against A. B, upon the ground that the thing itself could not be produced. .

PLATT, B.—The only difficulty which arises in the case is this, that suppose the signature to the register to be a forgery, the plaintiff would have no means of shewing that to be so, unless the original register were produced. That is certainly some inconvenience; but, on the other hand, as the production of the document was not possible, I think the evidence given was admissible.

PARKE, B.—For the purpose of preserving parochial registers, the law allows parties to prove their contents by producing in evidence an examined copy, and dispenses with the production of the original register. Now, to prove the identity of a person, you may shew that in consequence of a particular mark, B, appearing upon the register, such a person was present at the time the entry in question was made upon it. In the present case a witness swore that he had seen the original register, and that one of the signa-

tures to it was that of a James Glossop, whom he knew: that was evidence that this James Glossop was the person who then married the defendant. In all cases it is doubtful whether the party who has the custody of the register will produce it; and I take it to be quite clear that he is not bound to produce it under a *subpœna duces tecum*. But in any event its absence is only matter of observation to the jury as to the degree of weight to be attached to the evidence of a witness who speaks to a mark existing upon a document which is not before the jury.

*Rule refused.*

[IN THE EXCHEQUER CHAMBER.]

1848. }  
Feb. 6. } CURLING v. WOOD.

*Case — Duty — Wharfinger — Mooring Vessels.*

*A declaration in case for damage done to the plaintiff's vessel, stated that the defendant possessed a wharf on the Thames, near which there was a wood-work, placed there by the defendant, and being at the bottom of the river, and over which the after-mentioned ship at certain states of the tide would float, but not at other states of the tide; that the plaintiff was possessed of a ship then being by sufferance of the defendant at and alongside the wharf for reward to the defendant in that behalf; that the defendant had the management and controul of the wharf, and the mooring and stationing of ships at and near it whilst they were at the wharf for the purpose of using it. Breach, that the defendant unskilfully, &c. placed, moored and stationed the plaintiff's ship in the river, near the wharf and over the wood-work, and detained it there for a long and improper time, and until the ship, on the fall of the tide, struck against the wood-work, and thereby was greatly injured. Plea, that the defendant had not the management and controul of the wharf, and the mooring and stationing of ships, &c. modo et formâ.*

*After a verdict for the plaintiff, a rule nisi for arresting the judgment was refused.*

*On error, the judgment of the Court below was affirmed; and it was held, that the declaration sufficiently shewed a duty on the part of the defendant safely to moor and station the vessel, and a breach of it.*

Error from the Court of Exchequer.

Case. The declaration stated that before and at the time when, &c. the defendant (the plaintiff in error) was possessed of a certain wharf for the loading and unloading of ships and vessels on the banks of the river Thames, near to which said wharf there then was certain wood-work before then by the defendant placed, and then being at and upon the bottom of the said river, over which said wood-work, at certain states of the tide of the said river, the ship or vessel hereinafter mentioned would float, but at other states of the said tide the said ship or vessel would not float, of all which premises the defendant before and at, &c. had notice; that at the time when, &c., and while the defendant was so possessed of the said wharf as aforesaid, the plaintiff was possessed of a certain ship or vessel of great value, to wit, &c., then being by sufferance and permission of the defendant at and alongside the said wharf for reward to the defendant in that behalf, and the defendant then had the management and controul of the said wharf, and the mooring and stationing of ships and vessels at and near the same, whilst such ships and vessels were at the said wharf for the purpose of using the same; yet the defendant, to wit, on &c., unskilfully, negligently and improperly placed, moored and stationed the said ship or vessel of the plaintiff in the part of the said river near the said wharf, and over the said wood-work, and unskilfully, negligently and improperly detained the said ship or vessel there over the said wood-work for a long and improper time, and until the said ship or vessel on the day and year aforesaid, upon the natural and usual fall of the tide in the said river, came, fell, and lodged upon and struck against the said wood-work at the bottom of the said river, and there remained and continued upon and striking against the said wood-work for a long time, to wit, &c., and thereby then became and was greatly strained, bilged, broken and injured, &c.

Third plea, denying that the defendant had the controul of the wharf, and of the mooring and stationing of vessels.

At the trial, before Platt, B., at the London Sittings after Easter term, 1846, the jury found a verdict for the plaintiff on the third plea. A rule *nisi* for arresting the judgment having been refused by the Court of Exchequer (1), the defendant below brought a writ of error on the judgment.

*Cleasby*, for the plaintiff in error (the defendant below), Feb. 6th, 1848 (2).—The declaration which charges the wharfinger with unskilfully mooring a vessel at an improper place, discloses no duty for the breach of which he is responsible. The question is an important one; and it is quite a new thing to attempt to make a wharfinger liable for an accident which has happened to a ship in the river when moored at his wharf. There is a well-known distinction between docks and wharves. Ships in dock are in the custody and under the charge of the dock-owners; but ships moored at a wharf are not under the charge or custody of the wharfinger.

[WIGHTMAN, J.—The declaration states that the defendant below had the management and controul of the wharf, and the mooring and stationing of vessels at and near the same.]

It is not stated that the defendant was employed to moor or station the ship, or that there was any reward to him for so doing; but that the vessel was alongside the wharf for reward to the defendant. This statement does not involve any duty on the part of the defendant to do any act relative to mooring. The object for which wharves are constructed is not the mooring of vessels. Wharfage is chargeable for laying goods upon the wharf — *Stephen v. Coster* (3).

[WILDE, C.J. — The declaration must mean that the defendant had the management of the wharf in respect of loading, &c.]

There is no allegation of any duty except that of a wharfinger. There was no deli-

(1) *Wood v. Curling*, 15 Mee. & Wels. 626.

(2) Before Wilde, C.J., Coleridge, J., Wightman, J., Erle, J. and Williams, J.

(3) 1 W. Black. 413, 423.

very over of the ship into the care of the defendant.

[WILDE, C.J.—It appears that the plaintiff parted with his controul as to mooring the ship.]

It cannot be urged that by virtue of the defendant's employment as a wharfinger, the duty of mooring was cast upon him. It can only be argued, that the allegation as to the mooring implies an employment by the plaintiff of the defendant for the purpose of mooring.

[WILDE, C.J.—The declaration states, and the verdict finds, that the defendant had the management of the mooring and stationing. That excludes everybody else.

[ERLE, J.—And it implies an undertaking to use ordinary care in doing it.]

[WILLIAMS, J.—If we can give a construction to the allegation which will support the verdict, that construction must be given to it after verdict.]

The statement of negligence in the declaration is nothing of itself, unless the relation of the parties raised a duty binding on the defendant to use due care—*Priestley v. Fowler* (4).

*Martin*, for the defendant in error, was not called upon.

WILDE, C.J.—There is little doubt that the declaration is perfectly sufficient. What is it that is alleged as evidence of the claim for indemnity against the wrong which the plaintiff suffered? It is stated that the wharf was used for profit, that it was prepared in a certain manner, and that the vessel was alongside for reward to the defendant. It may be that wharfingers are not generally bound to moor ships. Different wharfingers may carry on their business in different manners. They may gain a profit from the mooring. The declaration here states that the defendant had the management and controul of the wharf and the mooring and stationing of vessels at or near it. What can be the meaning of having the stationing but controuling the place where the ship was to be placed? Then it is stated that the defendant unskilfully,

(4) 3 Mee. & Wels. 1; s. c. 7 Law J. Rep. (N.S.) Exch. 42.

negligently, and improperly placed and stationed the vessel in a part of the river near the wharf, and over the wood-work which had been placed there by the defendant; and then that he unskilfully, negligently, and improperly detained the vessel over the said wood-work for an improper time, till the vessel, upon the fall of the tide, lodged and struck upon it, and so was damaged. The effect of the whole statement in the declaration is, that the defendant, being proprietor of the wharf, the plaintiff came to use it for the profit of the defendant; that the defendant, who knew the condition of the wharf, placed the plaintiff's vessel where it was greatly injured. Is not that a state of things which creates the right to indemnity stated in the declaration? If such right is denied, the declaration might have been demurred to; but after the verdict how are we to construe it? Are we to look out for difficulties in the construction? It would be doing violence to language not to support the verdict. I think there is a good statement of such a relation between the parties as brought a responsibility on the defendant. The declaration states that he had the controul, and chose to place and station the vessel where it received an injury. I cannot see any just foundation for the doubt that wharfingers are not bound safely and securely to moor. That may be the case generally; but in this case the defendant chooses to moor for profit, and in doing so he unskilfully does that which causes the damage. I think, therefore, that he is responsible for that damage, and that the judgment of the Court below was correct.

*Judgment affirmed.*

1848. } WEBSTER v. CROUCH AND  
June 9. } ARROWSMITH.

*Pleading—Demurrer—Certainty.*

*A declaration stated that the plaintiff had divers dealings with the defendants, and that divers accounts remained unsettled between them; that the plaintiff had, for the accommodation of one of the defendants, accepted divers bills of exchange, and thereupon, in consideration that the plaintiff then delivered*

*On error, the judgment of the Court below was affirmed; and it was held, that the declaration sufficiently shewed a duty on the part of the defendant safely to moor and station the vessel, and a breach of it.*

Error from the Court of Exchequer.

Case. The declaration stated that before and at the time when, &c. the defendant (the plaintiff in error) was possessed of a certain wharf for the loading and unloading of ships and vessels on the banks of the Thames, near to which said wharf then was certain wood-work before the defendant placed, and then being upon the bottom of the said wharf which said wood-work, at certain tide of the said river, the hereinafter mentioned wood-work, so that other states of the said river the vessel would not float. The defendant before that at the time when the defendant was possessed of a certain wharf as aforesaid, and as assessed of a certain value, to the defendants, as the said Crouch, as alongsid the sum of 15*l.* towards a bill then drawn by the defendant Crouch, the sum of 4*s.* 6*d.*, which would become due on the 10th of May 1846. Breach, that the defendants did not, nor would return the said acceptances, or pay to the plaintiff the said sum of 15*l.*

Demurrer, assigning for causes that no sufficient consideration was shewn for the defendants' promise; that the acceptances delivered to the defendant may have been worthless; that the declaration was defective in certainty in not stating the names of the parties whose acceptances were delivered to the defendant. Joinder therein.

*J. Brown*, in support of the demurrer.—The declaration is bad. First, there is no valid consideration for the defendants' promise. The consideration is not connected with the inducement; it does not appear whose "accounts" remained unsettled, nor whether the "debts" mentioned in the declaration were those of the plaintiff

Third plea, demurrer. The declaration had the contrary to the plaintiff's pleading, mooring and stationing the vessel.

At the London jury the

the case of the *Thames*, *1846*, *1847*, *1848*, *1849*, *1850*, *1851*, *1852*, *1853*, *1854*, *1855*, *1856*, *1857*, *1858*, *1859*, *1860*, *1861*, *1862*, *1863*, *1864*, *1865*, *1866*, *1867*, *1868*, *1869*, *1870*, *1871*, *1872*, *1873*, *1874*, *1875*, *1876*, *1877*, *1878*, *1879*, *1880*, *1881*, *1882*, *1883*, *1884*, *1885*, *1886*, *1887*, *1888*, *1889*, *1890*, *1891*, *1892*, *1893*, *1894*, *1895*, *1896*, *1897*, *1898*, *1899*, *1900*, *1901*, *1902*, *1903*, *1904*, *1905*, *1906*, *1907*, *1908*, *1909*, *1910*, *1911*, *1912*, *1913*, *1914*, *1915*, *1916*, *1917*, *1918*, *1919*, *1920*, *1921*, *1922*, *1923*, *1924*, *1925*, *1926*, *1927*, *1928*, *1929*, *1930*, *1931*, *1932*, *1933*, *1934*, *1935*, *1936*, *1937*, *1938*, *1939*, *1940*, *1941*, *1942*, *1943*, *1944*, *1945*, *1946*, *1947*, *1948*, *1949*, *1950*, *1951*, *1952*, *1953*, *1954*, *1955*, *1956*, *1957*, *1958*, *1959*, *1960*, *1961*, *1962*, *1963*, *1964*, *1965*, *1966*, *1967*, *1968*, *1969*, *1970*, *1971*, *1972*, *1973*, *1974*, *1975*, *1976*, *1977*, *1978*, *1979*, *1980*, *1981*, *1982*, *1983*, *1984*, *1985*, *1986*, *1987*, *1988*, *1989*, *1990*, *1991*, *1992*, *1993*, *1994*, *1995*, *1996*, *1997*, *1998*, *1999*, *2000*, *2001*, *2002*, *2003*, *2004*, *2005*, *2006*, *2007*, *2008*, *2009*, *2010*, *2011*, *2012*, *2013*, *2014*, *2015*, *2016*, *2017*, *2018*, *2019*, *2020*, *2021*, *2022*, *2023*, *2024*, *2025*, *2026*, *2027*, *2028*, *2029*, *2030*, *2031*, *2032*, *2033*, *2034*, *2035*, *2036*, *2037*, *2038*, *2039*, *2040*, *2041*, *2042*, *2043*, *2044*, *2045*, *2046*, *2047*, *2048*, *2049*, *2050*, *2051*, *2052*, *2053*, *2054*, *2055*, *2056*, *2057*, *2058*, *2059*, *2060*, *2061*, *2062*, *2063*, *2064*, *2065*, *2066*, *2067*, *2068*, *2069*, *2070*, *2071*, *2072*, *2073*, *2074*, *2075*, *2076*, *2077*, *2078*, *2079*, *2080*, *2081*, *2082*, *2083*, *2084*, *2085*, *2086*, *2087*, *2088*, *2089*, *2090*, *2091*, *2092*, *2093*, *2094*, *2095*, *2096*, *2097*, *2098*, *2099*, *2100*, *2101*, *2102*, *2103*, *2104*, *2105*, *2106*, *2107*, *2108*, *2109*, *2110*, *2111*, *2112*, *2113*, *2114*, *2115*, *2116*, *2117*, *2118*, *2119*, *2120*, *2121*, *2122*, *2123*, *2124*, *2125*, *2126*, *2127*, *2128*, *2129*, *2130*, *2131*, *2132*, *2133*, *2134*, *2135*, *2136*, *2137*, *2138*, *2139*, *2140*, *2141*, *2142*, *2143*, *2144*, *2145*, *2146*, *2147*, *2148*, *2149*, *2150*, *2151*, *2152*, *2153*, *2154*, *2155*, *2156*, *2157*, *2158*, *2159*, *2160*, *2161*, *2162*, *2163*, *2164*, *2165*, *2166*, *2167*, *2168*, *2169*, *2170*, *2171*, *2172*, *2173*, *2174*, *2175*, *2176*, *2177*, *2178*, *2179*, *2180*, *2181*, *2182*, *2183*, *2184*, *2185*, *2186*, *2187*, *2188*, *2189*, *2190*, *2191*, *2192*, *2193*, *2194*, *2195*, *2196*, *2197*, *2198*, *2199*, *2200*, *2201*, *2202*, *2203*, *2204*, *2205*, *2206*, *2207*, *2208*, *2209*, *2210*, *2211*, *2212*, *2213*, *2214*, *2215*, *2216*, *2217*, *2218*, *2219*, *2220*, *2221*, *2222*, *2223*, *2224*, *2225*, *2226*, *2227*, *2228*, *2229*, *2230*, *2231*, *2232*, *2233*, *2234*, *2235*, *2236*, *2237*, *2238*, *2239*, *2240*, *2241*, *2242*, *2243*, *2244*, *2245*, *2246*, *2247*, *2248*, *2249*, *2250*, *2251*, *2252*, *2253*, *2254*, *2255*, *2256*, *2257*, *2258*, *2259*, *2260*, *2261*, *2262*, *2263*, *2264*, *2265*, *2266*, *2267*, *2268*, *2269*, *2270*, *2271*, *2272*, *2273*, *2274*, *2275*, *2276*, *2277*, *2278*, *2279*, *2280*, *2281*, *2282*, *2283*, *2284*, *2285*, *2286*, *2287*, *2288*, *2289*, *2290*, *2291*, *2292*, *2293*, *2294*, *2295*, *2296*, *2297*, *2298*, *2299*, *2300*, *2301*, *2302*, *2303*, *2304*, *2305*, *2306*, *2307*, *2308*, *2309*, *2310*, *2311*, *2312*, *2313*, *2314*, *2315*, *2316*, *2317*, *2318*, *2319*, *2320*, *2321*, *2322*, *2323*, *2324*, *2325*, *2326*, *2327*, *2328*, *2329*, *2330*, *2331*, *2332*, *2333*, *2334*, *2335*, *2336*, *2337*, *2338*, *2339*, *2340*, *2341*, *2342*, *2343*, *2344*, *2345*, *2346*, *2347*, *2348*, *2349*, *2350*, *2351*, *2352*, *2353*, *2354*, *2355*, *2356*, *2357*, *2358*, *2359*, *2360*, *2361*, *2362*, *2363*, *2364*, *2365*, *2366*, *2367*, *2368*, *2369*, *2370*, *2371*, *2372*, *2373*, *2374*, *2375*, *2376*, *2377*, *2378*, *2379*, *2380*, *2381*, *2382*, *2383*, *2384*, *2385*, *2386*, *2387*, *2388*, *2389*, *2390*, *2391*, *2392*, *2393*, *2394*, *2395*, *2396*, *2397*, *2398*, *2399*, *2400*, *2401*, *2402*, *2403*, *2404*, *2405*, *2406*, *2407*, *2408*, *2409*, *2410*, *2411*, *2412*, *2413*, *2414*, *2415*, *2416*, *2417*, *2418*, *2419*, *2420*, *2421*, *2422*, *2423*, *2424*, *2425*, *2426*, *2427*, *2428*, *2429*, *2430*, *2431*, *2432*, *2433*, *2434*, *2435*, *2436*, *2437*, *2438*, *2439*, *2440*, *2441*, *2442*, *2443*, *2444*, *2445*, *2446*, *2447*, *2448*, *2449*, *2450*, *2451*, *2452*, *2453*, *2454*, *2455*, *2456*, *2457*, *2458*, *2459*, *2460*, *2461*, *2462*, *2463*, *2464*, *2465*, *2466*, *2467*, *2468*, *2469*, *2470*, *2471*, *2472*, *2473*, *2474*, *2475*, *2476*, *2477*, *2478*, *2479*, *2480*, *2481*, *2482*, *2483*, *2484*, *2485*, *2486*, *2487*, *2488*, *2489*, *2490*, *2491*, *2492*, *2493*, *2494*, *2495*, *2496*, *2497*, *2498*, *2499*, *2500*, *2501*, *2502*, *2503*, *2504*, *2505*, *2506*, *2507*, *2508*, *2509*, *2510*, *2511*, *2512*, *2513*, *2514*, *2515*, *2516*, *2517*, *2518*, *2519*, *2520*, *2521*, *2522*, *2523*, *2524*, *2525*, *2526*, *2527*, *2528*, *2529*, *2530*, *2531*, *2532*, *2533*, *2534*, *2535*, *2536*, *2537*, *2538*, *2539*, *2540*, *2541*, *2542*, *2543*, *2544*, *2545*, *2546*, *2547*, *2548*, *2549*, *2550*, *2551*, *2552*, *2553*, *2554*, *2555*, *2556*, *2557*, *2558*, *2559*, *2560*, *2561*, *2562*, *2563*, *2564*, *2565*, *2566*, *2567*, *2568*, *2569*, *2570*, *2571*, *2572*, *2573*, *2574*, *2575*, *2576*, *2577*, *2578*, *2579*, *2580*, *2581*, *2582*, *2583*, *2584*, *2585*, *2586*, *2587*, *2588*, *2589*, *2590*, *2591*, *2592*, *2593*, *2594*, *2595*, *2596*, *2597*, *2598*, *2599*, *2600*, *2601*, *2602*, *2603*, *2604*, *2605*, *2606*, *2607*, *2608*, *2609*, *2610*, *2611*, *2612*, *2613*, *2614*, *2615*, *2616*, *2617*, *2618*, *2619*, *2620*, *2621*, *2622*, *2623*, *2624*, *2625*, *2626*, *2627*, *2628*, *2629*, *2630*, *2631*, *2632*, *2633*, *2634*, *2635*, *2636*, *2637*, *2638*, *2639*, *2640*, *2641*, *2642*, *2643*, *2644*, *2645*, *2646*, *2647*, *2648*, *2649*, *2650*, *2651*, *2652*, *2653*, *2654*, *2655*, *2656*, *2657*, *2658*, *2659*, *2660*, *2661*, *2662*, *2663*, *2664*, *2665*, *2666*, *2667*, *2668*, *2669*, *2670*, *2671*, *2672*, *2673*, *2674*, *2675*, *2676*, *2677*, *2678*, *2679*, *2680*, *2681*, *2682*, *2683*, *2684*, *2685*, *2686*, *2687*, *2688*, *2689*, *2690*, *2691*, *2692*, *2693*, *2694*, *2695*, *2696*, *2697*, *2698*, *2699*, *2700*, *2701*, *2702*, *2703*, *2704*, *2705*, *2706*, *2707*, *2708*, *2709*, *2710*, *2711*, *2712*, *2713*, *2714*, *2715*, *2716*, *2717*, *2718*, *2719*, *2720*, *2721*, *2722*, *2723*, *2724*, *2725*, *2726*, *2727*, *2728*, *2729*, *2730*, *2731*, *2732*, *2733*, *2734*, *2735*, *2736*, *2737*, *2738*, *2739*, *2740*, *2741*, *2742*, *2743*, *2744*, *2745*, *2746*, *2747*, *2748*, *2749*, *2750*, *2751*, *2752*, *2753*, *2754*, *2755*, *2756*, *2757*, *2758*, *2759*, *2760*, *2761*, *2762*, *2763*, *2764*, *2765*, *2766*, *2767*, *2768*, *2769*, *2770*, *2771*, *2772*, *2773*, *2774*, *2775*, *2776*, *2777*, *2778*, *2779*, *2780*, *2781*, *2782*, *2783*, *2784*, *2785*, *2786*, *2787*, *2788*, *2789*, *2790*, *2791*, *2792*, *2793*, *2794*, *2795*, *2796*, *2797*, *2798*, *2799*, *2800*, *2801*, *2802*, *2803*, *2804*, *2805*, *2806*, *2807*, *2808*, *2809*, *2810*, *2811*, *2812*, *2813*, *2814*, *2815*, *2816*, *2817*, *2818*, *2819*, *2820*, *2821*, *2822*, *2823*, *2824*, *2825*, *2826*, *2827*, *2828*, *2829*, *2830*, *2831*, *2832*, *2833*, *2834*, *2835*, *2836*, *2837*, *2838*, *2839*, *2840*, *2841*, *2842*, *2843*, *2844*, *2845*, *2846*, *2847*, *2848*, *2849*, *2850*, *2851*, *2852*, *2853*, *2854*, *2855*, *2856*, *2857*, *2858*, *2859*, *2860*, *2861*, *2862*, *2863*, *2864*, *2865*, *2866*, *2867*, *2868*, *2869*, *2870*, *2871*, *2872*, *2873*, *2874*, *2875*, *2876*, *2877*, *2878*, *2879*, *2880*, *2881*, *2882*, *2883*, *2884*, *2885*, *2886*, *2887*, *2888*, *2889*, *2890*, *2891*, *2892*, *2893*, *2894*, *2895*, *2896*, *2897*, *2898*, *2899*, *2900*, *2901*, *2902*, *2903*, *2904*, *2905*, *2906*, *2907*, *2908*, *2909*, *2910*, *2911*, *2912*, *2913*, *2914*, *2915*, *2916*, *2917*, *2918*, *2919*, *2920*, *2921*, *2922*, *2923*, *2924*, *2925*, *2926*, *2927*, *2928*, *2929*, *2930*, *2931*, *2932*, *2933*, *2934*, *2935*, *2936*, *2937*, *2938*, *2939*, *2940*, *2941*, *2942*, *2943*, *2944*, *2945*, *2946*, *2947*, *2948*, *2949*, *2950*, *2951*, *2952*, *2953*, *2954*, *2955*, *2956*, *2957*, *2958*, *2959*, *2960*, *2961*, *2962*, *2963*, *2964*, *2965*, *2966*, *2967*, *2968*, *2969*, *2970*, *2971*, *2972*, *2973*, *2974*, *2975*, *2976*, *2977*, *2978*, *2979*, *2980*, *2981*, *2982*, *2983*, *2984*, *2985*, *2986*, *2987*, *2988*, *2989*, *2990*, *2991*, *2992*, *2993*, *2994*, *2995*, *2996*, *2997*, *2998*, *2999*, *3000*, <

CHERRY v. HEMING AND AN-  
OTHER.

action of.

that, by an indenture  
the defendants, the  
rs patent to the  
defendants cove-  
nants: pro-  
hs from the  
ts should  
eir dis-  
they  
went  
nd

ver  
covenant  
and. Aver-  
gave due notice of  
and of their intention  
the defendants had not sold  
patent. Breach, non-payment of  
instalments. Plea, that the defendants  
were ready and willing and endeavoured to  
sell the letters patent, but that no *bonâ fide*  
sale could be effected:—Held, that the defen-  
dants not having sold the letters patent were  
liable to pay the instalments.

Covenant. The declaration stated that  
by indenture, dated the 1st of March 1836,  
made between the plaintiff of the first part,  
G. W. of the second part, G. R. of the third  
part, and the defendants of the fourth part,  
the parties of the first, second and third parts  
bargained, sold, and assigned to the defen-  
dants certain letters patent; that the de-  
fendants covenanted with the plaintiff to pay  
to her 840*l.* by instalments as thereafter  
mentioned, that is to say, 120*l.*, the first in-  
stalment, on the 1st of April 1837, 60*l.* on  
the 1st of April 1838, and an instalment of  
60*l.* yearly on the 1st of April in each year;  
provided always, that if at the expiration of  
twelve months from the date of the said  
indenture the defendants should not approve  
of the working of the said patent and of such  
their disapprobation and of their intention to  
sell the same as thereafter mentioned they

should give notice in writing to the plaintiff,  
such notice not to be given before the 1st of  
March 1837 or after the 31st of March 1837,  
then and in such case the payment of the  
first instalment should be suspended; and  
if having given such notice the defendant  
should within six months after the date  
thereof *bonâ fide* sell and dispose of the said  
letters patent to any person willing to pur-  
chase the same for the best price that could  
be reasonably obtained, and out of the pro-  
duce of such sale pay the costs of such sale,  
and retain to themselves 246*l.* and pay over  
to the plaintiff the net surplus, if any, then  
and in such case the covenant and agree-  
ment for payment of 840*l.* should cease and  
determine. But if the defendants should  
neglect to give such notice, or having given  
such notice should neglect or refuse to ob-  
serve all the other matters and things in  
the said proviso contained, then the cove-  
nant for payment of 840*l.* as aforesaid should  
be and stand in full force, and the said first  
instalment of 120*l.*, in case the same should  
have been suspended by the notice, should,  
at the expiration of the six calendar months  
from such notice, revive and be payable.  
Averment, that the defendants gave due  
notice of their disapprobation of the said  
letters patent and of their intention to sell  
the same; that six months from the date of  
the notice elapsed before the suit; and that  
the defendants had not *bonâ fide* sold the  
said letters patent or rendered the plaintiff  
an account of the sale, or of the costs, or of  
the net surplus. Breach, the non-payment  
by the defendants of any portion of the said  
sum of 840*l.*

The defendants pleaded, lastly, that after  
the giving the notice in writing to the plaintiff  
of the defendants' disapprobation of the said  
letters patent, and of their intention to sell  
the same, and within and during the period  
of the said six months after the expiration  
of the notice, the defendants were ready and  
willing, and endeavoured and offered *bonâ fide*  
to sell the said letters patent for the best  
price that could be reasonably obtained by  
public auction, but that no person would  
become the purchaser, and no *bonâ fide* sale  
could be effected; that during the said six  
months, and since, the defendants have been  
unable to sell the same; that the said letters  
patent have remained unsold without any de-  
fault and against the will of the defendants;



*On error, the judgment of the Court below was affirmed; and it was held, that the declaration sufficiently shewed a duty on the part of the defendant safely to moor and station the vessel, and a breach of it.*

Error from the Court of Exchequer.

Case. The declaration stated that before and at the time when, &c. the defendant (the plaintiff in error) was possessed of a certain wharf for the loading and unloading of ships and vessels on the banks of the river Thames, near to which said wharf there then was certain wood-work before then by the defendant placed, and then being at and upon the bottom of the said river, over which said wood-work, at certain states of the tide of the said river, the ship or vessel hereinafter mentioned would float, but at other states of the said tide the said ship or vessel would not float, of all which premises the defendant before and at, &c. had notice; that at the time when, &c., and while the defendant was so possessed of the said wharf as aforesaid, the plaintiff was possessed of a certain ship or vessel of great value, to wit, &c., then being by sufferance and permission of the defendant at and alongside the said wharf for reward to the defendant in that behalf, and the defendant then had the management and controul of the said wharf, and the mooring and stationing of ships and vessels at and near the same, whilst such ships and vessels were at the said wharf for the purpose of using the same; yet the defendant, to wit, on &c., unskillfully, negligently and improperly placed, moored and stationed the said ship or vessel of the plaintiff in the part of the said river near the said wharf, and over the said wood-work, and unskillfully, negligently and improperly detained the said ship or vessel there over the said wood-work for a long and improper time, and until the said ship or vessel on the day and year aforesaid, upon the natural and usual fall of the tide in the said river, came, fell, and lodged upon and struck against the said wood-work at the bottom of the said river, and there remained and continued upon and striking against the said wood-work for a long time, to wit, &c., and thereby then became and was greatly strained, bilged, broken and injured, &c.

Third plea, denying that the defendant had the controul of the wharf, and of the mooring and stationing of vessels.

At the trial, before Platt, B., at the London Sittings after Easter term, 1846, the jury found a verdict for the plaintiff on the third plea. A rule *nisi* for arresting the judgment having been refused by the Court of Exchequer (1), the defendant below brought a writ of error on the judgment.

*Cleasby*, for the plaintiff in error (the defendant below), Feb. 6th, 1848 (2).—The declaration which charges the wharfinger with unskillfully mooring a vessel at an improper place, discloses no duty for the breach of which he is responsible. The question is an important one; and it is quite a new thing to attempt to make a wharfinger liable for an accident which has happened to a ship in the river when moored at his wharf. There is a well-known distinction between docks and wharves. Ships in dock are in the custody and under the charge of the dock-owners; but ships moored at a wharf are not under the charge or custody of the wharfinger.

[WIGHTMAN, J.—The declaration states that the defendant below had the management and controul of the wharf, and the mooring and stationing of vessels at and near the same.]

It is not stated that the defendant was employed to moor or station the ship, or that there was any reward to him for so doing; but that the vessel was alongside the wharf for reward to the defendant. This statement does not involve any duty on the part of the defendant to do any act relative to mooring. The object for which wharves are constructed is not the mooring of vessels. Wharfage is chargeable for laying goods upon the wharf — *Stephen v. Coster* (3).

[WILDE, C.J. — The declaration must mean that the defendant had the management of the wharf in respect of loading, &c.]

There is no allegation of any duty except that of a wharfinger. There was no deli-

(1) *Wood v. Curling*, 15 Mee. & Wels. 626.

(2) Before Wilde, C.J., Coleridge, J., Wightman, J., Erle, J. and Williams, J.

(3) 1 W. Black. 413, 423.

very over of the ship into the care of the defendant.

[WILDE, C.J.—It appears that the plaintiff parted with his controul as to mooring the ship.]

It cannot be urged that by virtue of the defendant's employment as a wharfinger, the duty of mooring was cast upon him. It can only be argued, that the allegation as to the mooring implies an employment by the plaintiff of the defendant for the purpose of mooring.

[WILDE, C.J.—The declaration states, and the verdict finds, that the defendant had the management of the mooring and stationing. That excludes everybody else.

[ERLE, J.—And it implies an undertaking to use ordinary care in doing it.]

[WILLIAMS, J.—If we can give a construction to the allegation which will support the verdict, that construction must be given to it after verdict.]

The statement of negligence in the declaration is nothing of itself, unless the relation of the parties raised a duty binding on the defendant to use due care—*Priestley v. Fowler* (4).

*Martin*, for the defendant in error, was not called upon.

WILDE, C.J.—There is little doubt that the declaration is perfectly sufficient. What is it that is alleged as evidence of the claim for indemnity against the wrong which the plaintiff suffered? It is stated that the wharf was used for profit, that it was prepared in a certain manner, and that the vessel was alongside for reward to the defendant. It may be that wharfingers are not generally bound to moor ships. Different wharfingers may carry on their business in different manners. They may gain a profit from the mooring. The declaration here states that the defendant had the management and controul of the wharf and the mooring and stationing of vessels at or near it. What can be the meaning of having the stationing but controuling the place where the ship was to be placed? Then it is stated that the defendant unskillfully,

negligently, and improperly placed and stationed the vessel in a part of the river near the wharf, and over the wood-work which had been placed there by the defendant; and then that he unskillfully, negligently, and improperly detained the vessel over the said wood-work for an improper time, till the vessel, upon the fall of the tide, lodged and struck upon it, and so was damaged. The effect of the whole statement in the declaration is, that the defendant, being proprietor of the wharf, the plaintiff came to use it for the profit of the defendant; that the defendant, who knew the condition of the wharf, placed the plaintiff's vessel where it was greatly injured. Is not that a state of things which creates the right to indemnity stated in the declaration? If such right is denied, the declaration might have been demurred to; but after the verdict how are we to construe it? Are we to look out for difficulties in the construction? It would be doing violence to language not to support the verdict. I think there is a good statement of such a relation between the parties as brought a responsibility on the defendant. The declaration states that he had the controul, and chose to place and station the vessel where it received an injury. I cannot see any just foundation for the doubt that wharfingers are not bound safely and securely to moor. That may be the case generally; but in this case the defendant chooses to moor for profit, and in doing so he unskillfully does that which causes the damage. I think, therefore, that he is responsible for that damage, and that the judgment of the Court below was correct.

*Judgment affirmed.*

1848. } WEBSTER v. CROUCH AND  
June 9. } ARROWSMITH.

*Pleading—Demurrer—Certainty.*

*A declaration stated that the plaintiff had divers dealings with the defendants, and that divers accounts remained unsettled between them; that the plaintiff had, for the accommodation of one of the defendants, accepted divers bills of exchange, and thereupon, in consideration that the plaintiff then delivered*

(4) 3 Mee. & Wels. 1; s. c. 7 Law J. Rep. (N.s.) Exch. 42.



CHERRY v. HEMING AND AN-  
OTHER.

tion of.

That, by an indenture  
the defendants, the  
patent to the  
defendants cove-  
nants: pro-  
from the  
should  
or dis-  
they  
nt

of  
if the  
notice should  
all the other  
proviso, the covenant  
should stand. Aver-  
defendants gave due notice of  
disapprobation and of their intention  
to, and that the defendants had not sold  
the letters patent. Breach, non-payment of  
the instalments. Plea, that the defendants  
were ready and willing and endeavoured to  
sell the letters patent, but that no *bond fide*  
sale could be effected:—Held, that the defen-  
dants not having sold the letters patent were  
liable to pay the instalments.

Covenant. The declaration stated that  
by indenture, dated the 1st of March 1836,  
made between the plaintiff of the first part,  
G. W. of the second part, G. R. of the third  
part, and the defendants of the fourth part,  
the parties of the first, second and third parts  
bargained, sold, and assigned to the defen-  
dants certain letters patent; that the defen-  
dants covenanted with the plaintiff to pay  
to her 840*l.* by instalments as thereafter  
mentioned, that is to say, 120*l.*, the first in-  
stalment, on the 1st of April 1837, 60*l.* on  
the 1st of April 1838, and an instalment of  
60*l.* yearly on the 1st of April in each year;  
provided always, that if at the expiration of  
twelve months from the date of the said  
indenture the defendants should not approve  
of the working of the said patent and of such  
their disapprobation and of their intention to  
sell the same as thereafter mentioned they

should give notice in writing to the plaintiff,  
such notice not to be given before the 1st of  
March 1837 or after the 31st of March 1837,  
then and in such case the payment of the  
first instalment should be suspended; and  
if having given such notice the defendant  
should within six months after the date  
thereof *bond fide* sell and dispose of the said  
letters patent to any person willing to pur-  
chase the same for the best price that could  
be reasonably obtained, and out of the pro-  
duce of such sale pay the costs of such sale,  
and retain to themselves 246*l.* and pay over  
to the plaintiff the net surplus, if any, then  
and in such case the covenant and agree-  
ment for payment of 840*l.* should cease and  
determine. But if the defendants should  
neglect to give such notice, or having given  
such notice should neglect or refuse to ob-  
serve all the other matters and things in  
the said proviso contained, then the cove-  
nant for payment of 840*l.* as aforesaid should  
be and stand in full force, and the said first  
instalment of 120*l.*, in case the same should  
have been suspended by the notice, should,  
at the expiration of the six calendar months  
from such notice, revive and be payable.  
Averment, that the defendants gave due  
notice of their disapprobation of the said  
letters patent and of their intention to sell  
the same; that six months from the date of  
the notice elapsed before the suit; and that  
the defendants had not *bond fide* sold the  
said letters patent or rendered the plaintiff  
an account of the sale, or of the costs, or of  
the net surplus. Breach, the non-payment  
by the defendants of any portion of the said  
sum of 840*l.*

The defendants pleaded, lastly, that after  
the giving the notice in writing to the plaintiff  
of the defendants' disapprobation of the said  
letters patent, and of their intention to sell  
the same, and within and during the period  
of the said six months after the expiration  
of the notice, the defendants were ready and  
willing, and endeavoured and offered *bond  
fide* to sell the said letters patent for the best  
price that could be reasonably obtained by  
public auction, but that no person would  
become the purchaser, and no *bond fide* sale  
could be effected; that during the said six  
months, and since, the defendants have been  
unable to sell the same; that the said letters  
patent have remained unsold without any de-  
fault and against the will of the defendants;

to the defendants three acceptances as follows:—16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.* at three months, and 26*l.* 7*s.* 11*d.*, dated the 7th of April, at five months, as full settlement of debts, the defendants promised the plaintiff to return to him the acceptances drawn by the said defendant as follows:—28*l.* 15*s.* and 28*l.* Breach, that the defendants did not return the acceptances:—Held, on special demurrer, that the declaration was ill for want of certainty.

**Assumpsit.** The declaration stated that the plaintiff had divers dealings with the defendant Crouch alone, and also with Crouch and the defendant Arrowsmith; that divers accounts remained unsettled between the plaintiff and the defendants; that the plaintiff had, for the accommodation of Crouch, accepted divers bills of exchange, and thereupon, to wit, on &c. in consideration that the plaintiff, at the defendants' request, then delivered to the defendants three acceptances as follows:—16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.* at three months, and 26*s.* 7*s.* 11*d.*, dated the 7th of April, at five months, as full settlement of debts, the defendants promised the plaintiff to return to him the acceptances drawn by the said Crouch, as follows:—28*l.* 15*s.* and 28*l.*, and to pay to the plaintiff the sum of 15*l.* towards a bill of exchange, drawn by the defendant Crouch, for 30*l.* 4*s.* 6*d.*, which would become due on the 10th of May 1846. Breach, that the defendants did not, nor would return the said acceptances, or pay to the plaintiff the said sum of 15*l.*

**Demurrer**, assigning for causes that no sufficient consideration was shewn for the defendants' promise; that the acceptances delivered to the defendant may have been worthless; that the declaration was defective in certainty in not stating the names of the parties whose acceptances were delivered to the defendant. Joinder therein.

*J. Brown*, in support of the demurrer.—The declaration is bad. First, there is no valid consideration for the defendants' promise. The consideration is not connected with the inducement; it does not appear whose "accounts" remained unsettled, nor whether the "debts" mentioned in the declaration were those of the plaintiff

or of third parties. Again, assuming the debts to be those of the plaintiff, sufficient facts are not stated to shew that the giving of the acceptances operated as a settlement of debts. It does not appear whether the bills of exchange equalled the debts, or whether the bills were negotiable. The authorities in support of this portion of the argument are *Cumber v. Wane* (1), *Sibree v. Tripp* (2), and *James v. Williams* (3). Secondly, the declaration is not sufficiently certain. It does not even state who are the acceptors of the bills. *Appellans v. Blanche* (4) shews that the omission of the christian names of persons mentioned in pleading, unless it be excused by averment, is bad on special demurrer. He cited, as to another point, *Lynn v. Bruce* (5) and *Reeves v. Hearne* (6).

**Manning, Serj. contra.**—The declaration is good. First, there is a valid consideration for the defendants' promise. Whatever may be the nature of the acceptances, the parties have treated them as a settlement of debts; and whether they be of any value or not the mere delivery of them to the defendants is an act of labour sufficient to support the declaration.

[**ALDERSON, B.**—Are the statements in the declaration made with convenient certainty? The plaintiff does not state whose debts they are. The plaintiff may amend, or judgment will be given against him.]

The other Barons concurring,—

*Manning, Serj.* elected to amend.

*Judgment accordingly* (7).

(1) 1 Stra. 426.

(2) 15 Mee. & Wels. 23; s. c. 15 Law J. Rep. (n.s.) Exch. 318.

(3) 13 Ibid. 323; s. c. 14 Law J. Rep. (n.s.) Exch. 220.

(4) 14 Mee. & Wels. 154.

(5) 2 H. Black. 317.

(6) 1 Mee. & Wels. 323; s. c. 5 Law J. Rep. (n.s.) Exch. 156.

(7) Per Pollock, C.B., Alderson, B., Rolfe, F. and Platt, B.

1848. } CHERRY v. HEMING AND AN-  
June 9. } OTHER.

*Covenant, Construction of.*

*A declaration stated that, by an indenture between the plaintiff and the defendants, the plaintiff sold certain letters patent to the defendants, and that the defendants covenanted to pay the price by instalments: provided, that if within twelve months from the date of the indenture the defendants should disapprove of the patent, and of their disapprobation and intention to sell it they should give notice to the plaintiff, the payment of the instalments should be suspended; and if the defendants should within six months after notice sell the said patent, and retaining to themselves 246l. pay over the surplus to the plaintiff, the covenant for payment of the entire sum should cease. But if the defendants having given such notice should neglect or refuse to observe all the other matters or things in the proviso, the covenant for payment of 840l. should stand. Averment, that the defendants gave due notice of their disapprobation and of their intention to sell, and that the defendants had not sold the letters patent. Breach, non-payment of the instalments. Plea, that the defendants were ready and willing and endeavoured to sell the letters patent, but that no *bonâ fide* sale could be effected:—Held, that the defendants not having sold the letters patent were liable to pay the instalments.*

**Covenant.** The declaration stated that by indenture, dated the 1st of March 1836, made between the plaintiff of the first part, G. W. of the second part, G. R. of the third part, and the defendants of the fourth part, the parties of the first, second and third parts bargained, sold, and assigned to the defendants certain letters patent; that the defendants covenanted with the plaintiff to pay to her 840l. by instalments as thereafter mentioned, that is to say, 120l. the first instalment, on the 1st of April 1837, 60l. on the 1st of April 1838, and an instalment of 60l. yearly on the 1st of April in each year; provided always, that if at the expiration of twelve months from the date of the said indenture the defendants should not approve of the working of the said patent and of such their disapprobation and of their intention to sell the same as thereafter mentioned they

should give notice in writing to the plaintiff, such notice not to be given before the 1st of March 1837 or after the 31st of March 1837, then and in such case the payment of the first instalment should be suspended; and if having given such notice the defendant should within six months after the date thereof *bonâ fide* sell and dispose of the said letters patent to any person willing to purchase the same for the best price that could be reasonably obtained, and out of the produce of such sale pay the costs of such sale, and retain to themselves 246l. and pay over to the plaintiff the net surplus, if any, then and in such case the covenant and agreement for payment of 840l. should cease and determine. But if the defendants should neglect to give such notice, or having given such notice should neglect or refuse to observe all the other matters and things in the said proviso contained, then the covenant for payment of 840l. as aforesaid should be and stand in full force, and the said first instalment of 120l., in case the same should have been suspended by the notice, should, at the expiration of the six calendar months from such notice, revive and be payable. Averment, that the defendants gave due notice of their disapprobation of the said letters patent and of their intention to sell the same; that six months from the date of the notice elapsed before the suit; and that the defendants had not *bonâ fide* sold the said letters patent or rendered the plaintiff an account of the sale, or of the costs, or of the net surplus. Breach, the non-payment by the defendants of any portion of the said sum of 840l.

The defendants pleaded, lastly, that after the giving the notice in writing to the plaintiff of the defendants' disapprobation of the said letters patent, and of their intention to sell the same, and within and during the period of the said six months after the expiration of the notice, the defendants were ready and willing, and endeavoured and offered *bonâ fide* to sell the said letters patent for the best price that could be reasonably obtained by public auction, but that no person would become the purchaser, and no *bonâ fide* sale could be effected; that during the said six months, and since, the defendants have been unable to sell the same; that the said letters patent have remained unsold without any default and against the will of the defendants;

was completed, the provision being that the parties may "issue execution against any person or persons who was or were a member or members of such corporation or co-partnership at the time the contract or contracts, or agreement or agreements on which such judgment, &c. were entered into." This is the common-law liability; but they do not confine it to persons who were partners at that time; for they go on and say, "or who became a member or members at any time before such contract was executed;" so that in the case of executory contracts these are liable who are partners at the time of the execution of the contract, and these also are liable at common law. Secondly, it makes those liable who became partners before the contract became an executed contract, and who are not liable at common law; and thirdly, those who were members "at the time of the judgment obtained," and these also are not liable at common law. It is, therefore, perfectly clear that this statute means to impose some additional liability beyond that which the common law imposed on the members of those copartnerships. I think there is no doubt that the object of the legislature was to accomplish a thing which it is very difficult to accomplish, namely, to treat these bodies as corporations, notwithstanding the fluctuating nature of their members; to make them liable to contracts, notwithstanding the change in their members; to make all the partnership property liable; and further to make each individual responsible for the debts of the partnership. The object of the legislature in allowing execution to be taken out against persons who were not liable as contracting parties, and also against those in the second degree, who were partners at the time of the judgment obtained, and not at the time of the contract, was upon the supposition that these persons had all the means of applying the funds of the society, and ought to have applied them, to the payment of the partnership debts. And probably they considered that persons who were actual members at the time the execution issued, and when the debt, therefore, ought to be paid, are the persons who, in the first instance, ought to be looked to, to take care that the partnership funds were applied to the payment of the debt; and that if they do not choose to apply them, or have

not the means of applying them, they should be responsible in their own persons for its due payment. That seems to be the principle upon which the legislature acted,—a principle of some harshness towards those who were members at the time that the execution issued; but then there is no doubt, as the Attorney General has observed, that this act was framed upon the supposition that these companies would be always solvent, and would have funds to pay their debts with. If that is the right view, the effect is to make those who are partners, at the time the execution issues, liable; and then, in the event of an execution against them being unsuccessful, the remedy is to be taken against those who were partners at the time of the contract, then against those who were so at the time of the contract being completed; then against those who were so at the time of the judgment being obtained. It is to be observed that the legislature have let slip one class of persons, whether intentionally or not I do not know, namely, those who have become partners after the contract was completed, and have ceased to be so before judgment obtained, although they were parties at the time that the action was commenced: that case the legislature did not provide for, and they are certainly exempt, for there are no words to embrace them. My opinion, therefore, is, that in this instance, the plaintiff, by taking his remedy, by issuing writs of *scire facias* against the existing members of the company,—I mean those existing at the time the *scire facias* was obtained,—has pursued the proper course, and that he was not bound to take out any *scire facias*, and would have been wrong to have taken out any *scire facias* against those who were partners at the time that the action was commenced.

I come, therefore, to the last question, whether or no the plaintiff has entitled himself to this interference of the Court by the steps which he has taken against those different persons who were members at the time. Now the affidavits state, and there is a list annexed, that there are a great number of persons who were partners in this concern, against whom it would be, undoubtedly, hopeless to take any proceedings. Seven writs of *scire facias* have been issued, which promise a result of about 130*l.* altogether. But then it is said that there are two

persons against whom no effectual steps have been taken in order to make them responsible, and against whom proceedings might be taken with effect. Against one *scire facias* issued; and it is objected that the present proceedings ought not to be allowed until that *scire facias* has come to its determination, and been finally disposed of. Now if I am satisfied that that *scire facias* would produce no result at all, or no result at all worth the expense of proceeding in it, then the pendency of such *scire facias* is no answer to this application; and I take it that is the principle of the case of *Field v. McKenzie* (15), in which Sir Thomas Wilde seems to have thought at first that you must issue a *scire facias* against every individual member, before you can apply to the Court for its interference against a person who was a member at the time of the contract made. That opinion was overruled by the rest of the Court, who thought it was enough if they were satisfied that every reasonable and proper effort had been made for the purpose of obtaining payment of the debt due to the creditors, by recourse to those who were primarily liable. That is the rule upon which I think I must act in the present case; and referring to the affidavits in the first place, with regard to the persons against whom the *scire facias* is pending, it appears to me that, looking to the affidavits on both sides, there appears to be no reasonable expectation of gaining anything from the *scire facias*. The defendant there, it appears, was the promoter, and was a trustee for a Scotch insurance office; and he accepted the shares as such trustee. I think it is impossible to make the partners in the Scotch Insurance Office liable, through his instrumentality, directly; but then it is said, that if he were to pay the amount, he would have his remedy in equity against the *cestuis que trust*; and suppose that that was not so, still if he was sued, and the *scire facias* was pursued to execution the probability is that the members of the Scotch company would not leave him to pay the debt, but would come forward upon a principle of honour, and discharge him. I think that is rather too remote a contingency for me to say that any good result can reasonably be expected to be

produced from that *scire facias*, unless the defendant is himself a person in solvent circumstances. Now the affidavits on the part of the plaintiff shew that he is not a man likely to pay any reasonable portion, or indeed anything of the considerable debt which is in dispute in this action; while the affidavits on the other side, although they say he is apparently carrying on business, do not remove that impression from my mind. The same also may be said with regard to the other individual. He is a person said to be possessed of considerable property. The affidavits on the other side say that the property is greatly encumbered by mortgage beyond its real value; and that, therefore, any proceeding against him must be hopeless. I therefore think that in this case the plaintiff has satisfied what the majority of the Court of Common Pleas, and, ultimately, I believe my Lord Chief Justice Wilde, said was necessary in such a case, and which is a doctrine which I think was previously laid down in the Court of Queen's Bench—see *Eardley v. Law* (16), and *Harvey v. Scott* (17), that all that is requisite in this case is the reasonable certainty that the remedies against the existing members would be ineffectual. This the plaintiff has done; and I think, therefore, that this writ ought to go.

*Rule absolute.*

1847. }  
Nov. 17. } DOE d. BURTON v. WHITE.

*Devise—"Estate"—When it passes the Fee—"Who have Issue."*

*The word "estate" in the operative part of a will passes not only the corpus of the property, but all the testator's interest in it, unless controuled by the context: and neither do superadded words of local description more applicable to the corpus of the property, nor words apparently explanatory of the meaning of the term in the devise itself, prevent it from passing the whole interest: but where the word "estate" is not used in the operative clause of the devise itself, but is introduced in another part of the will referring to it, it cannot be construed as having the effect of*

(16) 12 Ad. & El. 802; s.c. 10 Law J. Rep. (n.s.) Q.B. 46.

(17) 17 Law J. Rep. (n.s.) Q.B. 9.



extending the meaning of the operative clause, whether prior or subsequent.

*A testator devised as follows:—"I give to my wife N. all that house, shop, and garden now in the tenure of B, for her own sole use and purpose, and I also give to my wife N. all that messuage, farm, and premises now in the holding of C, to hold to her, my said wife, during the term of her natural life; and from and after her decease I give and devise the said messuage or tenement, and also the said farm and premises, given to my said wife for her life as aforesaid, to my son John. I give and bequeath to my son George the lease of the farm I rented of L, for his own use and benefit; and I also give to my son George that one acre of copyhold land I bought of G, and also half an acre of freehold land adjoining that one acre of copyhold land." After other devises the will contained the following passage:—"And I give and bequeath and order the rents or interests that is behind, due, and unpaid shall go and be paid to that person I have left the estates and properties respectively to. As to all the rest, residue, and remainder of my property whatsoever, and of what nature or kind soever, I give, devise, and bequeath the same to be equally divided between and amongst my said wife N. and her children who have issue, share and share alike."—Held, first, that the devise to George did not carry a fee in the devised lands; secondly, that the words "who have issue" meant who have when the will takes effect, and that the children of N, the wife, who had no issue at the death of the testator, did not take any interest under the residuary devise.*

Ejectment to recover certain freehold and copyhold premises, in the parish of Hales Owen, in the county of Worcester.

The cause came on for trial, before Gaselee, Serj., at the Worcestershire Summer Assizes, 1847, when, by consent, the jury found the following special verdict:—

Aaron White, late of Hales Owen, in the county of Worcester, being seised in fee of certain freehold and copyhold premises, duly made and published his will, bearing date the 17th of July 1820; the material parts of which are as follows:—"I give to my wife Nanny White all that house, shop, and garden, now in the tenure of Benjamin Yates, for her own sole use and purpose;

and I also give to my wife Nanny White all that messuage, farm, and premises, now in the holding of Mr. Chambers, situate at Cakemore, in that part of the parish of Hales Owen which lies in the county of Worcester, except the half acre of land now lying in Upper Quinton Field, and now in the holding of my son George White, to hold to her, my said wife, during the term of her natural life; and from and after her decease, I give and devise the said messuage or tenement, and also the said farm and premises given to my said wife for her life as aforesaid, to my son John White, subject to the payment out of the aforesaid premises of the sum of 50*l.*, to be paid to my son George White, and also the sum of 50*l.* to my daughter Sally Powers. I give and bequeath to my son George White the lease of the farm I rented of Lord Lyttleton, for his own use and benefit; and I also give to my son George White that one acre of copyhold land I bought of Counsellor Guest, lying and being in the uppermost Quinton Field, in the parish of Hales Owen; and also half an acre of freehold land adjoining that one acre of copyhold land, which I purchased of Martin & Horne, to my son George White; and also one more acre of copyhold land I bought of Counsellor Guest, lying and being in Horsenail Field, in the parish of Hales Owen, to George White, and now in his own occupation; and also those two half acres of land lying in Horsenail Field to my son George White; and also that leasow of arable land, called the Top Croft, containing four acres and a half, lying and being in Ridge Acre, in the parish of Hales Owen, to my son George White; and also those two dwelling-houses, shops, and gardens, now in the occupation of Benjamin Clay and Thomas Haycock, to my son George White; and also three plecks of land or gardens that I inclosed from the waste, and purchased of the surveyor of the highways, Mr. Richard Blocksedge, to my son George White; and also that house, shop, and garden, with the appurtenances thereto belonging, situate in Long Lane, in the parish of Hales Owen, and now in the occupation of Samuel Partridge, unto my son George White. . . . And I also give and bequeath to my daughter, Sally Powers, those two dwelling-houses, shops, and

gardens, with the appurtenances thereto belonging, situate in the parish of Hales Owen, and county of Salop, and now in the tenure or occupation of J. Gould, to and for her own use, and to dispose of them as she may think proper amongst her children; and if she should die without disposing of the aforesaid property given to her, for it to go and be divided amongst her children, share and share alike. . . . I give and bequeath to my son John White, all that farm or estate I bought of Mr. Bradley, of London, containing about twenty acres, situate at the Quinton, in the parish of Hales Owen. . . . And I give and bequeath and order the rents or interests that is behind, due and unpaid, shall go and be paid to that person I have left the estates and properties respectively to. As to all the rest, residue, and remainder of my property whatsoever or of what nature or kind soever, I give, devise, and bequeath the same to be equally divided between and amongst my said wife Nanny White and her children, who have issues, share and share alike."

Aaron White died on the 23rd of May 1822, leaving Nanny White, his widow, and four children him surviving, all of whom were then married, that is to say, Sally, the wife of T. Powers; George White, the devisee in the said will mentioned; Lucy, the wife of W. Burton; and John White, one of the within-named defendants. All the children, except George White, had issue living at the time of the death of Aaron White. George White had issue between the death of Aaron White and the death of Nanny White, which issue are still living.

Nanny White made her will, duly signed and attested, dated the 30th of June 1826, and thereby gave and devised all her property that she might have or be entitled to at the time of her death, to her daughters, Sally Powers and Lucy Burton, to be equally divided between them, for their entire use and purpose, and to their heirs and assigns for ever.

Nanny White died in the month of January 1829, without altering or revoking her said will.

George White was, in the year 1830, duly admitted, according to the custom of the manor of Warley Wigan, to the said two acres of copyhold land devised to him by the will of Aaron White, to hold for all such

estate and interest that he took therein under the said will, according to the custom of the manor.

George White, by his will, in writing, bearing date the 26th of June 1840, and duly signed and attested for the passing of freehold estates, gave and devised all his real and personal estate whatsoever and wheresoever, unto his brother, the said John White, his heirs, executors, and administrators, upon certain trusts, for the benefit of his, the said George White's two daughters. George White died in the month of July 1840, without altering or revoking his said will.

Lucy Burton died intestate in the month of March 1837, leaving William Burton, the lessor of the plaintiff, her eldest son and heir-at-law, her surviving; and the said William Burton, the husband of the said Lucy, died in the month of September 1841.

After the death of George White, the defendant, John White, claimed to be entitled as devisee under the said will of the said George White, as tenant in fee simple, to the whole of the freehold and copyhold premises devised by the said will of Aaron White to the said George White, and procured the attornments to him of the several tenants in possession of the said premises, and has continued to receive the whole of the rents thereof, and has refused to account for or pay over any part of such rents to the lessor of the plaintiff, and the said John White came in and defended this action of ejectment as landlord, under the usual landlord's rule for that purpose.

The other defendants, except the said John White, were, at the commencement of this action, and still are, the several tenants in possession of the said freehold and copyhold premises devised to the said George White, which premises they severally held as tenants from year to year to the said George White in his lifetime, and after his death attorned and paid rent to the defendant John White, so claiming as aforesaid, and refused to pay rent to the lessor of the plaintiff, or to acknowledge him as landlord of any part of the said premises.

Upon the death of the said George White, the lessor of the plaintiff, William Burton, claimed as heir-at-law of his mother, Lucy Burton, to be entitled to one undivided fourth part, and also one undivided eighth

part of and in the said freehold and copyhold lands and premises devised by the said will of Aaron White to the said George White, alleging that the said Lucy Burton was, at the time of her death, entitled to one undivided fourth part thereof, as tenant in common in fee, under the will of her father, Aaron White, and to one undivided eighth part thereof as tenant in common in fee under the will of her mother, the said Nanny White. (The special verdict then stated lease, entry, and ouster, and concluded in the usual form.)

In Michaelmas term (Nov. 10),

*Phipson*, on behalf of the lessor of the plaintiff, appeared to argue, but the Court called on

*Hodgson* (*Whateley* was with him), for the defendant.—First, George White took an estate in fee in the lands devised. Though the testator had devised to him certain freehold and copyhold lands without words of inheritance, yet the subsequent clause in the will giving the rents in arrear to the persons to whom he has left the “estates and properties,” must be read as part of the devise of the lands, and shew that the testator intended George should take an estate in fee. He referred to the following cases: *Randall v. Tuchin* (1), *Wilkinson v. Chapman* (2), *Stewart v. Garnett* (3), *Goodwyn v. Goodwyn* (4), *Roe v. Bacon* (5). The authorities are collected in *Jarman on Wills*, vol. 2. p. 181, and they clearly establish that the word “estate” will pass the fee, unless it is distinctly qualified by some previous words. When a testator says, “I have left the estates and properties” to a certain person, his intention is plainly that that person shall have them. In the devise to John the testator uses the word “estate.” The testator, instead of using the word “estate” in every devise, expresses the same thing by concluding his will with a declaration that the devisees shall have the unpaid rents, &c. of the estates and properties he has respectively given to them. The second question is, whether the children of the testator’s wife, who had no issue

at his death, took any interest under the will. The residue is to be equally divided between his wife and “her children who have issue.” That may be construed without violence to the language to mean a gift to the wife and such children as *shall have issue*.

[*PARKE, B.*—If it had been a devise to “children,” those only would have taken who were living at the time of the testator’s death. The meaning is, who have children when the will takes effect.]

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

*POLLOCK, C.B.*—[His Lordship stated the special verdict, and continued:—]—There are two questions raised by this special verdict. The first, whether the devise to George White carried a fee in the devised lands. The second, whether, under the residuary devise, the children of Nanny White, who had no issue at the death of the deviser, took any interest. We are all satisfied upon both of these points, and decide them in favour of the lessor of the plaintiff. The first question depends upon the construction of the words “estates and properties,” in the part of the will in which they are used. The devise to George White of half an acre of freehold land, an acre of copyhold land, a leasow of arable land, &c., unquestionably passed an estate for life only to George White; but the learned counsel for the defendant contends that the operation of this devise is extended by the subsequent words, “I give and bequeath and order the rents or interests that is behind, due and unpaid, shall go and be paid to that person *I have left* the estates and properties respectively to.” It is contended that this clause is explanatory of the testator’s meaning, and shews that he intended all his interest in the devised land to pass.

It is established, by a long course of decisions, that the word “estate” or “estates,” used in the operative part of the will, passes not only the corpus of the property, but all the interest of the testator in it, unless controuled by the context; and that super-added words of local description, more applicable to the corpus of the property, indicating its situation or the nature of

(1) 6 Taunt. 410.

(2) 3 Russ. 145.

(3) 3 Sim. 398.

(4) 1 Ves. sen. 227.

(5) 4 Mau. & Selw. 366.

its occupation, do not prevent it from passing the whole interest; nor do words apparently explanatory of the meaning of the term inserted in the devise itself,—as where the testator leaves his real estate, *that is*, his land and buildings situate at A.—*Denn v. Hood* (6); or his freehold estate, *consisting* of thirty acres of land—*Gardner v. Harding* (7); or where the testator, after devising dwelling-houses to one for life (with a minute description), all *which estates* he devised after his death to another—*Randell v. Tuchin*. The Courts have extended the meaning of the word in order to effectuate what it may always be presumed that it was the intention of the testator to have done. But where the word “estates” is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, we find no decision or dictum authorizing us to construe it as having the effect of extending the meaning of the operative clause, whether prior or subsequent; and to read the will as if the testator had said, “by the devise of lands in another clause, I mean to give all my estate in these lands.” This is the distinction pointed out by Gibbs, C.J., in the case just referred to of *Randell v. Tuchin*, where he says that the word “estate” is here used in the *operative* part of the devise, not introduced incidentally after the devising part is perfected, but introduced in the devise itself; and Heath, J. states the rule to be, that where the word “estate” is an *operative* word, it passes the fee. And it has been long settled, that where the word is used in a prior part of the will, as where the testator says, “as to all my estate, I devise the same as follows,” and then proceeds to devise lands, the use of the word “estate” will not enlarge the subsequent devises. It cannot be construed, in that case, as meaning a declaration by the testator that, by the subsequent devise of land, he meant to devise a fee; nor can it in this be held to amount to a statement by the testator that, by the prior devise, he intended that all his interest should pass. For these reasons, we are of opinion that a fee in the several lands devised did not pass to George White. As the devise itself did not carry a fee, the subsequent words, merely

referring to it, and not being intended themselves to give any interest in the lands, do not. They are merely descriptive of persons to whom something else is given in a prior part of the will.

On the second question we have already given our opinion. The words, “who *have* issue,” must mean, who *have when* the will takes effect, that is, at the time of the testator’s death; and as a devise to her *and her children* would include only the children living at that time, the superadded description of having issue must be construed as applicable to those children who then have issue. Upon the latter point no stress was laid by the able counsel for the defendant.

*Judgment for the lessor of the plaintiff.*

1848. }  
Jan. 18. } LEE v. STONE AND OTHERS.

*Will, Construction of*—“Survivors or Survivor”—*Estate in Possession.*

*Devise of three several estates to testator's three daughters, M, C, and L, for their respective lives, remainder to their children as tenants in common in fee, provided, “that if any or either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then and in that case the property hereinbefore given to such daughter so dying shall go and accrue to the survivors or survivor of my said daughters, their heirs,” &c., “in equal shares and proportions as tenants in common; and if all my daughters, except one, should depart this life without having lawful issue, then that the share of such daughters so dying shall go to the survivor of my said daughter, her heirs and assigns for ever.” C. died on the 3rd of October 1841, leaving a son; and on the 25th L. died without having had issue. On the 22nd of December M. and her husband conveyed to a trustee the property devised to her for life, and also that devised to L, to hold to the use of M. for the joint lives of herself and her husband, with remainder to the survivor in fee:—Held, first, that the word “survivor,” in the will, must be read in its ordinary sense, and that upon the death of L. the estate*

(6) 7 Taunt. 35.

(7) 2 Moore, 565.

*devised to her for life vested absolutely in M. in fee. Secondly, that the son of C. could not, under any contingency, become entitled to any interest in the property devised to M. Thirdly, that under the will and conveyance the husband of M, in her right, had an estate in possession during the joint lives of himself and his wife.*

The following case was stated for the opinion of this Court, by order of the first Vice Chancellor.

John Cook, late of West Bromwich, in the county of Stafford, cooper, deceased, was, at the respective times of making his will hereinafter mentioned, and of his decease, seised for an estate of inheritance in fee simple in possession of the three several properties in his said will respectively described, and thereby devised to his three daughters therein mentioned respectively, for their respective lives.

The said John Cook, on the 24th of February 1840, duly made and executed his said will, which was (so far as it is material to the present case) as follows:—

“I give and devise to my eldest daughter Mary Ann, the wife of Henry Stone, of West Bromwich, pawnbroker, all that my messuage, tenement, or dwelling-house, where I now reside, situate in High Street, in West Bromwich aforesaid, with the shop, yard, outbuildings, and premises thereto belonging, and also all that newly erected messuage, tenement, or dwelling-house, adjoining to the last-mentioned messuage, tenement, or dwelling-house, on the north-west side thereof, with the shop, garden, outbuildings, and premises behind the same and thereto belonging; to hold unto my said daughter Mary Ann Stone and her assigns, for and during the term of her natural life, to and for her own use and benefit, subject nevertheless to and charged and chargeable as hereinafter mentioned. And from and after the decease of my said daughter Mary Ann Stone, I give and devise the said two messuages, tenements, or dwelling-houses, shops, gardens, and premises, unto all and every the child and children lawfully begotten of my said daughter Mary Ann Stone, if more than one, to be equally divided between them share and share alike, as tenants in common, and not as joint tenants; and if

there shall be but one such child, then to such only child, his or her heirs and assigns for ever. And I do hereby charge and make chargeable the property hereinbefore given to my said daughter, Mary Ann Stone, for life as aforesaid, with the payment of two several sums of 20*l.*, one of which sums I give and bequeath to my daughter Charlotte Angell, and the other I give and bequeath to my daughter Lucy Cook. And I give and devise unto my said daughter Charlotte Angell all those my three messuages, tenements, or dwelling-houses, situate in the High Street, in West Bromwich, aforesaid, adjoining to the south-east side of the messuage or dwelling-house where I now reside, together with the outbuildings, gardens, and premises thereto belonging, and also all those three other messuages, tenements, or dwelling-houses, adjoining the said last-mentioned messuages or dwelling-houses, situate in Water Street, in West Bromwich, aforesaid, together with the outbuildings, gardens, and premises thereto belonging; to hold unto my said daughter Charlotte Angell, and her assigns, for and during the term of her natural life, to and for her own use and benefit. And from and after the decease of my said daughter, Charlotte Angell, I give and devise the same messuages, tenements, or dwelling-houses, land, and premises, unto all and every the child or children of my said daughter Charlotte Angell lawfully begotten, if more than one, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants; and if there should be but one such child, then to such only child, his or her heirs and assigns for ever. And I give and devise unto my daughter Lucy Cook all those my three messuages or dwelling-houses standing and being in the High Street, in West Bromwich aforesaid, at the north-west side of the messuages or dwelling-houses hereinbefore given to my said daughter Mary Ann Stone, with the gardens, outbuildings, and premises thereto belonging; to hold unto my said daughter Lucy Cook, and her assigns, for and during the term of her natural life, to and for her own use and benefit. And from and after the decease of my said daughter Lucy Cook, I give and devise the said messuages, tenements, or dwelling-houses, land, and pre-

mises, unto all and every child and children lawfully begotten of my said daughter Lucy Cook, if more than one, share and share alike, as tenants in common, and not as joint tenants, and if there shall be but one such child, then to such only child, his or her heirs and assigns for ever. Provided always, and it is my will, that if any or either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then and in that case the property hereinbefore given to such daughter so dying shall go and accrue to the survivors or survivor of my said daughters, their or her heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And if all my daughters, except one, should depart this life without having lawful issue, then I direct that the shares of such daughters so dying shall go to the survivor of my said daughters, her heirs, executors, administrators, and assigns for ever."

The said John Cook died on the 24th of January 1841, without having revoked or altered his said will, and leaving his said three daughters, (that is to say) Mary Ann, the wife of Henry Stone, Charlotte, the wife of John Angell, and Lucy, the wife of John Atkins, (in the said will called Lucy Cook,) his only children and co-heiresses-at-law.

The said Charlotte Angell died on the 3rd of October 1841, intestate, and leaving a son John Cook Angell, her only child and heir-at-law.

The said Lucy Atkins died on the 25th of October 1841, an infant under the age of twenty-one years, and without leaving or ever having had issue, and she left her sister, the said Mary Ann Stone, and her nephew, the said John Cook Angell, her co-heirs-at-law.

By an indenture of release, bearing date the 22nd of December 1841, and made and duly executed between and by the said Henry Stone and Mary Ann his wife of the one part, and John Dumbell, therein described, of the other part, (which said indenture was expressed to be made in pursuance of the act of parliament, passed in the 4th year of her present Majesty, and intituled 'An act for rendering a release as effectual for the conveyance of freehold estates as a lease and release between the

same parties,' and was duly acknowledged by the said Mary Ann Stone, as by law required for rendering effectual conveyances by married women), all the said property by the said will of the said testator, John Cook, devised to the said Mary Ann Stone for life, and also all the said property by the said will devised to the said Lucy Atkins for life, together with all the appurtenances thereunto belonging respectively, and all the estates, right, title, interest, property, claim, and demand whatsoever of them the said Henry Stone and Mary Ann his wife, and of each of them, into and out of the same premises, were (*inter alia*), in consideration of the sum of 10s. to the said Henry Stone and Mary Ann his wife paid by the said John Dumbell, duly conveyed by the said Henry Stone and Mary Ann his wife unto the said John Dumbell and his heirs, to have and to hold the same unto the said John Dumbell and his heirs; nevertheless to the use of the said Mary Ann Stone and her assigns, for and during the joint natural lives of them the said Henry Stone and Mary Ann his wife, without impeachment of waste, and her receipts alone for the rents and profits to be from time to time good discharges. And from and immediately after the decease of either of them, the said Henry Stone and Mary Ann his wife, to the use of the survivor of them, the said Henry Stone and Mary Ann his wife, his or her heirs and assigns for ever.

The said Henry Stone and Mary Ann his wife, and John Cook Angell are all now living, and the said Mary Ann Stone has not and has never had any issue.

The questions for the opinion of the Court are, first, whether the said Mary Ann Stone, or the said Henry Stone, and Mary Ann Stone his wife, in her right, has or have any and what estate in possession in the property by the said will devised to the said Lucy Atkins for life. Secondly, whether the said John Cook Angell has any and what estate in possession in the property by the said will devised to the said Lucy Atkins for life. Thirdly, whether, contingently or otherwise, the said John Cook Angell has any and what estate in reversion, remainder, or expectancy in the property by the said will devised to the said Lucy Atkins for life. Fourthly, whether the said Mary Ann Stone, or the said Henry Stone, and Mary

Ann his wife, in her right, has or have any and what estate in possession in the property by the said will devised to the said Mary Ann Stone for life. Fifthly, whether, contingently or otherwise, the said John Cook Angell has any and what estate in reversion, remainder, or expectancy in the property by the said will devised to the said Mary Ann Stone for life.

The case was argued, in Michaelmas term, by—

*Rose*, for Mary Ann Stone and Henry Stone.—With respect to the property devised to Lucy Atkins he contended that upon her death, Mary Ann Stone took an estate in fee simple in the whole, and that John Cook Angell took no interest whatever. That there was nothing in the will to shew that the testator used the word "survivor" in any other than its ordinary sense; and therefore, like every other term unexplained by the context, it must be interpreted according to its literal meaning—2 *Jarman on Wills*, 609, *Ferguson v. Dunbar* (1), *Crowder v. Stone* (2), *Davidson v. Dallas* (3), *Wilmot v. Wilmot* (4), *Milsom v. Audry* (5), and *Leeming v. Sherratt* (6). If the word "heirs" receives its natural meaning there can be no tenancy in common between Mary Ann Stone and John Cook Angell. Had the first daughter died without issue the survivors would have taken an estate in fee simple, as tenants in common; and the intention of the testator was, that the latter part of the proviso should operate by way of executory devise of the accruing share in the event of the second daughter dying without issue. With respect to Mary Ann Stone she had an estate for life in the share originally devised to her; and, upon the death of Lucy Atkins without issue, she took a moiety of the inheritance as co-heir of the testator with John Cook Angell. Each of the daughters has an estate for life, with remainder in fee to her children, and each child when born would take a vested interest—*Doe v. Perryn* (7), *Right v. Creber* (8),

*Doe v. Hopkinson* (9); but until that contingency happened, the inheritance descended to the testator's heir-at-law. The effect of the conveyance was to merge the life estate in the reversion, and to destroy the contingent remainder—*Fearne on Contingent Remainders*, 339, *Mansell v. Mansell* (10), and *Purefoy v. Rogers* (11).

*Winser*, for John Cook Angell.—In order to carry out the testator's intention, the words "survivors or survivor" must be construed to mean "others or other;" and if so, the word "survivor" in the latter branch of the proviso must receive the same construction. The testator uses the word "property" in the former part of the proviso, but in the latter part of it he uses the word "share," which was intended to apply to the share that accrued to the survivors on the death of the first daughter, and is by no means identical with the word "property." Unless the word "survivor" be so construed there would be an intestacy as to this property on the death of Mary Ann Stone without children. In those cases in which the word "survivor" has been construed according to its ordinary meaning the context and general intention of the testator as expressed on the face of the will have required it. Here they require the words "survivors or survivor" to be read as meaning "others or other." He then referred to Lord Abinger's judgment in *Toldrey v. Colt* (12), *Harman v. Dickinson* (13), *Doe v. Wainwright* (14), *Leake v. Robinson* (15), and *Aiton v. Brooks* (16). As to the effect of the deed of the 22nd of December 1841, there could be no merger. It would only operate to defeat the contingent remainders, and would have no effect on the executory devise—*Cruise's Digest*, tit. 'Merger.'

*Rose* replied.

*POLLOCK, C.B.*—The question in this case is, whether the words "survivors or survivor," occurring in the will of John

(1) 3 Bro. C.C. 468, n.

(2) 3 Russ. 217.

(3) 14 Ves. 576.

(4) 8 Ibid. 10.

(5) 5 Ves. 465.

(6) 2 Hare, 14; s.c. 11 Law J. Rep. (N.S.) Chanc. 423.

(7) 3 Term Rep. 484.

(8) 5 B. & C. 866; s.c. 4 Law J. Rep. K.B. 324.

(9) 5 Q.B. Rep. 223; s.c. 13 Law J. Rep. (N.S.) Q.B. 85.

(10) 2 P. Wms. 678.

(11) 2 Wms. Saund. 380.

(12) 1 Mee. & Wels. 287.

(13) 1 Bro. C.C. 91.

(14) 5 Term Rep. 427.

(15) 2 Mer. 394.

(16) 7 Sim. 204.

Cook, are to be construed according to their natural import, or as meaning "other or others."

The testator had three daughters, Mary Ann, the wife of Henry Stone, Charlotte, the wife of John Angell, and Lucy, afterwards the wife of John Atkins, but who, at the date of the will, was unmarried.

By the will in question, the testator gave a real estate to his daughter Mary Ann, for her life, with remainder to her children as tenants in common in fee, and he gave another real estate to each of his two other daughters, Charlotte and Lucy, for their respective lives, with like remainder to their respective children in fee. Then follows this proviso:—"Provided always, and it is my will, that if any or either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then, and in that case, the property hereinbefore given to such daughter so dying, shall go and accrue to the *survivors* or *survivor* of my said daughters, their or her heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And if all my daughters except one should depart this life without having lawful issue, then I direct that the shares of such daughters so dying shall go to the *survivor* of my said daughters, her heirs, executors, administrators, and assigns, for ever."

The testator died in January 1841. On the 3rd of October following Charlotte Angell died intestate, leaving a son, John Cook Angell, her only child and heir. And on the 25th of the same month of October 1841, Lucy Atkins died an infant, never having had any child.

The case states, that on the 22nd of December 1841, Stone and his wife conveyed to John Dumbell and his heirs, as well the property devised to Mary Ann Stone for life, as also that devised to Lucy Atkins for life, to hold the same to Dumbell and his heirs, to the use of Mary Ann Stone, for the joint lives of herself and her husband, with remainder to the survivor of them in fee.

The question is whether, on the death of Lucy, Mary Ann Stone, as the then sole surviving daughter of the testator, took the whole of the estate originally devised to Lucy, or whether John Cook Angell, as heir-at-law

of Charlotte his mother, took one moiety of it. And this depends upon the construction to be put upon the word "survivor," as occurring in the proviso. If it is to be construed according to its natural meaning, certainly Mary Ann is entitled to the whole, for she alone survived Lucy: if it means "other," then John Cook Angell, as heir-at-law of his mother Charlotte, is entitled to one moiety.

We are of opinion that in this case there is nothing to justify us in giving to the word "survivor" any other than its natural meaning. Even admitting that there are cases in which the Courts have taken upon themselves to say that by the words "survivors or survivor" the testator must have meant "others or other," though there has been nothing to warrant such a construction beyond the strong probability that the testator may so have intended, yet it is also certain that the almost uniform current of authority on this subject for above half a century has run in an opposite direction; and this on very sound and reasonable principles. It may be, that by a rigid adherence to the ordinary meaning of the testator's words, the Courts may sometimes disappoint the intention which he really had, and which, by the words in question, he meant to express; but this is a misfortune against which it is impossible to guard: it arises, not from any defect of the law, but from the neglect of the testator in not using language calculated to express his real meaning. The law admits of no will except a will reduced into writing, and signed by the testator; and we are violating the law whenever we receive as a testator's will, not what he has written, but what we conjecture he meant to have written. Of course, this observation does not apply to a case where, on the face of the will, it appears that any word of known import is used in some *other* than its definite sense, differing from its ordinary sense. We are bound, then, to give such word the sense in which it has been used, in the same way as if the testator had in terms said he intended so to use it. It is impossible to lay down any general rule beforehand, defining what will in each case be sufficient to enable a Court to say, from matter apparent on the face of the will, that the testator is using any word not according to its ordinary meaning. It is



sufficient for us to say, that there must be something beyond the mere probability, however strong, that the testator was not aware of the precise effect of the language he has used. In this case there is nothing to shew to us that the word "survivor" was used in any other than its ordinary sense, and therefore we must give to it its ordinary meaning, and hold that the property given to Lucy for her life, on her death vested absolutely in Mary Ann in fee.

On the same principle precisely, we must hold that under no possible contingency can John Cook Angell become entitled to any interest in the property given to Mary Ann Stone for her life. By the fourth question put to us we are requested to state whether Stone and his wife, or either of them, have now any and what estate in possession in the property devised to Mrs. Stone for her life. On this part of the case some arguments were addressed to the Court as to what was the effect of the deed of the 22nd of December 1841 on the contingent remainders in fee expectant on the life estate given to Mrs. Stone; but the question proposed to us is only as to whether Mr. and Mrs. Stone have now any and what estate in possession in this property, and it is perfectly clear, under the operation of the will and deed, that Mr. Stone, in right of his wife, has an estate in possession during the joint lives of himself and his wife. On these principles, we shall certify our opinion to the Vice Chancellor Knight Bruce.

*Certificate accordingly.*

1848. }  
July 13. } MAILLÉ v. MANN.

*Sheriff's Bailiff—Attorney and Client—Liability for Fees.*

*Where a sheriff's bailiff is employed by an attorney to issue a writ of execution against a defendant, the attorney and not the client is liable to the bailiff for his fees.*

Assumpsit by the plaintiff, as bailiff of the sheriff of Cambridgehire, for work and labour in executing a certain writ and keeping a certain person, arrested by the plaintiff,

at the request of the defendant, under the said writ.

Plea—Non assumpsit.

At the trial, before Platt, B., at the Westminster Sittings, in Michaelmas term last, the following facts appeared:—The plaintiff was a bailiff of the sheriff of Cambridgehire, and the defendant a farmer residing in the same county; and the action was brought to recover the sum of 3*l.* 3*s.* for arresting and carrying to Cambridge gaol a person named Payne, against whom the defendant had obtained a judgment, and who had been arrested by the plaintiff. The defendant having a claim against Payne on a promissory note, instructed his attorney, Mr. Wilkin, to proceed against him for the recovery thereof. The action was afterwards brought in the name of Mr. Wilkin's agent in London, and judgment obtained against Payne. The defendant having subsequently instructed Mr. Wilkin to sue out execution against the defendant, the London agent issued a *ca. sa.*, and sent it to the under-sheriff's office, with instructions that the warrant should be delivered to the plaintiff, the sheriff's bailiff. Under these circumstances, it was contended, on behalf of the defendant, that the plaintiff must be nonsuited, on the ground that the action ought to have been brought against the attorney, and not against the client, the defendant. The learned Judge refused to nonsuit, and the jury, under his direction, found a verdict for the plaintiff; leave being reserved to the defendant to move to enter a nonsuit.

O'Malley having obtained a rule nisi accordingly,—

Huddleston shewed cause (May 30).—The sheriff's officer was at liberty to bring an action for his fees against the client, the present defendant, and was not bound to proceed against the attorney. The case resembles that of a witness, where it has been held that the attorney in the cause is not liable to a witness whom he subpoenas to give evidence—*Robins v. Bridge* (1). The attorney is merely the agent.

[POLLOCK, C.B.—Is the attorney to burden his client with every separate contract that he, the attorney, may make?]

*Magbery v. Mansfield* (2) decides that

(1) 3 *Mee. & Wels.* 114; *a. c.* 7 *Law J. Rep.* (N.S.) *Exch.* 49.

(2) 16 *Law J. Rep.* (N.S.) *Q.B.* 102.

the attorney of the execution plaintiff is not liable to the sheriff for the fees due on the execution of a writ of *ca. sa.* The attorney is an agent acting with a disclosed principal. In *Hartop v. Jukes* (3) it was held that the solicitor under a commission of bankruptcy is not liable, in the first instance, to the messenger whom he nominates, for his bill of fees. The bailiff executes the writ in the name of the principal, who is mentioned in the writ. In *Newton v. Chambers* (4) it was held that a sheriff's officer might maintain an action against the attorney of the plaintiff for fees, on proof of an employment by the attorney, and of its being usual for the attorney to be charged with such fees. In *Maybery v. Mansfield* Erle, J. said, "The law is, that the client is liable in such a case as this."

[POLLOCK, C.B.—In that case *Robins v. Bridge* was not cited.]

In *Seal v. Hudson* (5) Coleridge, J. seems to be of opinion that in a case like the present the attorney is not liable. *Foster v. Blakelock* (6) decides, indeed, that a bailiff, employed by an attorney to execute writs, may maintain an action against him for the usual fees; but that case, as well as *Walbank v. Quarterman* (7), is distinguishable from the present, on the ground that there the bailiff was decidedly employed by the attorney.

[ALDERSON, B.—Is the attorney entitled to pledge the credit of the client for those liabilities which are usually paid by the attorney?]

*Hart v. White* (8) decides that the petitioning creditor, and not the solicitor, is liable to the messenger under a commission of bankruptcy for the costs and expenses attending it.

[ALDERSON, B.—The dictum of Erle, J. was not necessary for the determination of the case, and is in the teeth of a written judgment.]

The Court intimated that they would consider the question, and also whether it

would be necessary to hear *Mr. O'Malley*, in support of the rule.

*Cur. adv. vult.*

*O'Malley* was not called on to support his rule; and—

ROLFE, B. now said—In this case, which was argued before us on the 30th of May last, we think the rule must be absolute to enter a nonsuit. The action is brought by the plaintiff, a bailiff of the sheriff of Cambridgeshire, against the defendant, to recover the sum of 3*l.* 3*s.*, for the plaintiff's trouble in executing a writ of *ca. sa.* issued against a third party, at the suit of the defendant and at his request. The defendant has pleaded non assumpsit. It was objected at the trial, that the defendant was not liable, but that the defendant's attorney was the party who ought to have been sued, and upon this ground a rule was obtained to enter a nonsuit. The case was argued before us, by Mr. Huddleston, on the part of the plaintiff, Mr. O'Malley appearing for the defendant, and the Court took time to consider their judgment. The case of *Foster v. Blakelock* decides that a sheriff's officer who has been employed by an attorney to execute writs for him, may maintain an action against the attorney for the fees usually paid on such occasions. *Walbank v. Quarterman* is expressly in point. That case decided that an attorney who employs a sheriff's bailiff is liable to him for his fees, and that the client is not liable, there being no privity between him and the officer. The plaintiff, on the other hand, relied upon the case of *Maybery v. Mansfield*. That decision, however, is not at variance with *Walbank v. Quarterman*, for in the former case the action was by the sheriff, whose right of action depends upon statutes and not upon contract. The plaintiff also relied upon *Seal v. Hudson* in the Bail Court, where my Brother Coleridge appears to have held, that the sheriff's officer could sue the attorney except under special circumstances. It does not, however, appear that the learned Judge's attention was called to all the cases on the subject. If, however, *Seal v. Hudson* is to be considered at variance with *Foster v. Blakelock* and *Walbank v. Quarterman*, and this Court

(3) 2 Mau. & Selw. 438.

(4) 1 Dowl. & L. P.C. 689; s. c. 13 Law J. Rep. (N.S.) Q.B. 141.

(5) 4 Dowl. & L. P.C. 760.

(6) 5 B. & C. 328; s. c. 4 Law J. Rep. K.B. 170.

(7) 3 Com. B. 94.

NEW SERIES, XVII.—EXCHEQ.

(8) Holt's N.P.C. 376.

is compelled to choose between conflicting authorities, we prefer adhering to *Foster v. Blakelock*.

*Rule absolute.*

[IN THE EXCHEQUER CHAMBER.]

1847.\* }  
Dec. 1. } WETHERELL, CLERK, v. LANGSTON.

*Covenant—Joinder of Co-covenantee—  
Pleading—Disclaimer.*

*A, by indenture, covenanted with B. & C, their executors, administrators, and assigns, to pay a sum of money, to be held by them on certain trusts. C. did not assent to or execute the deed, and subsequently by an indenture, to which neither A. nor B. were parties, disclaimed all the trusts of the first indenture:—Held, that B. could not alone sue A. upon the covenant during the lifetime of C.*

Error from the Court of Exchequer.

*Covenant.* The declaration stated an indenture of settlement, bearing date the 30th of December 1842, and made between John M. Cooke and Mary Eliza his wife, of the first part; the plaintiff in error (the defendant below) of the second part; and the defendant in error (the plaintiff below) and Charles Lord Glenelg of the third part, whereby it was witnessed for the considerations therein mentioned that the defendant below, for himself, his heirs, executors, and administrators, covenanted with the plaintiff below and Lord Glenelg, their executors, administrators, and assigns, to pay them 15,325*l.* by certain instalments, to be held by them upon the trusts therein mentioned; and that in default of payment of the said sum or any instalment thereof, it should be lawful for the plaintiff below and Lord Glenelg to issue execution on a warrant of attorney given by the defendant below, to suffer judgment at the suit of the said plaintiff below and Lord Glenelg. The declaration then set out another indenture, dated the 9th of December 1843, and made between the said J. M. Cooke of the first part, the plaintiff below of the second part, and John Evans of the third part, whereby

\* The publication of this case has been unavoidably delayed.

the said J. Evans was substituted as a trustee of the settlement in the room of the plaintiff below. It then averred that Lord Glenelg never executed or assented to or ratified the first-mentioned indenture, and that on the 28th of March 1844, by an indenture then made between the said Lord Glenelg of the one part, and the said John Evans of the other part, the said Lord Glenelg disclaimed the trusts of the said first-mentioned indenture, of which the defendant below had notice. Breach, that the defendant below had refused to pay certain instalments which became due under the said covenant.

To this declaration there was a special demurrer, on the ground that it did not disclose any right in the plaintiff below to maintain an action alone against the defendant below for breach of the covenant mentioned in the declaration, and that Lord Glenelg ought to have been joined as a co-plaintiff. The defendant below joined in demurrer, and judgment was given by the Court of Exchequer (without argument) for the plaintiff below. Upon this judgment a writ of error was brought, which was argued (1) after Michaelmas term, 1846, by—

*Watson*, for the plaintiff in error.—This covenant being entered into with the defendant in error and Lord Glenelg, as joint covenantees, an action by one during the life of the other cannot be maintained. The non-assent and disclaimer of Lord Glenelg cannot affect the prior covenant of the plaintiff in error, who has agreed to pay money to the two trustees, and not to one of them only. The confidence was reposed in the two, and cannot be claimed by one only. The argument on the other side treats it as a covenant with two, or with one in case the other dissents. As to any reasoning founded on the hardship which would arise if Langston cannot sue alone, as Lord Glenelg may refuse to lend his name to a joint action, the answer is, that being a trustee, equity will compel him to join if necessary for justice. The same reasoning would apply to every case where one of several joint covenantees has given a release. This action is entirely novel, no instance being to be found in the

(1) Before Wilde, C.J., Patteson, J., Coleridge, J., Coltman, J., Maule, J., Wightman, J., Erie, J. and Williams, J.

books of one of two joint covenantees suing alone during the life of the other. Both may sue jointly, though one did not seal the deed—*Clement v. Henley* (2), *Vernon v. Jefferys* (3). In *Petrie v. Bury* (4), it was held that all *must* sue, though some did not seal. It is true that the effect of a disclaimer or express refusal to assent to the covenant was not decided on in that case. Abbott, C. J. expressly alludes to such a state of circumstances, and adds, "trustees may often assent to a trust without executing the deed which creates it, and they may assent at any time, and without an express allegation of dissent that will not appear." Bayley, J. then says, "it appears on the face of the deed to have been his (the covenantor's) intention that the money should go into the hands of the three, and that there should be the security of them all for the due application of the money. It is a general rule, confirmed by the late case of *Scott v. Godwin* (5), that all joint covenantees or obligees must sue." This point came incidentally into discussion in *Foley v. Addenbrooke* (6). This is by no means analogous to a disclaimer of an estate which a party may refuse to accept if he pleases. The doctrine as to this is laid down in *Sheppard's Touchstone*, p. 284; *Butler and Baker's case* (7), *Townson v. Tickell* (8); but the case is different with a contract, which cannot be disclaimed without defeating the joint contract altogether. Then the question is not altered by the fact of there being the deed of disclaimer by Lord Glenelg. That deed does not affect the original covenant, as the parties to the contract were not parties to the deed. Therefore it cannot at all affect the right of Lord Glenelg to come in and sue at any subsequent time. If judgment were entered up on the warrant of attorney given by the defendant below, it must be entered, and execution issued in the name of Lord Glenelg as well as his co-covenantees.

*Pashley*, for the defendant in error (the plaintiff below).—The argument for the

plaintiff in error is, that Lord Glenelg may still come in and sue on the covenant, but he is estopped by this deed from doing so. This case falls within the class of estoppels *in pais*, stated in 1 *Instit.* 352, *a.* In *Lyon v. Reed* (9), Parke, B. said, "The acts *in pais*, which bind parties by way of estoppel, are but few, and are pointed out by Lord Coke—*Co. Litt.* 352, *a.* They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like." Here there is actually the solemnity of a deed.

[COLERIDGE, J.—Is there any case where a person, not a party to the deed, has taken advantage of the estoppel?]

There may be an estoppel by a deed-poll against the party executing. In *Whelpdale's case* (10) it is laid down, "if a bond be delivered to another to the use of the obligee, and it is tendered to him and he refuses it, then the delivery has lost its force, and the obligee can never after agree to it, and therefore the obligor may say it is not his deed." In *Cooch v. Goodman* (11), the question, whether all the parties to a deed must join, was considered, but the case was ultimately decided on another ground. It is said that a disclaimer of an estate differs from this case. That is so; but the difference is in favour of a contract being capable of disclaimer. An estate vests at once on the execution of the instrument creating it, whereas a contract, being an act of the will in both parties, cannot exist if one of the parties dissents from it: "no estate can be made to a man of anything in fee simple, for life or otherwise, against his will; and therefore, by his disagreement or refusal of it, the estate itself, and the deed whereby it is conveyed, may become void"—*Sheppard's Touch.* p. 288. *The London and Brighton Railway Company v. Fairclough* (12), *Home v. Booth* (13), *Lunn*

(9) 13 *Mee. & Wels.* 285; *a. c.* 13 *Law J. Rep.* (n.s.) *Exch.* 377.

(10) 5 *Rep.* 119, *b.*

(11) 2 *Q. B. Rep.* 580; *a. c.* 11 *Law J. Rep.* (n.s.) *Q. B.* 225.

(12) 2 *Man. & Gr.* 674; *a. c.* 10 *Law J. Rep.* (n.s.) *C. P.* 133.

(13) 3 *Ibid.* 709; *a. c.* 11 *Law J. Rep.* (n.s.) *C. P.* 74.

(2) 1 *Roll. Abr.* 'Faits,' F, 2.

(3) 2 *Str.* 1146; *a. c.* 7 *Mod.* 358.

(4) 3 *B. & C.* 353; *a. c.* 3 *Law J. Rep.* *K. B.* 29.

(5) 1 *Bos. & Pul.* 67.

(6) 5 *Q. B. Rep.* 197; *a. c.* 12 *Law J. Rep.* (n.s.) *Q. B.* 163.

(7) 3 *Rep.* 26.

(8) 3 *B. & Ald.* 31.

*v. Thornton* (14), *Archard v. Coulsting* (15), were also cited. *Begbie v. Crook* (16) is a direct authority in favour of the plaintiff below. In *Bonifant v. Greenfield* (17), it was thought that if land was devised to several, and one refused, the rest might sell—*Bro. Abr. 'Devise,'* pl. 31, there cited. *Townson v. Tickell* was the case of two devisees, one of whom dissented, and it was held that the other might sue alone. But the case of a contract is said by the other side to rest on different principles from an estate which a party cannot be forced to accept of against his will. No doubt the contract of the defendant below was entered into with two; but the question is, whether the disclaimer by one of these two has not relation back to the time when the contract was made, and does not shew that the dissenting party never in truth entered into such a contract at all. If so, it is void as to him, but stands good as to the other contractor. Suppose Lord Glenelg had died the day before the execution of the settlement, but without the knowledge of the covenantor, there is no doubt that the covenant would still be good as to Langston; on the same principle as if the co-covenantee were an alien enemy, the other could sue alone. So, if the co-covenantee were a monk, who is *civiliter mortuus*—*Sheppard's Touchstone*, 71.

[WILDE, C.J. referred to *Vin. Abr. tit. 'Grants,'* F, A, 5.]

*Smith v. Wheeler* (18), *Nicloson v. Wordsworth* (19), *Cooke v. Crawford* (20), *Keble's case* (21), *Waferer v. Rowe* (22), *Small v. Marwood* (23), are in point. The operation of the deed fails as soon as the covenantee disagrees to it.

[WILDE, C.J.—That is what the other side say: the covenant is gone.]

The effect is to make it as if there never had been a covenant with Lord Glenelg—

(14) 1 Com. B. 381, note.

(15) 6 Man. & Gr. 75.

(16) 2 Bing. N.C. 70; s. c. 4 Law J. Rep. (N.S.) C.P. 264.

(17) Cro. Eliz. 80.

(18) Vent. 128.

(19) 2 Swanst. 365.

(20) 13 Sim. 91; s. c. 11 Law J. Rep. (N.S.) Chanc. 406.

(21) Lit. Rep. 371.

(22) Moor. 300.

(23) 9 B. & C. 300; s. c. 7 Law J. Rep. K.B. 197.

*Thetford v. Thetford* (24); but it still enures as a good covenant with Langston. Until the assent of all the persons who take, the deed is inoperative—*Matson v. Booth* (25). It is analogous to bills of exchange which are altered before acceptance—*Kearney v. Nash* (26), *Jones v. Jones* (27).

[COLERIDGE, J.—Do you say that without any disclaimer the deed would be imperfect till Lord Glenelg had assented?]

Probably in the absence of anything to the contrary, assent would be presumed. It is said in *Butler and Baker's case*, "if a man makes a gift in tail to husband and wife, and afterwards grants the reversion of the lands and tenements which the husband and wife held in tail, and afterwards the husband die, and the wife, to have her dower, waives and disagrees to the estate tail; now as to her there is a nullity of the estate *ab initio*; and to such intent the law feigns that the estate was made only to the husband." In *Petrie v. Bury* it is only said one joint covenantee cannot sue alone without shewing some excuse for not joining his co-covenantee. Here a valid and sufficient excuse is alleged. He referred to *Wms. Saund.* p. 291, i, k.

*Watson*, in reply.—In order to carry out the principle contended for on the other side, it must be shewn that the covenantor assented to contract with one only of the covenantees, otherwise it is imposing on him a different contract from that which he entered into. Many of the old cases are directly in favour of the plaintiff in error; as if an obligation be delivered to one for a third party who dissents, the obligation is gone, so *à fortiori* where the dissenting party is one of the obligors. Again, if Lord Glenelg had released, the covenant would have been gone; and the reason is, because it is entire and incapable of being severed. The case of the monk, joined as obligor, rests on the principle that he is *civiliter mortuus*, and therefore not in existence.

[WILDE, C.J.—But the argument deduced from the confidence reposed in the two would equally apply to such a case.]

It is submitted that this Court must treat

(24) 1 Leon. 192.

(25) 5 Mau. & Selw. 223.

(26) 1 Stark. 452.

(27) 1 Cr. & Mes. 721; s. c. 2 Law J. Rep. (N.S.) Exch. 249.

this merely as a contract with two; and, therefore, only capable of being enforced by two, so long as both live. Equity will deal with the matter of trust and confidence. As to the deed operating by estoppel, that cannot be, as estoppels must be mutual, and neither of the parties to this action could be estopped by the deed of disclaimer—*Com. Dig.* tit. 'Estoppel.'

*Cur. adv. vult.*

Judgment was now delivered by—

WILDE, C.J.—This case arises on a writ of error on a judgment given for the plaintiff below in the Court of Exchequer, in an action of covenant. The declaration states an indenture of settlement of the 30th of December 1842, purporting to be made between John Mynde Cooke and Eliza his wife of the first part; the defendant of the second part; and the plaintiff and Lord Glenelg of the third part, by which it was witnessed that the defendant covenanted with the plaintiff and Lord Glenelg, their executors, administrators, and assigns, to pay them a certain sum of money in certain instalments, upon trusts mentioned in that indenture. The declaration then states an indenture of the 9th of December 1843, between John Mynde Cooke of the first part, the plaintiff of the second part, and one John Evans of the third part, and purporting to substitute John Evans as trustee of the former settlement in the place of the plaintiff. The declaration goes on to aver that Lord Glenelg never assented to or ratified the first-mentioned indenture; and that, on the 28th of March 1844, by an indenture made between Lord Glenelg of the first part, and the said John Evans of the second part, the said Lord Glenelg disclaimed all the trusts of the first-mentioned indenture; and that the defendant had notice of such indenture of disclaimer. The declaration then states a breach of the covenant to pay certain instalments. To this declaration the defendant demurred; and the Court of Exchequer gave judgment for the plaintiff.

The question raised by this record is, whether the declaration shews a right in the plaintiff to maintain a separate action against the defendant. Much of the argument in this court applied to a different question, that is to say, whether a joint action could

have been maintained by the plaintiff, and the other covenantee, Lord Glenelg. But as the question whether the separate action can be maintained may, as it appears to us, be decided upon principles immediately applicable to it, without any intermediate inquiry as to the right to maintain a joint action, we do not think it material to inquire whether such joint action could be maintained. No doubt or difficulty arises in the present case as to the construction of the covenant; it is in terms a joint and not a several covenant, and there is nothing in the subject to which it applies, in the interest of the covenantees, or in the context of the indenture, to require or admit a different construction. It was not disputed on the argument that the covenant was of this description; the right to maintain a separate action not being contended, on the part of the plaintiff, to arise upon any construction of the terms of the covenant itself, but out of the transaction which afterwards took place, as stated in the declaration (the material part of which is the disclaimer of Lord Glenelg), but for which transaction it was properly admitted that the present action could not be maintained. The question, therefore, is, whether that disclaimer has the effect of enabling the plaintiff to sue alone; and this question may be decided upon two very general and well-established rules of law: first, that in order to make a binding contract, the assent of both parties is necessary; the other, that a right to sue upon a contract is not assignable by the act of the party who has such right. This latter rule is subject to exceptions in cases of certain mercantile contracts and of contracts relating to land, which are not applicable to the present case.

To apply the first of these rules to the present case. The only contract to which the assent of the defendant is shewn, is that contained in the settlement of December 1842; the execution of that indenture is the only act of the defendant from which any assent of his can be inferred; from that time he is merely passive; he is no party to the subsequent transaction between Lord Glenelg and Evans, which, therefore, whatever other effect it may have, cannot operate as an assent by him to any contract. It is true, indeed, that a contract may arise upon an instrument under seal between a party who

does not execute it and one who does; as where the covenantor executes, but the covenantee, or one of several covenantees, does not; but in that case the covenantee who has not executed, by bringing the action, gives his consent to the contract; and the covenantor having consented, by executing the deed, thence is the consent of both parties. But though a consent to a contract is implied by being a plaintiff in an action upon it, being a defendant certainly does not involve any such consent by him to any contract. That a contract by one person with two jointly, does not comprehend or involve a contract with either of them separately, is evident from the well-known doctrine that a covenant or promise to two, if proved in an action brought by one of them, sustains a plea which denies the existence of the contract. The meaning of the words of the covenant in the present case is, that the defendants will pay the two covenantees; that meaning is the same whether they accept the covenant or not; and the acceptance of one, and the refusal of the other, does not alter the sense, so as to convert it into a covenant to one only. In the case of *Petrie v. Bury*, which was one of a joint covenant to three, of whom two did not seal the deed, Holroyd, J. says, "The plaintiff is not entitled to sue alone on this covenant; it was made with three persons; and, although two of them did not seal the deed, yet it is not to be converted into a covenant with one: no intention that it should be so is shewn, and by law the covenant does not import that. Supposing the two others had executed, the present plaintiff would not by himself be entitled to recover the whole, or any part of the money; and there is nothing to shew an intention that he should have any such right, in the event of the neglect of the others to execute the deed." This reason applies distinctly to the present case, in which there is nothing to shew an intention that, in the event of Lord Glenelg's refusal, the plaintiff should have the right of recovering the money alone. The present declaration, therefore, does not shew any covenant by the defendant with the plaintiff alone, inasmuch as it shews no consent by him to such a covenant; and without his consent the assent of the plaintiff and Lord Glenelg is inoperative to make a contract binding on him.

The liability, however, to be sued jointly by the two covenantees, to which the defendant did assent, might perhaps be sufficient to sustain the present action, if it were not for the rule secondly above referred to, which prohibits the assignment of the right to enforce such a liability, inasmuch as the indenture of disclaimer sufficiently shews an intention on the part of Lord Glenelg and the plaintiff that the plaintiff shall have the right to sue, which before the execution of that deed might have been exercised by the plaintiff and Lord Glenelg. But there is no doubt that such a right is not by law assignable. The defendant, indeed, does in terms covenant with the plaintiff and Lord Glenelg, their executors, administrators and assigns; but the rule which prohibits the assignment of a right to sue on a covenant is not one which can be dispensed with by the agreement of the parties; and it applies to covenants expressed to be with assigns as well as to others. It was observed in the argument, on the part of the plaintiff, that the covenant in question was not one on which at all events both parties must sue, for that in the event of the plaintiff surviving Lord Glenelg, the joint nature of the covenant would not prevent him from suing alone; and there is no doubt this is so. But in the case of survivorship, as in that of the transfer of the right to sue to the personal representatives of a sole or surviving covenantor, the right of action is transferred by operation of law, not by act of the party. There are many cases in which that may be done by the operation of law which cannot be done by act of the party.

It is laid down by Lord Coke, that "a man by his own act cannot alter the nature of his action, and therefore if the lessee for life or lessee for years do waste, now is an action of waste given to lessor, wherein he shall recover two things, viz. the place wasted, and treble damages; in this case, if the lessor release all actions real he shall not have an action of waste in the personality only, and if he release all actions personal he shall not have an action of waste in the realty only; and so if the lessee doth waste, and after surrender to the lessor his estate, and the lessor accept thereof, the lessor shall not have an action of waste. But by act in law the action may be changed,

as if a man make a lease *pur terme d'auter vie*, and the lessor doth waste, *cestui que vie* dieth, an action of waste shall lie for damages, only because the other is determined by act in law."

There were also some authorities cited in the argument on the part of the plaintiff, which, it was contended, shewed that by the disclaimer of Lord Glenelg, the plaintiff became solely entitled to the right of action, which but for that disclaimer would have belonged to him jointly with Lord Glenelg. They were cases in which a devise or conveyance to two persons jointly, one of whom disclaimed, has been held to vest the whole estate in the other. But the analogy of those cases is inapplicable, because the subject dealt with was not a mere personal contract, but an interest in land. Now joint obligees or covenantees in personal contracts differ materially from joint tenants of estates in land, in respect of their power of dealing with their rights. An interest in land, whether joint or several, may be transferred by the act of the party; and the conveyance by a joint tenant, by release or otherwise, operates on his moiety only; he may convey it to his co-tenant, or to a stranger; whereas a right to sue on a contract cannot be conveyed, though it may be extinguished, and a release by one of the joint parties extinguishes the right of both. It was upon a similar reason that, in real actions, a nonsuit of one demandant or plaintiff was not the nonsuit of both; but he that made default should be summoned and severed; but in personal actions the nonsuit of one is generally the nonsuit of both—*Co. Lit.* 139, a. To allow a joint devisee or grantee, &c. of land to vest the whole interest in his co-devisee or grantee, &c., by refusing to accept the estate, is allowing him to do no more than he could have done by a release immediately after acceptance; but if a joint covenantor could, by refusal, enable his co-covenantor to sue alone, he would do that before acceptance which he could by no means do after acceptance.

Since, then, the defendant has not incurred any liability to be sued on a separate contract, and since the plaintiff has not acquired the right to enforce in a separate action any liability to which the defendant might be subject in a joint action, it follows, that whether the defendant's original liability

be or be not put an end to, this declaration is bad, and the judgment for the plaintiff ought to be reversed.

*Judgment reversed.*

1848. }  
May 12.\* } JONES v. BONNER AND NASH.

*Attorney — Pauper Plaintiff — Release after Action, Setting aside—Costs.*

*Where a release has been executed by a pauper plaintiff after action brought, and without the knowledge and consent of the attorney, it is matter entirely within the discretion of the Court, whether under the circumstances of the case they will set it aside.*

*Where such a release has been executed in pursuance of a bonâ fide arrangement between the plaintiff and the defendant, the Court refused to set it aside, although its effect was to deprive the plaintiff of his costs.*

This was an action of trespass brought by the plaintiff, who had been admitted to sue *in formâ pauperis*. Issue had been joined, and notice of trial given for the Herefordshire Spring assizes in 1848. The cause would have been then tried, but on the 4th of March a plea of a release *puis darrein continuance* was delivered to the plaintiff's attorney, who thereupon countermanded the notice of trial which had been given, and early in the present term the attorney obtained a rule, calling upon the defendants to shew cause why the plea of release *puis darrein continuance* and the deed of release therein mentioned should not be set aside.

The affidavits filed on either side were somewhat contradictory, but it appeared that the action had been brought for an alleged trespass to the cottage and goods of the plaintiff, committed by the defendant Nash, acting under the command of the other defendant Bonner, who was the plaintiff's landlord. The affidavit of the plaintiff stated that he was sorry that he had executed the release, but that he had been induced to do so by a promise made to him by Bonner, that he would give him a sovereign, and a promise made by one Bodenham that he would put him into a cottage. The

\* Decided in a previous term.



attorney swore that he believed that Bonner had fraudulently colluded with the plaintiff to deprive him, the attorney, of his costs, and that the execution of the release was in pursuance of that design. The defendant Bonner in his affidavit denied this, and stated that the plaintiff had come voluntarily to him to settle the action; that he had given the sovereign to assist the plaintiff and his family, who were in very distressed circumstances; that it was then arranged that the plaintiff should sign a release; that a release having been prepared, the plaintiff attended at the house of the defendant Bonner on the 28th of February last; that it was read over to him twice, and explained to him; that no promise of a cottage was held out to him by Bodenham or by any one else, but that he then executed the release of his own free will. There were several other affidavits confirming this account of the transaction.

*Martin* now shewed cause against the rule.—It is plain from these affidavits that the signing of the release by the plaintiff was his own voluntary act; if so, there is no pretence for setting it aside. If the case of *Wright v. Burroughes* (1), which will doubtless be relied upon, is to be taken as deciding that under no circumstances can a defendant settle an action with a plaintiff who has been allowed to sue *in formâ pauperis*, unless with the consent of the plaintiff's attorney, the Court of Common Pleas have gone too far.

*Skinner*, in support of the rule.—The attorney of a person who has been admitted to sue *in formâ pauperis* does not stand in the position of the attorney of an ordinary plaintiff. In a pauper suit the attorney gives his skill and time under the belief that his client has good grounds for the action he has brought, and seeks for his recompense out of the costs which, if successful, he will obtain from the defendant. It is upon this ground that the Courts have discountenanced the settling of an action by the plaintiff and the defendant behind the back of an attorney—*Wright v. Burroughes*.

*POLLOCK, C.B.*—I am of opinion that this rule should be discharged. In *Wright*

(1) 3 Com. B. 344; a. c. 15 Law J. Rep. (N.S.) C.P. 277.

*v. Burroughes* the facts were entirely different from those of the present case, and there Chief Justice Tindal appears to have guarded himself from laying down any precise rule of law upon the subject, but to have thought that, under the circumstances of the case, the discretionary power of the Court ought to be exercised to protect the attorney. If the attorney of a plaintiff who has been allowed to sue *in formâ pauperis* is to be understood as undertaking the cause upon the understanding that he is to be allowed to carry it on to a termination in spite of the plaintiff—that he is *dominus litis*—then Mr. Skinner's argument should prevail. But in my opinion such is not the understanding. The Courts have not gone further than to say, that if there have been collusion between the plaintiff and the defendant, and the cause has been settled for the purpose of depriving the attorney of his costs, then the Court will interfere to protect him; but such interference has never been extended to a case where a fair, reasonable, and *bond fide* arrangement has been come to between the plaintiff and the defendant. Instead of setting aside any such arrangement, I should be very sorry to throw any impediment in the way of its being made.

*ROLFE, B.*—I am of the same opinion. In the case of *Wright v. Burroughes* the late Lord Chief Justice Tindal thus commences his judgment: "I will not say that cases may not arise in which it may be lawful for a pauper plaintiff to settle with the defendant without regard to his attorney's lien." Now, assuming that it is competent for the parties to settle the suit behind the back of the attorney, then this is just one of those cases in which it should be allowed; for the cause of action appears to me to be one in which it is highly probable that nominal damages only would have been recovered: and so far from the defendant Bonner seeking to collude with the plaintiff for the purpose of depriving the attorney of his costs, the plaintiff appears to have pressed the arrangement upon the defendant; for I cannot help expressing an opinion that the affidavit now made by the plaintiff is false, and that when he goes on to say that he much regrets having executed the release, it is the attorney who is putting those words into his mouth

for the purposes of this rule. For these reasons I think that the Court ought not to interfere.

PLATT, B.—I entirely concur with the rest of the Court. It appears to me that a plaintiff in a pauper suit is like any other plaintiff, and has a right at any time to put a stop, by any *bond fide* arrangement he may enter into, to the further progress of the cause. Were this not the case, he would be a mere instrument in the hands of the attorney to extort money in the shape of costs from the defendant. Attornies, before they undertake causes of this description, should inquire into the characters of their clients, and, as they take them for better or for worse, should see that they are honest men, not rogues and vagabonds. But it is said that in this case the arrangement had for its object to cheat the attorney of his costs; if that were clearly the object of the parties, the attorney ought perhaps to be protected: but upon these affidavits I do not see that this was the object of the defendant Bonner, but, on the contrary, that he became a party to an arrangement which was urged upon him by the plaintiff, and the effect of which was to put a stop to a vexatious action, in which it is probable only nominal damages would have been obtained.

*Rule discharged, with costs.*

1848. }  
Jan. 26. } ROGERS AND OTHERS v. CHILTON.

*Bill of Exchange—Pleading—Repleader.*

*Assumpsit by the indorsee of a bill of exchange for 25l., drawn by the defendant, indorsed by him to T. R. K, and by him to the plaintiffs. Plea, that the indorsement by T. R. K, to the plaintiffs was in blank; that after such indorsement and on the day of the bill becoming due T. R. K. paid the plaintiffs the sum of 25l., in the said bill specified, in full satisfaction of the said sum of 25l., and the plaintiffs then delivered the bill to T. R. K, who, at and after the time of the commencement of the action, was and still is the holder of the bill. Replication, that at the commencement of the suit the plaintiffs were the holders of the bill; without this, that at the commencement of the suit T. R. K. was the holder thereof. The jury found a*

*verdict for the plaintiffs:—Held, on an application for a repleader, that the issue raised was a material issue.*

Assumpsit by the indorsees against the drawer of a bill of exchange for 25l., payable at three months, indorsed by the defendant to Thomas Reginald Kemp, and by him to the plaintiffs.

Second plea, that the indorsement by Thomas Reginald Kemp was an indorsement in blank, and that after the bill was indorsed to the plaintiffs, and on the day when it became due, the said Thomas Reginald Kemp paid to the plaintiffs the said sum of 25l. in the said bill specified, according to the tenour and effect thereof and of his indorsement, in full satisfaction and discharge of the said sum of 25l. in the said bill specified; and the plaintiffs then delivered the said bill to the said Thomas Reginald Kemp, who from the time of such payment and delivery until and at and after the time when this action was commenced, hath been and still is the holder of the said bill, and the defendant then became and was and is liable to pay the said sum in the said bill specified to the said Thomas Reginald Kemp. Verification.

Replication, that at the time of the commencement of this suit the plaintiffs were the holders of the said bill; without this, that at the time of the commencement of this suit the said Thomas Reginald Kemp was the holder thereof *modo et forma*. Conclusion to the country.

The cause was tried before Pollock, C.B., at the London sittings after Michaelmas term last, when the jury found a verdict for the plaintiffs for the amount claimed.

Knowles moved (Jan. 14) for a repleader. —The replication contains an admission that the bill has been satisfied, and that the sum of 25l. was paid by Kemp to the plaintiffs, and received by them in satisfaction of the bill. The plaintiffs did not, therefore, hold the bill for themselves, but for Kemp, who was the proper party to bring the action. Without doubt that would be the case if the defendant had been the acceptor. *Bacon v. Searles* (1) shews that where the indorser of a bill of exchange receives part of the contents of the bill from

(1) 1 H. Black. 88.

the drawer, he cannot recover more than the residue from the acceptor, and that where the drawer pays the whole the acceptor is discharged.

[PARKE, B.—May not the plaintiffs continue the suit for the benefit of another party? If Kemp allows them to keep the bill, it is the same as allowing them to sue for him. According to the finding of the jury, Kemp was not entitled to bring the action, as the bill had not been given up to him.]

*Stones v. Butt* (2) is in point. There the plaintiff was not, at the time when the defendant was arrested, in possession of the bill of exchange on which the action was brought, but it was in the possession of the person to whom the plaintiff was indebted; and to whom he had indorsed it over; but it appeared that those persons only held the bill as trustees for the plaintiff, and that they were ready to give up possession of the bill to him for the purposes of the suit. The Court held that the defendant was not entitled to be discharged out of custody. He also referred to *Byles on Bills*, p. 305.

[PARKE, B.—Are not the plaintiffs to be considered the holders of the bill if it is assumed that they held it for Kemp?]

Kemp was entitled to the possession of the bill, and therefore could have brought the action; how then could other parties have a right to bring it?

[PARKE, B.—How is this an immaterial issue? We have already decided that it is material (3).]

*Knowles* then contended that the verdict was contrary to the evidence.

The Court having taken time to consider the latter point,—

POLLOCK, C.B. now said.—In this case there will be no rule. A motion was made to this Court for a repleader, the ground being that the issue raised in the replication to the second plea was immaterial. [His Lordship stated the pleadings.] We think the issue raised was material, and therefore must refuse a rule.

*Rule refused.*

1848. } PRICE AND ANOTHER v. GROOM  
June 10. } AND ANOTHER.

*Bankrupt—Reputed Ownership—Deed, Construction of—Partnership—Estoppel.*

*By a deed of trust, W, a horse contractor and jobber, assigned, until such time as all his then debts should be paid off, all his stock in trade, &c. to certain trustees for the benefit of his creditors, to hold upon certain trusts, inter alia that so long as W. should observe the orders of the trustees he was to be allowed to carry on and conduct the business, subject to the orders of the trustees; that if he refused to comply with those orders, the trustees might immediately determine such permission; that the trustees should have power to sell any portion of the stock they pleased; that all monies received in the business were to be paid to the account of the trustees, and all monies paid by their cheques; and that W. was to receive a weekly salary for carrying on the business. The creditors also agreed to advance a large sum of money for the purposes of the business. This sum was advanced, and the business was carried on for some time under the terms of the deed, but W. having refused to comply with certain orders of the trustees, the trustees, on the 22nd of July 1847, determined the permission to W. to carry on the business, and W. thereupon admitted in writing that the trustees had his leave to assume possession of the stock in trade, &c. Several of the horses used in the business were at that time let out on hire to various persons, and the trustees on that day served notice upon each of those persons that the horses in their possession belonged to them as trustees. On the 24th of July W. committed an act of bankruptcy. Upon an interpleader issue to try the title to these horses as between the trustees and the assignees,—Held, upon these facts, first, that by the deed no partnership was created between W. and the trustees.*

*Secondly, that by allowing W. to carry on the business in his own name the trustees were not estopped from relying upon their own title to the property under the deed as against the assignees.*

*Thirdly, that the horses were not at the time of the bankruptcy in the possession, order, or disposition of the bankrupt within the meaning of the 6 Geo. 4. c. 16. s. 72.*

(2) 2 Cr. & Mee. 416; s. c. 3 Law J. Rep. (N.S.) Exch. 135.

(3) *Rogers v. Chilton*, ante, p. 8.

Interpleader issue to try whether, on the 24th of July 1847, certain horses claimed by the defendants, as assignees under the bankruptcy of one Wiggins, and by the plaintiffs, as trustees under a deed of trust for themselves and other creditors of Wiggins, were the property of the plaintiffs as against the assignees.

At the trial of the issue, which took place before Parke, B., at the sittings in last Trinity term, it appeared, that the bankrupt Wiggins, who had been carrying on business as a horse contractor, having become embarrassed, and a meeting of his creditors having taken place, in pursuance of an agreement then come to, a deed was executed, on the 23rd of August 1844, by Wiggins of the first part, the plaintiffs of the second part, and the remainder of the creditors of the third part, by which Wiggins assigned to the plaintiffs, as trustees of the creditors, until such time as all his debts to them should be paid off, all his stock in trade, &c., to hold upon certain trusts, *inter alia*, that so long as Wiggins should observe the orders and directions of the plaintiffs, he was to be allowed to carry on the business and conduct the same, subject to the orders of the plaintiffs; that if Wiggins refused or failed to comply with these orders, the plaintiffs might immediately determine the permission; that the plaintiffs should have power to sell and dispose of any portion of the stock they pleased; that all monies received in the business were to be paid into a banker's hands, and only drawn out by the cheques of the plaintiffs, and that Wiggins was to receive the wages of 5*l.* a week for conducting the business. The creditors agreed also to advance a large sum of money for the purpose of carrying on the business, and which sum was afterwards advanced accordingly.

After the execution of this deed Wiggins continued to carry on the business, his name appeared written up at the place of business, and parties dealt with him; but the plaintiffs, in pursuance of the provisions of the deed, gave him directions from time to time, and he accounted to them for the proceeds, &c. of the business. So matters continued until July 1847, when the plaintiffs having discovered that Wiggins had been accepting bills of exchange to a considerable amount, and had concealed the fact from the plaintiffs, a meeting of the

creditors was held on the 22nd of July, and in pursuance of the resolution then come to, the plaintiffs gave Wiggins notice that he had acted improperly and contrary to their directions, and that they, therefore, put an end to his any longer carrying on the business. Upon the receipt of that notice, Wiggins made the following memorandum of admission:—"I hereby agree and admit that conformably with the provisions of the deed of trust, &c. the right has accrued to the trustees of determining and putting an end to their permission to my carrying on my trade and business mentioned in the said deed, and that they have exercised that right and put an end to that permission; and further that in obedience to such act of theirs they have, with my leave, licence, and assent, assumed the entire possession and controul of the said trade, business, stock in trade, &c." At this time many of the horses belonging to the estate were in the possession of various persons to whom Wiggins had at different times let them on job in the way of his business, and these transactions of letting had taken place between Wiggins solely, in his own name, and the several persons to whom the horses had been let, without any participation or interference on the part of the plaintiffs, whose names did not appear in the transactions. On the same 22nd of July the plaintiffs gave a notice in writing to each of these parties, that the horses in their possession belonged to the plaintiffs as trustees under the deed, and requiring them "not to part with the said horses, or any of them, nor to pay for the hire thereof to any other person than to the plaintiffs." On the 24th of July Wiggins committed an act of bankruptcy, upon which a fiat in bankruptcy afterwards issued, and the defendants became assignees. As such assignees they made claim to the horses which formed the subject of this issue.

It appeared further, at the trial, that during the time which had elapsed from the execution of the deed to that of the bankruptcy, some of the horses had been sold and others purchased as well out of the monies advanced by the creditors as before mentioned as out of the incomings of the business, but all were mixed up together, and it became impossible to distinguish between horses purchased after and those purchased before the deed. The sum realized by these

horses, and all the stock in trade of the bankrupt, amounted to much less than the sum due to his old creditors.

It was contended, on behalf of the assignees, that as to those horses which were afterwards purchased, the property in them did not pass to the plaintiffs by operation of the deed; secondly, that the effect of the deed was to make Wiggins a partner with the plaintiffs in the business; thirdly, that the plaintiffs having allowed the bankrupt to carry on the business in his own name were estopped from saying that he was their servant only; and, lastly, that, under the circumstances of the case, the horses must be considered to be in the possession, order, or disposition of the bankrupt, within the meaning of 6 Geo. 4. c. 16. s. 72.

Upon the first point, the learned Judge asked the opinion of the jury, whether they were satisfied that there had been any appropriation by the bankrupt to the trustees of all the horses purchased since the execution of the deed. Upon the other points, he ruled against the defendants. The jury found a general verdict for the plaintiffs.

*Montagu Chambers* now moved for a new trial, upon the ground of misdirection.—First, the jury having found that the bankrupt appropriated the horses which were purchased after the execution of the deed to the trustees, it must be admitted they became their property; but having become so, they allowed them to remain in the disposition of the bankrupt, and, if so, they became the property of the assignees. Secondly, the legal effect of the deed of the 23rd of August 1844, was to make the bankrupt a partner in the business with the trustees. He was interested in the profits, for the larger they were the greater progress he made in the discharge of his liabilities. He derived, therefore, such a benefit from the business as to make him in law a partner.

[ALDERSON, B.—The effect of the deed is, that so long as the trustees have any interest in the business the bankrupt has none; and as soon as the bankrupt begins to take any interest, that of the trustees is to cease. How can you say that they were partners?]

The interest of the bankrupt depends upon the prosperity of the trade; if great, he will

be enabled to pay the debts to the creditors and retain any surplus to himself—*Grace v. Smith* (1). Thirdly, as the trustees have put the bankrupt forward as the apparent owner of these horses, they are estopped from saying as against those who became creditors of the bankrupt after the execution of the deed, that he was not the owner—*Pickard v. Sears* (2), *Gragg v. Wells* (3).

ALDERSON, B.—I am of opinion that no rule should be granted in this case. To dispose of the last point first: it has been argued that these horses were the property of the assignees, because the bankrupt was in possession of them at the time of the bankruptcy as reputed owner. Was he in possession of them as reputed owner with the consent of the true owner? For that is the question. Now, in the case of *Smith v. Topping* (4), I ruled at Nisi Prius, and the Court of Queen's Bench afterwards upheld my ruling, that where the true owner of goods allowed the bankrupt to retain possession of them as reputed owner up to the day before the bankruptcy, but upon that day demanded them, they could not be said to be in the possession of the bankrupt with the consent of the true owner at the date of the bankruptcy. So in the present case, as soon as the trustees gave notice to the parties who had the horses that the bankrupt had no longer any interest in them, that put an end to the reputed ownership. But then, it is said, that the bankrupt was the true owner of the horses, for that the effect of the deed of trust was to make him a partner with the trustees in carrying on the business. Inasmuch, however, as there was no community of profit and loss between these parties at one and the same time, there was clearly no partnership in point of law between them. Lastly, it was argued, that as the trustees put forward the bankrupt as the person ostensibly carrying on the business and as the apparent owner of these horses, they are estopped as against the future creditors of the bankrupt from saying that he was not the owner. If that proposition

(1) 2 W. Black. 998.

(2) 6 Ad. & El. 469.

(3) 10 Ibid. 90; s. c. 8 Law J. Rep. (N.S.) Q.B. 193.

(4) 5 B. & Ad. 674; s. c. 3 Law J. Rep. (N.S.) K.B. 47.

could be maintained, its effect would be to make wild work with the bankrupt law. The cases only go to this extent, that where a party makes an actual representation to another intending that he should act upon it, and the latter does so, such person shall not be put into a worse position by reason of such representation being false than he would be were it true. But this doctrine has no application to the facts of the present case.

ROLFE, B.—I am of the same opinion. It appears to me that the effect of the deed of the 24th of August 1844 was clearly not to create any partnership between the bankrupt and the trustees. With respect to the other point, I should very much doubt whether where goods are in the possession of third parties, they can be said to be in the possession, order or disposition of the bankrupt at all: in other words, whether a constructive possession of them by the bankrupt is sufficient; but it is unnecessary to canvass that proposition, for after the notice was given by the trustees it is impossible to contend that they could be any longer in the bankrupt's possession, order or disposition with the consent of the true owner.

PLATT, B. concurred.

PARKE, B.—I remain entirely of the opinion which I expressed at the trial. As soon as the facts appeared, I thought the law applicable to them was as plain as possible. The first question which arose was, whether all the horses were the property of the assignees. I thought, under the authority of *Lunn v. Thornton* (5), that there was a doubt whether the property in those horses which were purchased after the execution of the deed passed to the trustees, unless they had been afterwards appropriated to them by the bankrupt. I left, therefore, that fact to the jury, and they found, in effect, that the bankrupt had so appropriated them. That point was therefore disposed of. It has been argued now that the trustees, by allowing the bankrupt to deal with these horses as his own were estopped from saying as against the future creditors that they were not so; but that is carrying out the doctrine laid down in *Pickard v.*

*Sears* to an extent not at all warranted by that decision. Had the trustees entered into any stipulation that future creditors should satisfy themselves out of the goods employed in the business, or had represented to such creditors that the bankrupt was really the party interested in the business, and upon that representation such creditors had dealt with the bankrupt, they might have been estopped from afterwards setting up a different state of facts; but that is not at all the case here. I quite concur with what has fallen from the rest of the Court with respect to the question of reputed ownership; and with respect to the construction of the deed, I may observe that not only in my opinion did no partnership arise out of it, but that also inasmuch as the assignees can, independently of the question of reputed ownership which has been disposed of, only claim under the bankrupt as respects the actual ownership, that then, inasmuch as the bankrupt admitted the property in these horses to be in the trustees, it is not open to the assignees to say that they are not.

*Rule refused.*

1848. } CLARK v. WOODS, SMITH, AND  
June 3. } COOPER.

*Commitment—Poor Rates—Costs—43 Eliz. c. 2. s. 4.—18 Geo. 3. c. 19.—Backing Warrant—24 Geo. 2. c. 55.—Trespass—Damages—Constable—Demand of Warrant—24 Geo. 2. c. 44. s. 6.*

*The 43 Eliz. c. 2. s. 4. does not extend to costs. Where, therefore, a warrant of two Justices of the county of S. commanded the constable to apprehend and take A. B. to the House of Correction, there to remain until payment of a sum, made up of the arrears of poor-rate due from him and of costs awarded,—Held, that such warrant was altogether bad; and that an action of trespass lay against the Justices and the constable for the arrest and imprisonment under it.*

*The backing of such a warrant by a Magistrate, under 24 Geo. 2. c. 55, is merely a ministerial act, and the Justices who originally issued the warrant are responsible for the arrest under it, although made in a*

(5) 1 Com. B. 379; s. c. 14 Law J. Rep. (N.S.) C.P. 161.

different county from that in which it was issued.

Where a party arrested under such warrant paid under protest the whole amount mentioned therein, he was entitled in an action of trespass brought for such arrest to recover as damages the whole amount so paid by him.

Under the 24 Geo. 2. c. 44. a demand of the perusal and copy of the warrant under which a constable has acted, which is in writing and signed by the plaintiff's attorney, is sufficient, although it has been left at the constable's place of abode by a person other than the attorney.

When, previous to such demand being made, the plaintiff has by other means obtained a copy of the warrant, that does not excuse the constable from complying with the demand, if he seek to avail himself of the protection given by that statute.

The mere fact of the Justices who issued the warrant being sued jointly with the constable, does not entitle the latter to a verdict, the last clause of the 24 Geo. 2. c. 44. s. 6. only applying to actions brought after the demand of the perusal and copy of the warrant has been complied with by the constable.

[For the report of the above case, see 17 Law J. Rep. (N.S.) M.C. p. 189.]

1848. { In the matter of the arbitration  
May 4. { between the NORTH STAFFORD-  
SHIRE RAILWAY COMPANY  
AND LANDOR AND OTHERS.

*Railway—Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. ss. 23, 25.—Arbitration—Notice of Appointment of Arbitrator—Award—Attachment.*

The *Lands Clauses Consolidation Act*, 8 Vict. c. 18. enacts, sec. 23, with respect to lands required to be taken for the purposes of the undertaking, that if the party claiming compensation desires to have the same settled by arbitration, and gives a notice in writing thereof to the promoters, stating therein the nature of his interest, and the amount of compensation claimed, the same shall be so settled.

Section 25. enacts, that in questions of disputed arbitration, unless both parties

concur in the appointment of a single arbitrator, each may appoint an arbitrator, and such appointment shall be deemed a submission to arbitration on the part of the party by whom the same shall be made.

The North Staffordshire Railway Company requiring certain lands for the purposes of their railway, gave notice thereof to T. L. R. H. and R. H. the parties interested therein, and received from them a notice which stated that they had and claimed an estate and interest in certain copyhold lands and hereditaments, situated in, &c. and required to be taken by the company, and that they claimed compensation for the said lands and hereditaments to the amount of 3,344l. 17s. 6d., that they desired to have the same compensation settled by arbitration, and appointed T. H. one of the arbitrators. Another arbitrator having been appointed by the company, and an umpire nominated by the arbitrators, a claim for compensation was made by one T. W. who alleged that he had a leasehold interest in the said lands. The umpire awarded that the sum of 1,861l. 2s. 6d. should be paid by the company to T. L. R. H. and R. H. as such trustees for the purchase of the fee simple in possession, free from all incumbrances of and in the said copyhold lands, &c. required to be taken by the company, but omitted to adjudicate upon T. W.'s interest. The company took possession of the land in question.

A motion to set aside the award having been made on the ground that the umpire had not apportioned the sums to be paid to T. L. R. H. and R. H. for their limited interest in the land, and the sum to be paid to T. W. for his interest,—The Court refused to set aside the award.

But held:—that the award was insufficient on the ground of the arbitrators not having found the value of the interest of T. L. R. H. and R. H. and awarded a distinct compensation on that account.

But, quære, whether it was not binding on the parties by reason of their conduct.

Semble, that the notice of T. L. R. H. and R. H. which constituted the submission, was not conformable to the statute, and therefore that the award could not be enforced by attachment.

This was a rule calling upon Thomas Landor, Richard Hughes, and Robert

Hughes, to shew cause why an award should not be set aside under the following circumstances :—The North Staffordshire Railway Company, who were incorporated by an act of parliament passed in 1846, requiring certain land for the purposes of their railway, gave notice under the 18th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18. (1), to Thomas Landor, Richard Hughes, and Robert Hughes, the parties interested in the said land, that they required to purchase the land. Landor and the two others accordingly sent to the company the following notice :—

(1) The following sections are important:—

The 18th section enacts, That when the promoters of the undertaking require to purchase any lands, they shall give notice to the parties interested in such lands, shall demand the particulars of their estate and interest, and state the particulars of the lands so required.

Section 23. enacts, That if the compensation claimed or offered exceeds 50*l.*, and the party claiming compensation desires an arbitration, and signifies such desire by notice in writing to the promoters before they have issued their demand for a jury, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of compensation so claimed, the same shall be so settled accordingly.

Sect. 25. "Where any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking, under the hands of the said promoters, or any two of them, or of their secretary or clerk, or on the part of any other party under the hand of such party, or if such party be a corporation aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made."

Sect. 37. "No award made with respect to any question referred to arbitration under the provisions of this or the special act, shall be set aside for irregularity or error in matter of form."

Sect. 63. relates to the mode of estimating the purchase-money and compensation.

Sect. 68. enacts, That where the compensation claimed exceeds 50*l.*, the party claiming it may have it settled by arbitration or by a jury.

Sect. 94. enacts, That where land shall be so cut through as to leave on either side of the works a piece of land of less extent than half an acre, the promoters of the undertaking may, under certain circumstances, insist upon purchasing such land.

"To the North Staffordshire Railway Company, &c.—We, the undersigned Thomas Landor, Richard Hughes, and Robert Hughes, do hereby give you notice, that as trustees named and appointed in and by the last will and testament of Francis Figgins, of &c., we have and claim an estate and interest in certain copyhold lands and hereditaments, situate in Sutton, in the parish of Prestbury, in the county of Chester, required to be purchased or taken by the said company for the purposes of their said railway; and that we do claim compensation for the said lands and hereditaments, and that the sum of 3,344*l.* 17*s.* 6*d.* is the amount of compensation we so claim.

"And we do hereby give you notice and require you to purchase a certain plot of land, part of the said lands and hereditaments, situate in Sutton aforesaid, which will be cut off and divided by the works of the said railway, and adjoining or near to the plot of land numbered 422 in the plan and book of reference of the said company. And we do hereby signify our desire to have the same compensation settled by arbitration. And we do hereby nominate and appoint Thomas Hill, of &c., to be one of the arbitrators in the premises; and we do hereby request you to nominate and appoint another arbitrator, to which said arbitrators, or their umpire, the said claim shall be referred.

"Dated this 15th day of May 1847.

"Thomas Landor,

"Richard Hughes,

"Robert Hughes."

The railway company, on receiving this notice, sent the following notice to Landor and the others, dated the 19th of May 1847 :—

"Whereas the North Staffordshire Railway Company require to purchase and take certain lands and hereditaments for the purposes of the North Staffordshire Railway, situate in &c., and which are wholly or part of the lands and hereditaments numbered 317, 401, 402, 413, 416, 417, and part of 422, in the plan and book of reference for the railway authorized to be constructed by the said excited act, for the said parish of Prestbury. And whereas on the 14th day of January last, a notice of the intention of the North Staffordshire Railway Company to purchase and take for the purposes afore-



said the said lands and hereditaments, was duly served on T. Landor ; and on the 15th day of January last a notice of such intention was duly served on Richard Hughes and Robert Hughes, as the owners of, or as parties interested in the said lands and hereditaments, or as parties enabled by the Lands Clauses Consolidation Act, to sell and convey or release the same lands and hereditaments to the said company ; and the said lands and hereditaments so required as aforesaid were on the said notices so served on you as aforesaid for better description delineated on the plan attached to each of the said notices so delivered therewith, and were therein distinguished by a red colour. And whereas they have stated the particulars of their claim in respect of the said lands and hereditaments to be that such lands and hereditaments are of copyhold tenure, and you claim the sum of 3,344*l.* 17*s.* 6*d.* as compensation for the same lands and hereditaments ; and they and the said company have not agreed as to the amount of compensation to be paid by the said company for the interest in such lands belonging to them, or which they are by the acts before recited or referred to enabled to sell, and for the damage to be sustained by them by reason of the execution of the works of the said railway. And whereas the said T. Landor, R. Hughes, and R. Hughes have by notice in writing, bearing date the 15th day of May instant, signified to the said company their desire to have the question of such compensation settled by arbitration : Now I, the undersigned, Jonathan Samuda, secretary to the said North Staffordshire Railway Company, do hereby nominate and appoint Thomas Kempson, of &c., as arbitrator on behalf of the said company, to whom, with the arbitrator appointed by the said T. Landor, R. Hughes, and R. Hughes, shall be referred the question as to the amount of compensation to be paid by the said company for the purchase of the said lands and hereditaments, or of the interest of the said T. Landor, R. Hughes, and R. Hughes therein, or for the interest of any other person or persons which by the said acts hereinbefore recited or referred to, you the said T. Landor, R. Hughes, and R. Hughes are enabled to sell, and also for

the damage that may be sustained by the said T. Landor, R. Hughes, and R. Hughes, or such person or persons as aforesaid, by reason of the execution of the works of the said company.

"Dated this 19th day of May 1847.

"J. Samuda,

"Secretary to the said North Staffordshire Railway Company."

The arbitrators having appointed an umpire under the 27th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, several meetings took place, at which a Mr. Wright claimed compensation from the company in respect of the lands in question, on the ground of his being lessee of the lands for seven years from Christmas 1846. The two arbitrators having failed to make their award within the time limited by the 31st section of the above act, the umpire on the 8th of November made his award as follows :—

"I do hereby award and determine that the sum of 1,861*l.* 2*s.* 6*d.* is the value, and shall be paid by the North Staffordshire Railway Company to the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, for the purchase of the fee simple in possession, free from all incumbrances, of and in the said copyhold lands, tenements, and hereditaments, described in the said first-recited notice, and delineated on the plan thereunto attached or delivered therewith, and therein coloured red, and required to be purchased and taken as aforesaid ; and that the further sum of 1,040*l.* 18*s.* 4*d.* shall be paid by the said company to the said T. Landor, R. Hughes, and R. Hughes, as such trustees as aforesaid, as compensation for the damage that has been or will be sustained by the said T. Landor, R. Hughes, and R. Hughes, as such trustees as aforesaid, by reason of the execution of the said railway and works, and also of the severing of the same lands and hereditaments from the other lands of the said T. Landor, R. Hughes, and R. Hughes, as such trustees as aforesaid, or otherwise injuriously affecting such other lands by the exercise of the powers of the said Lands Clauses Consolidation Act, or of the act or acts authorizing the said railway and works, or any act incorporated therewith."

On the 16th of December, the solicitors

to the company sent to Mr. Landor's solicitors a copy of the award, apprising them at the same time of Mr. Wright's claim to compensation; and stating that in the event of Wright taking proceedings against the company to obtain compensation, they should deduct the amount from the purchase-money. Mr. Landor's solicitors returned for answer, that they would not allow the company to make any deduction. The company afterwards took possession of the land. The main grounds on which the rule nisi was obtained were as follows:—

"That the umpire has not in or by his said award, decided what is the amount of the compensation to be paid by the North Staffordshire Railway Company for the interest of Thomas Landor, Richard Hughes, and Robert Hughes, in the lands and hereditaments in the award mentioned, required by the said company to be purchased and taken. That the said T. Landor, R. Hughes, and R. Hughes, having a limited interest only in the said lands and hereditaments, and not being enabled by the said acts of parliament in the award mentioned, or otherwise, to sell the interest therein of Thomas Wright in the affidavit in this case mentioned, and such interest of the said T. Wright having been notified to and proved before the said umpire, he the said umpire ought to have awarded a distinct sum for the said interest of the said T. Landor, R. Hughes, and R. Hughes, and by his only awarding a gross sum for the fee simple in possession, free from all incumbrances, it cannot be ascertained what amount is to be paid to the said T. Landor, R. Hughes, and R. Hughes, for their interest in the said lands and hereditaments, and that there is no machinery in the said acts or either of them to apportion or ascertain the proportion of the said sum of 1,861*l.* 2*s.* 6*d.* in the said award mentioned, which is to be paid to them, and the proportion thereof which is to be paid to the said T. Wright, or to any other incumbrancer or person entitled to any interest in the said lands and hereditaments.

"That the said award does not decide upon what was submitted to the arbitrators and umpire, and upon what was the matter in difference before them, namely, the amount to be paid for compensation for

the interest in the said lands belonging to the said T. Landor, R. Hughes, and R. Hughes, or which they are or were by the acts in the said awards mentioned, or either of them, enabled to sell; and that such compensation cannot be ascertained, and is not decided by the umpire's finding a gross sum for the fee simple in possession. That by reason of the several foregoing reasons, the award is not certain or final."

*Martin* shewed cause.—One of the grounds on which the Railway Company attempt to set aside this award is, that the notice of the 15th of May, appointing an arbitration, is defective. The 25th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, enacts, that the appointment of an arbitrator "shall be deemed a submission to arbitration on the part of the party by whom the same shall be made;" and the objection will be that the submission is not made under the statute, and therefore is invalid. That objection cannot, however, be sustained, after the company have taken possession of the land. The 37th section enacts, that an award shall not be set aside for irregularity or error in form.

[*PARKE, B.*—The arbitrators are bound to state the value of the interest which the parties are able to convey. The award is insufficient, for the arbitrator does not find the value of that interest; he only finds that if the parties are able to convey, the value is so much.]

The question really referred is as to the amount of compensation, and the award finds this in terms. Besides, the award ought not to be set aside on such a ground, for by sections 77. & 78. the purchase-money may in certain cases be deposited, and may be distributed by the Court of Chancery. The arbitrator has no power under the act of parliament to adjudicate upon the several interests of the parties; he can only value what the parties say they are possessed of.

[*POLLOCK, C.B.*—We think we ought not to interfere with the award. The point is doubtful, and the question may be tried elsewhere.]

[*PARKE, B.*—I think it is doubtful whether the award is valid. The question submitted to the arbitrator is not exactly

according to the statute, and consequently the award could not be forced by attachment. There has been no statutory submission. The award ought not to be set aside, because it is at the least very doubtful whether the award is not binding on the parties by reason of their conduct, which may be called their parol and non-statutory submission.]

[PLATT, B.—The umpire ought to have given Landor and the others a compensation for their interest minus that of Wright.]

[PARKE, B.—The umpire has not decided as he ought the question of the fee simple.] He was then stopped by the Court. Crompton, in support of the rule.

*Per Curiam* (2).—The rule must be discharged, but without costs.

*Rule discharged.*

1848. { *In the matter of the arbitration*  
May 4. { *between THE NORTH STAFFORD-*  
          { *SHIRE RAILWAY COMPANY AND*  
          { *C. WOOD AND R. WOOD.*

*Railway—Lands Clauses Consolidation Act, 8 Vict. c. 18, ss. 18, 25—Arbitration—Submission—Excess of Jurisdiction.*

*The North Staffordshire Railway Company having, under the Lands Clauses Consolidation Act, 8 Vict. c. 18, given to C. W. and R. W. landowners, notice to treat for the taking of certain portions of their land, the latter thereupon served a notice upon the company, stating themselves to be owners and lessees of the land in question, that their interests were more particularly described in a schedule of claims served therewith; that they claimed 2,280*l.* 8*s.* as compensation for the purchase-money and for damage arising from the execution of the railway works (claiming in the schedule in respect of the value of the land and for compensation for severance and damage); that if the amount were not paid, they required the matter to be settled by arbitration, and desired the company to appoint an arbitrator on their behalf. The company then served C. W. and R. W. with a similar notice, appointing an arbitrator to whom was to be*

*referred the amount of compensation to be paid by the company for the purchase of the lands, or of the interests of C. W. and R. W., or of any other person, which C. W. and R. W. were enabled to sell. By the 8 Vict. c. 18, s. 25, these notices respectively constituted a submission by each party to arbitration. At the hearing before the umpire, C. W. and R. W. gave evidence of the value of certain small pieces of land, which being severed by the works of the company, C. W. and R. W. contended the latter were bound to purchase. This evidence was objected to by the company, but received by the umpire. The umpire awarded that the sum of 1,444*l.* should be paid by the company to C. W. for the purchase of the fee simple, the copyhold and leasehold interest, and that the further sum of 732*l.* should be paid to C. W. and R. W. as compensation for the damage sustained by the execution of the works and of the severing or otherwise injuriously affecting of the said lands.*

*The company having applied to set aside this award, on the ground, amongst others, that the umpire had exceeded his authority in awarding one gross sum for the land required by the company, and the land required by C. W. and R. W. to be taken by the company, inasmuch as the company had not agreed to submit to arbitration the purchase of the last-mentioned land:—Held, that the award was bad, and could not be enforced, as nothing had been submitted but the value of the land required by the company; but the Court refused to set the award aside.\**

*Whether it could be sustained by reference to the conduct of the parties, quære.*

This was a rule calling upon Charles Wood and Richard Wood to shew cause why an award or compensation should not be set aside under the following circumstances:—On the 13th of December 1846, the North Staffordshire Railway Company, in pursuance of the 18th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, gave to Charles and Richard Wood notice to treat for the purchase of certain lands, situated in Prestbury, in the county of Chester, numbered 374, 375, 376, and 377 in the company's book of reference, and described in a plan thereunto annexed;

(2) Pollock, C.B., Parke, B., Rolfe, B., and Platt, B.

\* See the preceding case.

and in June 1847 they served them with another notice to treat for other land, numbered 372 and 372<sup>a</sup>. The Messrs. Wood then served the company with a notice of the appointment of an arbitrator. In this notice they stated themselves to be owners in fee and in copyhold tenure, and also lessees of the lands mentioned in the company's notices, and that their interests therein are particularly described in the owners' schedule of claims, served by them therewith, and that they claimed the sum of 2,280*l.* 8*s.* as compensation for the purchase-money for the same, and for the damage that might be sustained by them by reason of the execution of the railway works; that if the amount thereof was not paid, they thereby signified their desire to have the amount of the compensation to be paid to them settled by arbitration; and they required the company to appoint an arbitrator to act on behalf of the company in the said arbitration. In the owners' schedule, annexed to this notice, the Messrs. Wood claimed a portion of the 2,280*l.* 8*s.* for the value of certain land, another portion on account of severance and damage done to the adjoining land and water, and the residue for the value and compensation in respect of three pieces of land numbered 372<sup>a</sup>, 374, and 375. In the month of September, the company served the Messrs. Wood with a notice of the appointment of an arbitrator. This notice, after reciting the substance of the company's two notices to treat, and specifying the amount of land required by them, recited the claim made by the Messrs. Wood in their appointment of arbitrator, and then proceeded in these terms:—

"Now we, the said North Staffordshire Railway Company, hereby, under the hand of me, the undersigned, J. Samuda, secretary to the said company, nominate and appoint George Clarke Pauling, of &c., arbitrator, to whom shall be referred the question as to the amount of compensation to be paid by the said company for the purchase of the said lands and hereditaments, or of the interest of the said Richard Wood and Charles Wood therein, and for the interest of any other person or persons, which by the said acts hereinbefore recited or referred to, they the said Richard Wood and Charles Wood are enabled to sell."

The two arbitrators having nominated an umpire, and proceeded with the reference, the Messrs. Wood gave evidence of the value of certain small portions of land, numbered in their schedule 372<sup>a</sup>, 374, and 375, which would be severed by the works of the company, and which being of less amount than half an acre respectively, they contended the company were bound, under the 94th section, to purchase. This evidence was received by the arbitrators, although it was objected to by the company on the ground that it was not included in the lands specified or alluded to in the company's appointment of an arbitrator, which constituted their submission to arbitration. The arbitrators having failed to make their award within the time limited by the act of parliament, the umpire made his award, in these terms:—

"I do hereby award and determine that the sum of 1,444*l.* is the value, and shall be paid by the said North Staffordshire Railway Company to the said Charles Wood and Richard Wood, for the purchase of the fee simple in possession and copyhold tenure and interest, free from all incumbrances, except the usual copyhold rent and services in respect of the said copyhold land and hereditaments, and also the leasehold interest as set forth in the said claim of the said Charles Wood and Richard Wood, of and in the said lands, tenements and hereditaments, described in the before recited notices, and delineated in the plans to the same notices respectively attached or delivered therewith, and therein coloured red, and required to be purchased and taken by the said company as aforesaid, and also required by the said Charles Wood and Richard Wood, in their notice and claim delivered to the said company, to be purchased and taken by the said company, as aforesaid, subject nevertheless as to the said leasehold tenements to a proportionate part of the said rent of 210*l.*, to which the same with other tenements is subject and liable, according to the quantity of land taken, and to be apportioned under the provisions of the Lands Clauses Consolidation Act, 1845. And that the further sum of 732*l.* shall be paid by the same company to the said Charles Wood and Richard Wood, as compensation for the damage that has been or shall be sustained by the said

Charles Wood and Richard Wood, by reason of the execution of the said railway and works, and also of the severing of the same lands, tenements, and hereditaments from the other lands, tenements, and hereditaments of the said Charles Wood and Richard Wood, or otherwise injuriously affecting any other lands, by the exercise of the powers of the said Lands Clauses Consolidation Act, 1845, or of the act or acts authorizing the said railway and works, or any act incorporated therewith."

This award the railway company moved to set aside, on the following amongst other grounds:—That the umpire had exceeded his authority by awarding one gross sum for the purchase of the land required to be purchased and taken by the North Staffordshire Railway Company, and of the land required by Charles Wood and Richard Wood, in their notice and claim in the said award mentioned, to be taken and purchased by the said company, inasmuch as the umpire had no authority to award any sum in respect of the last-mentioned land, that is to say, the land required by the said Charles Wood and Richard Wood, to be taken and purchased as aforesaid, or to make any award or umpirage as to such last-mentioned land. And as it cannot be known or ascertained from the said award how much of the said sum of money so awarded for the purchase is awarded in respect of the land required by the said company, and how much is awarded in respect of the land required by the said Charles Wood and Richard Wood to be taken; and the award is therefore bad altogether. That the umpire has included in his award, and awarded upon matter not submitted to him, that is to say, the amount of the purchase-money of the land not required by the company to be taken, but required by the said Charles Wood and Richard Wood to be taken. That the umpire has not decided, nor can it be ascertained from the said award, what is the amount to be paid for the purchase of the land required by the company to be taken and purchased. That the award does not shew how much of the sum of 1,444*l.* in the said award mentioned, is awarded in respect of the purchase of the said land required by the said company; and that the said award is uncertain therein, and does not, in conse-

quence thereof, decide the matter submitted, namely, the amount to be paid for the purchase of the land required by the said company to be taken and purchased. That the award or umpirage is void, as the two parties thereto never agreed upon the same subject-matter for the arbitrators or umpire to decide, and that the said company only agreed that the award should be as to the land required by them to be taken; whereas the said Charles Wood and Richard Wood only agreed that the award should be both as to the land required by the company to be taken, and the land required by themselves, the said Charles Wood and Richard Wood, to be taken; and the company never consented or submitted to be bound by any award or umpirage, including the amount to be paid for the purchase of the land required by the said Charles Wood and Richard Wood to be taken; and the said Charles Wood and Richard Wood never agreed to be bound by any award or umpirage which should not include the amount to be paid for the purchase of the said last-mentioned land."

*Martin and Townsend shewed cause.*—It must be conceded on the part of the Messrs. Wood that the award cannot be supported if it includes not only the land which the company intended to take and use for the purposes of the railway, but also that which being in smaller portions than half an acre, they were bound by the 94th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18. to take and pay for. It is submitted, however, that the award does not include the latter description of land, or if it does, that the schedule and notice of appointment of arbitrators delivered by the Messrs. Wood gave the arbitrators or umpire power to adjudicate upon this land. They referred to *The Queen v. the Trustees of Swansea Harbour* (1).

[*PARKER, B.*—The proceedings are all wrong; but whether we ought to set aside the award is a different question.]

*Crompton, contra.*—The umpire had no jurisdiction to adjudicate upon those pieces of land which, being less than half an acre, the company were bound by the act of parliament

(1) 8 Ad. & El. 439; s. c. 8 Law J. Rep. (N.S.) Q.B. 69.

to purchase. The schedule of claims has nothing to do with the notice of appointing the arbitrators, which alone constitutes the submission to arbitration; and the company do not refer in any way to the schedule, nor do they adopt it. The Messrs. Wood had no right to force the company to purchase these small pieces of land.

[PARKE, B.—If the company were to act upon this reference, they would have no account of the amount of land that they had required the landowners to sell.]

It appears from the affidavits that the claimants gave evidence of the value of land not referred to or included in the company's submission to arbitration, and that such evidence was objected to by the company on the ground that the umpire had no authority to award upon any matter or thing not mentioned in such appointment or submission.

POLLOCK, C.B.—I think this rule must be discharged, but without costs.

PARKE, B.—I am of the same opinion; the award is clearly bad, and cannot be enforced. Nothing has been referred but the value of the land required by the company to be taken. Whether the award may not be sustained by reference to the conduct of the parties is another matter. It certainly cannot be supported on these submissions.

ROLFE, B. and PLATT, B. concurred.

*Rule discharged.*

[IN THE EXCHEQUER CHAMBER.]

1846.	}	BAILDON, EXECUTOR, ETC. v. WALTON.
Feb. 6.		
1847.		
Dec. 2.		

*Limitations, Statute of—Payment of Interest—Admission in Writing—Construction.*

*In an action for money lent the defendant pleaded the Statute of Limitations; and at the trial the plaintiff proved the transmission of the money to the defendant, and the payment by him of a half-yearly sum for interest up to a certain time, and produced an answer to a bill in Chancery, in which the defendant admitted having paid the same half-yearly*

*sum within six years, but asserted that it was paid by way of annuity, and not of interest. Assuming that an acknowledgment of a payment must be in writing, and signed, under the 9 Geo. 4. c. 14. s. 1, in order to bar the operation of the Statute of Limitations,—Held, that the evidence for the plaintiff was sufficient to go to the jury. That the construction of the admission in the answer was for the Court, and that the whole of it should have been left to the jury; but that they might believe the fact of the payments having been made half-yearly, but reject the residue, and infer from the other evidence that the payments were really made in respect of interest.*

*Words used at the time of making a payment qualify it; but it is for the jury to judge of the truth of a statement accompanying the admission of a previous payment.*

Assumpsit, by the plaintiff, as executor of Elizabeth Craven, deceased.

The first three counts of the declaration were for 500*l.*, for money lent by the testatrix to the defendant, for interest due from the defendant to the testatrix, and for money found to be due from the defendant to the testatrix on an account stated between them, and they alleged promises made by the defendant to the testatrix in her lifetime.

The fourth, fifth, and sixth counts were similar, but alleged the promises to have been made by the defendant to the plaintiff as executor, after the testatrix's decease.

The seventh count was upon an account stated between the defendant and the plaintiff, as executor, after the decease of the testatrix.

Pleas—First, non assumpsit; second, the Statute of Limitations.

The cause was tried, at the sittings in Middlesex, after Michaelmas term, 1844, before Pollock, C.B.; and by his direction the jury found a verdict for the plaintiff, with 340*l.* damages. Leave was reserved to the plaintiff to move to increase the damages, by adding the interest which had accrued since the testatrix's death; and leave was also given to the defendant to move to enter a nonsuit. Rules nisi having been accordingly obtained, both of them came on for argument before the Court of Exchequer on the 24th of May 1845; and

it was ultimately agreed by the counsel that a bill of exceptions should be tendered by the plaintiff upon the evidence adduced by him at the trial of the cause, and upon such summing up as would raise the question in dispute, under the plea of the Statute of Limitations, as if it had been done at the trial.

A bill of exceptions was accordingly tendered, which contained allegations to the following effect:—It was proved, at the trial, that the testatrix, Elizabeth Craven, died on the 19th of June 1843; that in the year 1817 the defendant wrote her a letter which contained these words: "I forgot to say I should allow you 5*l.* per cent. for the money, and, perhaps in my next, I shall send you proposals as to sinking it if you wish." On the 14th of December 1817, the defendant wrote to Miss Craven in these terms:—"Dear Miss Craven, I have received the parcel, and suppose all is right, but have not had time to look them over. The

former parcel of half bills were for 235*l.* I will acknowledge the whole amount when I next write to you, and at which time I shall send you my proposals." On the 2nd of December 1818, the defendant wrote to Miss Craven, as follows: "I shall not say anything about your uncle and the money now; you might easily have evaded the question. However, when I see you, I will make an arrangement respecting it. On the other half of this letter I send you a statement as a memorandum which you can cut off. It is up to Midsummer day, so your interest will now be due again very soon, and the interest up to that time, as near as I could calculate, was 8*l.* I have put 2*l.* to the interest, which will now make the whole 300*l.*, so you will now have to receive 7*l.* 10*s.* at Midsummer and Christmas, which will be 5*l.* per cent., or 15*l.* per year." The memorandum accompanying the letter was as follows:—

1808.		£.	s.
June 25.	To interest .. ..	8	0
	Cash .. ..	2	0
	Balance.. ..	290	0
		£ 300 0	

1817.		£.	s.
Oct. 1.	By Bank note ..	25	0
Nov. 25.	Ditto .. ..	30	0
Dec. 16.	Ditto .. ..	235	0
June 25.	Interest and Cash	10	0
		£300 0	

On the 21st of June 1819, the defendant sent Miss Craven an acknowledgment for 20*l.*, and on the 27th of August in the same year another for 20*l.* more. In several subsequent letters addressed by the defendant to Miss Craven, he referred to the interest which he owed her, as amounting to 8*l.* 10*s.* half-yearly. In the year 1843 the plaintiff filed a bill in the Court of Chancery against the defendant, charging that the defendant had borrowed money of the testatrix amounting to 340*l.*, and had paid 5*l.* per cent. interest for it half-yearly down to the 25th of December 1842. The defendant, in his answer, denied that he had borrowed the money from the plaintiff's testatrix, and alleged that she had presented him with sums amounting together to 340*l.*, and that he had paid her 5*l.* per cent. upon that sum, by way of annuity, and not by way of interest, and transmitted the sum of 8*l.* 10*s.* periodically as a half-yearly payment, down to Christmas 1842.

The counsel for the plaintiff insisted that this evidence was sufficient to entitle the

jury to find for the plaintiff on the first issue as to the last four counts of the declaration, and on the issue of the Statute of Limitations.

The learned Judge ruled that the evidence was not sufficient for that purpose, and directed the jury to find for the defendant on the first issue as to the last four counts, and on the second issue, which they did accordingly.\*

*Ellis*, for the plaintiff in error (6th Feb. 1847) (1).—There was sufficient evidence of the original debt to go to the jury, and that the payments which the defendant acknowledged by his answer to have been made by him within six years were payments by way of interest for a debt, al-

\* This was the statement in the bill of exceptions agreed upon between the parties on the argument in the Court of Exchequer, but the Chief Baron said he would have ruled the other way. *Willis v. Newham* was relied on for the defendant, but the counsel for the plaintiff denied its applicability.

(1) Before Wilde, C.J., Patteson, J., Coleridge, J., Wightman, J., Cresswell, J., Erle, J., and Williams, J.

though he denied in the answer that they were made on that account. The general proposition applicable to the case is, that the payment of interest within six years is evidence of a new contract between the parties. The plaintiff relies upon the payment itself, and not upon the acknowledgment contained in the answer to the bill in Chancery. That answer admits that money was transmitted periodically by the defendant to the deceased, but avers that it was not paid as interest upon a debt. *Willis v. Newham* (2) decides that if you seek to establish the fact of payment by means of an acknowledgment, that acknowledgment must, under the 9 Geo. 4. c. 14. s. 1, be in writing and signed by the party; but it does not decide that an acknowledgment is the only means by which the payment may be proved. Here the answer is not used as an acknowledgment of the kind of payment which is required to defeat the Statute of Limitations, but simply to prove the fact of the transmission of the money from the one party to the other, extrinsic evidence being relied upon to shew that such transmission was a payment of interest in respect of a debt. In the notes to *Hodsdon v. Harridge* (3) it is laid down, that when once the fact of payment has been proved, parol admissions of the defendant may be received to shew upon what account the payment was made. The effect of payment to bar the operation of the statute is so stringent, that a payment by one of three co-contractors in fraud of the other two, has been held sufficient to bind them all—*Goddard v. Ingram* (4). The first step in the extrinsic evidence was to prove the original debt. The defendant's letters admitting the receipt of monies from time to time, and the periodical payments in respect of the money received, were sufficient evidence for the jury of the original debt. Some of the half-yearly payments of 8*l.* 10*s.* were expressed to be for interest, and surely the jury might infer that subsequent payments of the same sum were made on the same account. It may be said that no acknowledgment was proved; but the payment itself was the acknowledgment of the

debt. An acknowledgment used as such derives its whole value from the fact that it comes from the defendant; but the evidence of a third person is admissible to prove payment. The fact of payment having once been established, the appropriation of the payment may be proved by any medium of proof—*Waters v. Tompkins* (5); confirmed in *Edan v. Dudsfield* (6), where the former case is applied analogically to the 17th section of the Statute of Frauds. In *Bayley v. Ashton* (7), Patteson, J. said, "If payment is proved without a word spoken, it will be enough, provided the appropriation is shewn; and this may be done by a parol admission, according to *Waters v. Tompkins*." These cases, then, justify the division of the proof of payment for the purposes of the statute into two elements, namely, transmission and appropriation. The case of *Willis v. Newham* is different in this respect from the present, for there the whole evidence was a statement by the party. The rule laid down in *Willis v. Newham* does not follow from the words of Lord Tenterden's act. As to the mischief contemplated by the act, that was supposed to arise from the liability of parties to misunderstand statements which they hear, and applies not to the fact of handing over money, but to the reason for handing it over. Yet in both *Waters v. Tompkins* and *Bayley v. Ashton* it was held, that the appropriation of payments might be proved by parol. In order to prove the new contract created by payment or acknowledgment, it is competent to shew either an acknowledgment of the debt or a payment in respect of it, or an admission of such acknowledgment, or an admission of such payment.

[WILDE, C.J.—There is a case in which it was held, that parol evidence of a written promise to pay a debt barred by the Statute of Limitations was admissible on proof that the document had been lost.]

That was the case of *Haydon v. Williams* (8). In this case the admission of payment corresponds with the secondary evidence of

(2) 3 Y. & Jer. 518.

(3) 2 Wms. Saund. 64 *k.*

(4) 3 Q.B. Rep. 839; s.c. 12 Law J. Rep. (n.s.) Q.B. 9.

(5) 2 Cr. M. & R. 723; s.c. 5 Law J. Rep. (n.s.) Exch. 61.

(6) 1 Q.B. Rep. 302.

(7) 12 Ad. & El. 495; s.c. 9 Law J. Rep. (n.s.) Q.B. 376.

(8) 7 Bing. 163; s.c. 9 Law J. Rep. C.P. 16.



the written acknowledgment. But even if the original acknowledgment were not lost, why should not an oral admission by the party be evidence? The statute prohibits an oral admission of the debt itself, not an oral admission that the statutory provisions had been complied with. The Judges are most anxious that the decision in *Willis v. Newham* should be reviewed. The principal cases in which it has been acted upon are *Bayley v. Ashton*, *Maghee v. O'Neil* (9), and *Eastwood v. Saville* (10).

*Peacock*, for the defendant in error.—It is contended for the plaintiff, that the answer in Chancery is to be taken, like any other admission, to prove the fact of payment, and that the jury may reject one portion of it and adopt another; but for the defendant it is submitted, that the answer must be taken as an acknowledgment under the 9 Geo. 4. c. 14. s. 1, in which case the construction of the document is for the Court, and not for the jury—*Morrall v. Frith* (11), *Bucket v. Church* (12). It has been distinctly established that the statute 9 Geo. 4. was not intended to alter the effect of an acknowledgment; and, therefore, an acknowledgment from which a promise to pay cannot be inferred will not defeat the Statute of Limitations. The effect of a payment is very different from the effect of an acknowledgment: for a payment by one of several co-contractors operates as a promise by all, whereas an acknowledgment by one of several binds him only who has signed it—*Burleigh v. Stott* (13), *Wyatt v. Hodson* (14). The case of *Willis v. Newham* decides that a verbal acknowledgment of the part payment of a debt is not sufficient to bar the operation of the Statute of Limitations, and that case was supported by the recent case of *Clark v. Alexander* (15). If the argument

on the other side is correct, admission of payment by one partner will be sufficient to bind his co-partners, whereas the statute says that no acknowledgment shall have effect against any party unless it be in writing and signed by him. If the acknowledgment of payment be accompanied by a statement which would prevent the presumption of a promise to pay, surely it cannot suffice to defeat the Statute of Limitations. A payment to be within the 9 Geo. 4. c. 14, must be made as payment of part or of interest in respect of a debt due—*Tippett v. Heane* (16), and the promise to pay must be absolute and not conditional—*Tanner v. Smart* (17). The question here is, whether the acknowledgment of the payment of interest is to be proved by a writing; and if it be, then the writing is to be construed by the Court. No case has been cited to shew that a verbal acknowledgment by a party himself, that he has paid interest, is sufficient to take the case out of the statute. In *Goddard v. Ingram* the payment was proved by direct evidence of the fact, not by an admission. In *Waters v. Tompkins* the acknowledgment was coupled with a fact, and there was evidence of the fact of a debt without the admission of the party. Here the statement in the answer is either a written acknowledgment to be construed by the Court, or merely a verbal admission, and then part of it only should not have been left to the jury, but the whole qualified admission.

*Ellis*, in reply.—The argument on the other side has proceeded on the supposition that the answer was relied upon as an acknowledgment of the debt; but that is not so. If it had been used as an acknowledgment, no doubt one part could not have been taken, and another rejected; but it was used only as evidence of a previous fact. The document was divisible, and the two elements might be separated. In *Ross v. Savory* (18) an account was not held to be so conclusive on a party but that an item in it might be shewn to be incorrect, and the separability of the statement of charge and discharge was admitted. *Clark v. Alexander*,

(9) 7 Mee. & Wels. 531; a.c. 10 Law J. Rep. (N.S.) Exch. 326.

(10) 9 Ibid. 615; a.c. 11 Law J. Rep. (N.S.) Exch. 333.

(11) 3 Mee. & Wels. 402; a.c. 7 Law J. Rep. (N.S.) Exch. 172.

(12) 9 Car. & Pay. 209.

(13) 8 B. & C. 36; a.c. 6 Law J. Rep. K.B. 232.

(14) 8 Bing. 309; a.c. 1 Law J. Rep. (N.S.) C.P. 93.

(15) 13 Law J. Rep. (N.S.) C.P. 133.

(16) 1 Cr. M. & R. 252; a.c. 3 Law J. Rep. (N.S.) Exch. 281.

(17) 6 B. & C. 603; a.c. 5 Law J. Rep. K.B. 213.

(18) 2 Bing. N.C. 145; a.c. 4 Law J. Rep. (N.S.) C.P. 275.

which has been cited in support of *Willis v. Newham*, was one of that class of cases in which the party has failed on evidence derived from the document alone. An acknowledgment under the statute certainly does not bind a co-contractor; but why should not an admission, which is not an acknowledgment, have the same effect in this case as well as in any others? The payment of a smaller sum in respect of a larger is evidence that something more is due—*Burn v. Boulton* (19), per Maule, J.; and the qualifications of the payment sought to be introduced here are statements made long after the payment relied on. It may be that evidence of payment should not be admitted without the words accompanying it, but the qualifying statements here did not accompany the payment.

*Curr. adv. vult.*

WILDE, C.J. (Dec. 2, 1847) delivered the judgment of the Court.—This was an action brought by Francis Baidon, as executor of Elizabeth Craven, against Thomas Wedgwood Walton, for money lent by the testatrix to the defendant, for interest, and for money due on an account stated with the testatrix, laying the promise to pay to the testatrix. There was a similar set of counts on promises to the executor, and a count on an account stated with the executor. The defendant pleaded non assumpsit, and that the cause of action did not accrue within six years. The case was tried, before the Lord Chief Baron at the Sittings in Middlesex, after Michaelmas term, 1844, when a bill of exceptions was tendered to the direction of the learned Judge, which bill states that the counsel for the plaintiff gave legal and sufficient evidence in support of the affirmative of the issue first joined, so far as the same relates to the first three counts. It then proceeds to state certain letters and other documents written by the defendant, and sent by him to the testatrix.—[His Lordship stated them.]—The bill of exceptions then sets out a bill in equity, exhibited by the plaintiff against the defendant, and his answer. The bill charged that the defendant borrowed of Elizabeth Craven, at different times, money amounting in the whole to 340*l.*, and that he paid interest

for it at the rate of 5*l.* per cent. per annum, by half-yearly payments, down to the 25th of December 1842, and that Elizabeth Craven died on the 13th of June 1843. The defendant, by his answer, denied that he had ever borrowed any money of Elizabeth Craven; but stated that she had, at different times, made him presents of money amounting in the whole to 340*l.* and that he had paid to her, half-yearly, 5*l.* per cent. on that sum, not as interest, but as an annuity in consideration of her having given him the money, and that the last of such payments was made on the 25th of December 1842. It was insisted for the plaintiff that this evidence was sufficient to entitle the jury (if they should think fit) to find a verdict for the plaintiff on the first issue, as far as it related to the last four counts, and on the issue secondly joined. The learned Judge ruled that it was not sufficient for that purpose, and directed the jury as to the last four counts and as to the issue on the Statute of Limitations, to find a verdict for the defendant, whereupon a bill of exceptions was tendered.\* The case was argued, after last Hilary term, by Mr. T. F. Ellis, for the plaintiff in error, who contended that there was sufficient evidence (as stated in the bill of exceptions) of an original debt from the defendant to the testatrix, and of payment of 8*l.* 10*s.* half-yearly for interest down to a certain period, and that the only fact to be supplied was the continuance of such payments within six years; that the defendant's answer in writing, and signed by him, admitted the payments of 8*l.* 10*s.* half-yearly down to the 25th of December 1842; and although in that answer he added that the payments were not made for interest on a debt, and that no debt ever existed, the jury were at liberty to reject the latter part, and find from the other evidence that the payments were made for interest on a debt.

On the other hand, it was contended by Mr. Peacock, for the defendant in error, that the jury could not reject any part of the statement in the answer, for that the statute, 9 Geo. 4. c. 14. says, that "no acknowledgment by words only should be deemed sufficient evidence of a new or continuing contract, unless such acknowledgment or promise shall be made or

\* See the note, *ante*, p. 358.

(19) 2 Com. B. 476; a. c. 15 Law J. Rep. (n.s.) C.P. 97.

contained by or in some writing, to be signed by the party chargeable thereby;" which words apply as well to an acknowledgment of a payment as to an acknowledgment of a debt; and therefore, as the acknowledgment must be in writing, nothing could be added to it by parol, and the Court must construe it altogether as written by the defendant; and if so construed, the answer did not admit a payment in discharge of interest on a debt, but expressly denied it.

In the course of the argument many observations were made, on the one side and the other, upon the case of *Willis v. Newham*, in which it was held that a verbal acknowledgment of part payment of a debt within six years would not, after the 9 Geo. 4. c. 14, be an answer to a plea of the Statute of Limitations; but it seems to us quite unnecessary to express any opinion on that point. In reality there is no question here upon the 9 Geo. 4. c. 14. The defendant has made no admission by words only, not contained in a writing signed by him. Whatever admission he has made was made in writing, signed and sworn to by him; and the true question is, what did he admit by that writing? For the purpose of this argument, it may be assumed that the acknowledgment of a payment as well as any other acknowledgment must be in writing signed by the party; and we agree with Mr. Peacock, that the written admission by the defendant must be construed by the Court; and we think that the plain meaning of it is, that the defendant admits having paid 8*l.* 10*s.*, half-yearly, to Elizabeth Craven down to December 1842, but asserts that such payment was made by way of annuity, and not as interest on a debt. We also agree with Mr. Peacock that the whole admission must be laid before the jury as one entire writing; but we are also of opinion that the jury were not bound to believe the whole of it: they might believe the fact of 8*l.* 10*s.* being paid half-yearly, but reject the residue, and infer from the other evidence in the case that the payments were made for interest upon a debt. If the admission had been made merely that the defendant had paid the sum of 8*l.* 10*s.* half-yearly, without adding that it was appropriated to any particular account, there can be no doubt that the jury might have inferred from the

evidence that a debt existed, and that interest was paid down to a certain period; and that the subsequent payments admitted to have been made were also for interest. In *Waters v. Tompkins* it was held, that where the fact of payment of a sum of money is proved, the appropriation of it may be shewn by other evidence, even by a verbal statement. Here the fact of payment was proved by an admission in writing, and of the appropriation there was sufficient evidence to be left to the jury. The only question is, whether the assertion of the defendant respecting the appropriation was conclusive. If the payments had been accompanied by that assertion they would have been qualified by it, and could not have been treated as payments of interest on a debt; but here there is an admission of a bygone act, viz., payment, and an assertion respecting it, which may or may not be true. It is no part of the act, but only what the defendant chooses to say respecting it. We think, therefore, that although that assertion must be admitted as evidence, the jury ought to have been allowed to contrast it with the other evidence in the case, and to decide whether the payments admitted were for interest or not; and inasmuch as that other evidence was withdrawn from their consideration, and they were directed to find for the defendant, there must be a *verdict de novo*.

*Judgment for the plaintiff.\**

1848. }  
May 1; } RICHARDS v. LORD SUFFIELD.  
July 11. }

*Attorney—Certificate—6 & 7 Vict. c. 73. s. 26.*

*The 26th section of the 6 & 7 Vict. c. 73. disables an attorney, who is uncertificated, only from suing for fees, rewards, and disbursements, for any business, matter, or thing done by him as an attorney or solicitor, in some suit or proceeding in one of the courts mentioned in the act, and not for business done which had no reference to such suits or proceedings.*

\* It was agreed between the counsel when the bill of exceptions was agreed upon, that if the Exchequer Chamber should direct a *verdict de novo* the plaintiff should have final judgment forthwith.

*Assumpsit.* The declaration stated that the defendant was indebted to the plaintiff for the work, labour, care, diligence, journeys and attendances of the plaintiff by him done, performed, and bestowed as the attorney and solicitor of and for the defendant, and at his request, and for fees due and of right payable to the plaintiff in respect thereof, &c. The second count was for other work and labour, and the third, for money paid.

Plea to these three counts, that the plaintiff under and by virtue of the said first, second, and third counts claims and seeks to recover against the defendant certain fees, rewards, and disbursements for and in respect of certain business, matters, and things theretofore done by the plaintiff as an attorney and solicitor for him, the defendant; that at the time the said business, matters, and things were done by the plaintiff as aforesaid, to wit, &c., the plaintiff, as such attorney and solicitor as aforesaid, did then carry on certain proceedings, to wit, conduct and manage a certain cause in which J. G. was plaintiff, and the now defendant was defendant, in the Court of Exchequer at Westminster, without having previously obtained or then having a stamped certificate then in force, contrary to the form of the statute in such case made and provided; and that the said business, matters, and things for the recovery of the fees, rewards, and disbursements in respect of which this action is brought, and each and any of them, were and was done by the plaintiff as such attorney and solicitor as aforesaid, whilst he was without such certificate, &c. Verification.

Special demurrer, assigning for cause (amongst others) that it did not appear that the business, matters, and things done by the plaintiff as an attorney and solicitor, in respect of which the fees, rewards, and disbursements in the said first, second, and third counts are alleged to be claimed, were done by the plaintiff in and about suing, prosecuting, defending, or carrying on any action or suit or any proceeding in any of the courts in the statute, in such case made, mentioned.

Joinder in demurrer.

*Temple* appeared in support of the demurrer; but the Court called on

*Hurlstone* to support the plea.—The chief question in this case turns upon the con-

struction which the Court will be disposed to put upon the 26th section of the 6 & 7 Vict. c. 73. (1). The plea follows the words of that section according to their literal construction. The words "attorney and solicitor as aforesaid" mean an attorney or solicitor who, having neglected to take out his certificate, nevertheless had done business in a proceeding in a court of law or equity, and the penalty which by that section attaches upon a party guilty of such neglect is a disqualification to sue, not only in respect of the business done by him in a proceeding in a court of law or equity, but in respect of any business whatsoever done by him as an attorney or solicitor. The words "any business" done by such attorney or solicitor occur also in the 37th section of the statute; and it is plain from the whole of that section that the word "business" is intended to include, not only business done in a court of law or equity, but also all other business done by a party as attorney or solicitor. When, as in the 35th and 36th sections of the same statute, the legislature intend to put a limit upon the incapacity to sue, they use words which express their intention. He referred also to 25 Geo. 3. c. 80. ss. 1, 3, 7; 37 Geo. 3. c. 80. s. 31; and to *Willon v. Chambers* (2).

*Temple*, in reply.—The greatest inconvenience would result from adopting the construction contended for by the other side. It would embrace business done by any person under a power of attorney, or as the solicitor of a bill in parliament, and in many other ways in which the person doing the business need not have been admitted as an attorney or solicitor in any of the courts of law or equity. An attorney might have a very good claim against his client recoverable upon one day; but if on the following he were to do business in any

(1) Section 26. enacts "that no person who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid."

(2) 7 Ad. & El. 524; s. c. 7 Law J. Rep. (N.S.) Q.B. 13.

proceeding in any of the courts for some other individual, his claim against his first client is to be barred. Such is not the construction to be put upon the words of the 26th section; and when reference is also made to the 1st and 2nd sections of the statute, it becomes quite clear that when the legislature made use of the words "attorney or solicitor as aforesaid" they intended that the incapacity to sue was not to be in respect of all business of whatever kind transacted by him as attorney or solicitor, but only in respect of business in any suit or proceeding in any court of law or equity.

*Cur. adv. vult.*

PARKE, B. now (July 11) delivered the judgment of the Court (3).—The principal objection to this plea on the argument of the demurrer was, that it does not appear by it that the action was brought for fees, rewards, and disbursements within the meaning of the 26th section of the statute 6 & 7 Vict. c. 73; the plaintiff's counsel contending that this disables an attorney who is uncertificated only from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act, and not for business done which had no reference to such suits or proceedings; and we are of that opinion. The 26th section provides that "no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid." The question is, what meaning we are to attribute to the words of reference in the expression "as an attorney or solicitor as aforesaid." We think they must necessarily refer either to an attorney or solicitor acting as described in the commencement of that section, or to the previous description of an attorney or solicitor in the 2nd section;

and, in the former case, the disability will be confined to suits for fees, &c. due for business done as an attorney in suing, prosecuting, defending, or carrying on any action or suit or any proceedings in any of the courts aforesaid; in the latter for fees due to any attorney, &c., acting as such in, or suing out any writ or process, or commencing, carrying on, soliciting, or defending any action, suit, or other proceeding in the name of any other person or in his own name in any of the courts mentioned in the 2nd section, including proceedings before one or more Justices; so that it really makes no difference whether the words "as aforesaid" relate to the beginning of the 26th section or to the 2nd. For one or the other they certainly do refer, and in either the disability to sue is confined to fees, &c., connected with a suit.

It was, however, argued, in support of the plea, that the difference of the language of the legislature in the 35th and 36th sections from that in the 26th indicated a different intention in the legislature.

The 35th section provides, that if any person not admitted and enrolled sues out any writ or process or defends an action, he shall be incapable of maintaining an action for any fees, &c. on account of prosecuting, carrying on, or defending any such action, suit or proceeding, or otherwise in relation thereto; and a similar provision is made by the 36th section, if any person shall commence, or carry on, or defend any action in the county court. The language being more general in the 26th section, it was contended that the restriction in that section was meant to be more extensive.

It appears to us that the words of reference "as an attorney or solicitor as aforesaid," confine the disability to the same class of fees, rewards, and disbursements as those pointed out expressly in the 35th and 36th sections. This being so, the plea is in our opinion defective, in not averring that the fees, &c. were due to the plaintiff as an attorney in prosecuting or defending a suit or proceeding in a court. They are not even stated to be due to him as an attorney at law, and they might be payable to him as an attorney acting before arbitrators or a compensation jury, or transacting business under a power of attorney for the defendant.

*Judgment for the plaintiff.*

(3) Pollock, C.B., Parke, B., Alderson, B. and Platt, B.

## [IN THE EXCHEQUER CHAMBER.]

1846. }  
 Feb. 7. } THOMAS v. HUDSON.  
 1847. }  
 June 18.\* }

*Prisoner*—5 & 6 Vict. c. 116.—7 & 8 Vict. c. 96.—*Commissioner of Court of Bankruptcy, Jurisdiction of—Escape.*

*The plaintiff having obtained judgment against F. in an action of assault, sued out a ca. aa. whereon F. was arrested and committed to the Queen's Prison, of which the defendant was the keeper. F. afterwards petitioned the Court of Bankruptcy for his discharge under the 5 & 6 Vict. c. 116. and the 7 & 8 Vict. v. 96, and having obtained from the Commissioner an order for his discharge, he was discharged by the defendant accordingly. In an action brought by the plaintiff against the defendant for an escape,—Held, (affirming the judgment of the Court below) that whether the Commissioner was right or wrong in discharging F. from the judgment in an action of tort, yet that he had such jurisdiction in the matter as to protect the defendant who had obeyed the order.*

Error from the Court of Exchequer.

Case against the keeper of the Queen's Prison for an escape. The pleadings are fully set out in the report of the case in the court below—*Thomas v. Hudson* (1), when judgment was given for the defendant below on the demurrer.

A writ of error having been brought into this court, was argued by—

*Martin*, for the plaintiff in error, and

*Watson*, for the defendant in error.—The arguments adduced were the same as those advanced in the court below, and it is therefore needless to repeat them here.

*Cur. adv. vult.*

The judgment of the Court (2) was subsequently (June 18, 1847) delivered by—

PATTESON, J.—It is not necessary to decide the first point in this case, viz. whether the learned Commissioner had power by his

interim order to discharge Foulkes from the judgment, at the suit of Thomas, the present plaintiff, which depends on the proper construction to be given to the 6th section of the statute 7 & 8 Vict. c. 96, inasmuch as we are all of opinion, on the second point, that, whether the commissioner was right or wrong, he had such jurisdiction in the matter as to distinguish this case from the *Marshalsea* case (3), and others of the same class; and that the judgment of the Court below, on this second point, is quite right, both in its result and in the reasons given for it, with which we entirely agree. The judgment must, therefore, be affirmed.

*Judgment affirmed.*

1848. }  
 July 13. } MIDDLEDITCH v. ELLIS.

*Debt on Simple Contract—Specialty—Subsequent Statement of Account.*

*The plaintiff was mortgagee under a mortgage from the defendant to him, with a power of sale in the event of non-payment of a certain sum of money, which was further secured by a bond given by the defendant to him. The property was afterwards sold by the plaintiff under the power, but did not produce sufficient to discharge the debt. An account was then stated between the plaintiff and the defendant, charging the defendant with the full amount of the principal and interest, and giving him credit for the net proceeds of the sale. The defendant admitted the correctness of the amount and promised to pay the balance, to recover which the plaintiff brought an action of debt on simple contract for money lent, and on an account stated:—Held, that the debt having been secured by specialty, the action could not be maintained.*

Debt for money lent, and on an account stated.

Pleas—First, never indebted; second, that the defendant delivered a bond conditioned for the payment by the defendant to the plaintiff of 350*l.*, which the plaintiff then accepted in satisfaction and discharge of the debt in the declaration mentioned; third, usury.

At the trial, before Platt, B., at the Middlesex Sittings in Michaelmas term, 1847, the following facts were proved:—In 1843,

(3) 10 Rep. 68.

\* The publication of this case has been unavoidably delayed.

(1) 14 Mee. & Wels. 353; s. c. 14 Law J. Rep. (N.S.) Exch. 283.

(2) Tindal, C.J., Patteson, J., Maule, J. Coleridge, J., Wightman, J. and Erle, J.

the plaintiff lent the defendant the sum of 350*l.*, which was secured by an assignment, by way of mortgage, of leasehold property, with a power of sale, and collaterally by the defendant's bond given to the plaintiff. In June 1847 the plaintiff sold the property, and rendered an account to the defendant, who admitted the correctness thereof. This account shewed a deficiency to the extent of 128*l.* 12*s.* 10*d.*, which balance the defendant promised to pay, and to recover which the present action was brought. For the defendant, it was contended, on the authority of 1 *Roll. Abr.* p. 9, pl. 11. and *Petch v. Lyon* (1), that the sum, for which the action was brought, having been secured by a specialty, an action of debt on simple contract could not be supported. The learned Judge overruled the objection, and the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of a contrary opinion.

*Pashley* having obtained a rule *nisi* accordingly,—

*Lush* shewed cause (May 30) (2), citing *Foster v. Allanson* (3) and *Petch v. Lyon*. (He was then stopped by the Court.)

*Pashley*, contra, relied upon *Schack v. Anthony* (4), *Drue v. Thorne* (5), 1 *Roll. Abr.* 'Action sur Case,' p. 9, pl. 11, *Com. Dig.* 'Pleader,' 2, W, 46, *Jones v. Ryder* (6), *Lubbock v. Tribe* (7), *Davis v. Gyde* (8), *Kearslake v. Morgan* (9), and *Edwards v. Bates* (10).

*Lush*, being called on, cited and referred to *Meravia v. Levy* (11) and *Baber v. Harris* (12).

*Cur. adv. vult.*

(1) 15 Law J. Rep. (N.S.) Q.B. 393.

(2) The arguments on each side are omitted, as they are sufficiently stated in the judgment of the Court.

(3) 2 Term Rep. 479.

(4) 1 Mau. & Selw. 573.

(5) Aleyn. 72.

(6) 4 Mee. & Wels. 32; s. c. 7 Law J. Rep. (N.S.) Exch. 216.

(7) 3 Ibid. 607; s. c. 7 Law J. Rep. (N.S.) Exch. 158.

(8) 2 Ad. & El. 623; s. c. 4 Law J. Rep. (N.S.) K.B. 84.

(9) 5 Term Rep. 513.

(10) 7 Man. & Gr. 790; s. c. 13 Law J. Rep. (N.S.) C.P. 156.

(11) 2 Term Rep. 483, n.

(12) 9 Ad. & El. 532; s. c. 8 Law J. Rep. (N.S.) Q.B. 153.

The judgment of the Court was now delivered by—

ROLFE, B.—This case was tried, before my Brother Platt last Michaelmas term, and a verdict was found for the plaintiff, subject to leave reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that, under the circumstances of the case, an action of debt on an account stated would not lie. A rule *nisi* for entering a nonsuit having been granted pursuant to this leave, the same was argued last term, before the Chief Baron and my Brothers Alderson, Platt, and myself. The plaintiff was mortgagee under a mortgage from the defendant, with a power of sale, and the mortgage deed contained the ordinary covenant by the defendant to pay the principal sum secured, with interest. The mortgaged property was afterwards sold by the plaintiff under the power, but it did not produce sufficient to discharge the debt due to the plaintiff. A meeting afterwards took place between the plaintiff and the defendant, when an account was stated between them, charging the defendant with the full amount of principal and interest, and giving him credit for the net proceeds of the sale. It may be taken that the defendant admitted the balance on this account to be correctly ascertained, and that he promised to pay it. The verdict was for this balance; and the only question is, whether on this state of facts, an action of debt on an account stated can be maintained; and we think it cannot. The general principle is clear, that where a debt is secured by a bond, covenant, or other specialty, there the obligation by simple contract is gone. The lesser security is merged in the greater. But the plaintiff contended that that doctrine does not apply in the present case, for although the original debt was secured by a covenant, yet that here there was a subsequent statement of accounts, and so that the defendant on that occasion made himself liable by a new contract to pay the balance remaining due, and in support of this proposition he relied on the case of *Foster v. Allanson*. In that case the plaintiff and the defendant had entered into articles of partnership under seal for seven years, and they covenanted with each other to adjust and make a final settlement at the end of the partnership, and then

to divide the stock and profits equally between them. Before the expiration of the seven years they agreed to dissolve the partnership, and they came to a settling of accounts, in which were included several items not relating to the partnership. A balance was found to be due on this settling to the plaintiff; and it was held that notwithstanding the specialty the plaintiff might recover that balance in an action of assumpsit on an account stated. But the judgment of Ashurst, J. goes expressly on the ground that this was a new transaction, and that the account was stated of other matters besides the items due under the deed; and although Buller, J. says that, even if no other articles had been introduced, he should have been of opinion that assumpsit would lie, yet that opinion was founded on the circumstances, that the dissolution of the partnership and subsequent settling of accounts constituted in point of law a good consideration for a new promise. Now, in the present case, none of the circumstances relied on in *Foster v. Allanson* are to be found. The defendant is charged with nothing but the money secured by the deed; there is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated: it is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged; and all which is really done is to make out to what extent the defendant remains liable upon the deed. This does not entitle the plaintiff to proceed as on a new liability arising from an account stated, and so the rule for a nonsuit must be made absolute.

*Rule absolute.*

[IN THE EXCHEQUER CHAMBER.]

1847. }  
June 18. } JOWETT v. SPENCER.

*Covenant—Condition Precedent—Mine.*

*The declaration stated that by indenture the plaintiff conveyed all the coals and mines of coal within and under certain premises to the defendant, and the defendant*

*covenanted to pay 40l. for every statute acre of coal which should be found; and that he would, till the consideration money should be paid, pay the sum of 40l. part, &c. annually by half-yearly instalments, commencing from the date of the indenture, whether a whole acre should have been gotten in any such year or not. It was then averred that at the time of making the indenture there had been, and still was, coal within and under the premises, and that two half-yearly instalments were in arrear:—Held, reversing the judgment of the Court of Exchequer, that the declaration was good, and that the finding of coal was not a condition precedent to the payment.*

*Error from the Court of Exchequer.*

*Covenant.* The declaration stated that by an indenture the plaintiff bargained, sold, aliened, and released to J. S. and the defendant all the coals, mines, &c. of coal lying within and under a certain messuage and lands, with the privilege of winning and carrying away the said coal; that the defendant covenanted to pay to the plaintiff as the price or consideration money of the said coal the sum of 40l. for every statute acre of the said coal which should be found within or under the said messuage and lands, and would, until the said consideration money should be paid, pay to the plaintiff the sum of 40l., part of the said consideration money in each year by two equal payments on the 3rd of January and the 3rd of July, whether the whole of an acre in any such year should be gotten or not. It was then averred, that at the making of the said indenture, there were within and under the said messuage and lands divers (to wit) fourteen acres of coal, and that thirteen acres of the said coal still remained within and under the said premises, and that the sum of 40l. for two of the said half-yearly instalments of the price and consideration money of the said coal became and was due and was in arrear to the plaintiff.

*Plea—Non est factum.*

At the trial, a verdict was found for the plaintiff, and the Court of Exchequer subsequently made a rule absolute to arrest the judgment, on the ground that the declaration was bad, for not shewing that coal had been found, the finding of coal being held to be



a condition precedent to the obligation to pay—see the report, *ante*, vol. 15, (N.S.) Exch. 347. The plaintiff thereupon brought his writ of error.

*Hugh Hill* (June 18, 1847) for the plaintiff in error.—The first question in the case is whether, according to the true construction of the instrument set out in the declaration, it was necessary that coals should actually be found in order to entitle the plaintiff to payment. The rule of construction applicable to the case is thus laid down by Tindal, C.J., in *Stavers v. Curling* (1). The question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument and by the application of common sense to each particular case. In this case the instrument was not a licence to mine, but a grant of coals for a certain consideration. The extent of the consideration money and the times of payment were definitely fixed, and the yearly payment was to be made without reference to the fact, “whether in any such year an acre of coal had been gotten or not.” How could effect be given to these last words if the finding of the coal were to be held a condition precedent to the payment? It was in the option of the grantee to work the mines or not. According to the doctrine in *Aspin v. Austin* (2), which has been followed in subsequent cases, a covenant by the defendant to work the mines within a reasonable time cannot be implied. The rule which establishes that where a party covenants to pay money on a day which may happen before the consideration is to be performed, the performance is not a condition precedent, is laid down, and the cases illustrating it are cited, in the notes to *Porlage v. Cole* (3).

The case of *Hall v. Bainbridge* (4) was similar to the present. There the plaintiff granted the defendant leave to use the principle of a patent in the manufacture and

use of steam-engines, and the defendant agreed to pay two sums of 1000*l.* each on fixed days, and 5*l.* per horse power for every engine afterwards to be made; and it was held, that the use of the principle was not a condition precedent to the payment of the money. If in fact all the coals found had been paid for, it was for the defendant to shew that to be the case. The declaration shewed that coal still remained ungotten on the premises, and alleged that two of the half-yearly instalments had become due, which could not be true if all the coals had been paid for. Supposing the finding of coal to be a condition precedent, and that it was necessary to shew in the declaration that coal had been found, the declaration is still supported after verdict by the allegation that the instalments were due and in arrear, and the jury must be taken to have been satisfied that coals had been found. The Court below cited the case of *Sicklemore v. Thistleton* (5) as similar to the present, but the two cases are distinguishable. The action there was against a surety, who was liable on demand in case his principal should neglect to pay the rent for forty days, and there was nothing in the breach to shew that the rent had been in arrear for forty days, or had been demanded from the defendant, and Lord Ellenborough put the case as one of a qualified covenant, on default of the principal. Here the defendant was primarily liable. If the words of the declaration are ambiguous, and may be construed so as to support it, the Court will, according to the well-known rule, give them that construction after verdict—1 *Wms. Saund.* 228 *d.*, *Lord Huntington v. Gardiner* (6), *Fletcher v. Pogson* (7), *Hobson v. Middleton* (8), *Boydell v. Harrison*, per Maule, J. (9). It is submitted that this declaration would have been good on

(1) 3 Bing. N.C. 355; *a. c.* 6 Law J. Rep. (N.S.) C.P. 41.

(2) 5 Q.B. Rep. 671; *a. c.* 13 Law J. Rep. (N.S.) Q.B. 155.

(3) 1 *Wms. Saund.* 320, *b.*

(4) 5 Q.B. Rep. 223; *a. c.* 13 Law J. Rep. (N.S.) Q.B. 5.

assessed the damages according to the facts; have found for the whole amount; and it must therefore be assumed that the jury were satisfied that coals had been found.

*Asherton*, for the defendant in error.—The law cited on the other side is good, but inapplicable to this case. It is assumed that this is a grant of mines, as distinguished from a licence to mine; but no feoffment or lease for a year appears on the record; and there is in fact nothing more than a liberty to mine granted. The first point is on the construction of the covenant. According to the ordinary rules of construction, the finding of the coal must be taken to be a condition precedent to the payment of the price. The relation between the parties was not that of lessor and lessee, but that of vendor and purchaser. There are two branches of the covenant, the former of which is to pay the price of the coal, and the latter, which is a subordinate one, points out means for effectuating the former. The bargain was to pay a certain fixed price for the coal found, *i. e.* ascertained to exist in the premises, and to pay a certain annual amount half-yearly, until the consideration for all the coals found should be fully paid, whether in the course of the year an acre of coal should have been gotten or not. There is an evident distinction on the face of the contract between "gotten" and "found." The meaning of the agreement was, that at the time it was made no steps had been taken to ascertain the quantity of coal lying within and under the premises, but it was the intention of the parties that the quantity should determine the price. They evidently intended that measures should be taken within a reasonable time to ascertain the quantity, so that the gross value should be known, and then that the defendant should go on paying the yearly sum of 40*l.* in half-yearly payments till the whole value had been paid. The half-yearly payment is part of a larger sum, which was to be ascertained before the plaintiff was entitled to anything, and the instalments are distinctly agreed to be parts of the price or consideration money. Supposing the finding of the coal to be a condition precedent, there is no averment contained in the declaration, which will support it after verdict. If the words in the breach alleging that the in-

stalments were "due and in arrear to the plaintiff" be relied upon, they are not sufficient; for coupling the breach with the rest of the pleading, it only amounts to a denial of payment under the circumstances before disclosed. The reason why a pleading is helped by verdict is, that although there may be some defective statement in it, yet it would be unreasonable to suppose that the jury, under the direction of the Judge, would have found their verdict without being satisfied as to the facts defectively stated, but involved in the averment. It is therefore important to look at the issues; and here there does not appear to have been any means of raising the question, whether coal had been found. It is said that the defendant cannot take the objection that no coal was found, because he has pleaded ever without traversing. But it was not open to the defendant to traverse that the instalments were due, that being rather a conclusion of law than of fact; and if he had traversed the averment in the declaration, he could only have put the plaintiff to prove the existence of coal, not that coal had been found. If the declaration be good, the liability of the defendant may go on as long as any coal exists, whether it be worth winning or not. The case of *Sicklemore v. Thistleton*, relied on in the court below, is directly in favour of the defendant.

*Hugh Hill*, in reply.

*Cur. adv. vult.*

LORD DENMAN, C.J. (June 6th, 1848,) delivered the judgment of the Court (9).—This is an action of covenant on an indenture, whereby the plaintiff conveys to the defendant and his heirs all the coal lying and being within and under certain premises, and the defendant covenants to pay 40*l.* for every statute acre of coal which should be found within or under the premises, and until the said price or consideration for the said coal should be fully paid, to pay 40*l.* per annum by half-yearly payments, on the 3rd of January and the 3rd of July, commencing from the date of the indenture (*viz.* the 2nd of July 1844), whether the whole of an acre of the said

(9) The Judges present were Lord Denman, C.J., Patteson, J., Coleridge, J., Coltman, J., Maule, J., Cresswell, J., Erle, J., and Williams, J.

coal should in any such year be gotten or not. The declaration avers that at the time of the making of the indenture there was within and under the premises a large quantity, and that a large quantity still remained; but it does not aver that any coals were found or gotten. The question is, whether the finding of coal is a condition precedent to the plaintiff's recovering the annual sum of 40*l.* It appears to us that it is not. The parties seem to have assumed that there were coals within and under the premises, and the indenture operates as an absolute sale and conveyance of that coal to the defendant, but without any covenant on his part to work or get that coal. The words of the conveying part are, "all the coals lying and being within and under the premises." Whether the defendant at any time should think fit to find and get them was left entirely to his will and pleasure. The consideration money is 40*l.* per acre for coals found, not for coals gotten. By the word "found," we apprehend the parties to mean "ascertained to lie and be." It is necessary that the quantity should be ascertained at some time, in order to fix the ultimate amount of the consideration money. That quantity might be found and ascertained without working or getting the coal. Who then is the proper person to find and ascertain the quantity? Not the plaintiff, for he had parted with all his interest in and possession of the coal, but the defendant who has taken them. In order to secure his so finding and ascertaining the quantity, the covenant of the defendant to pay 40*l.* per annum till the consideration money should be fully paid is inserted; otherwise, as there is no covenant to work or get the coal, the quantity might never be ascertained. The right of the plaintiff to sue for the annual sum is absolute and without condition, and if by finding and ascertaining the quantity of the coal, and paying the annual sum stipulated, the defendant has fully paid the consideration money for the purchase of the coal, it is for him to plead those facts. We think then that the plaintiff is entitled to keep his verdict, and that the judgment of the Court below should be reversed.

*Judgment reversed.*

1847. }  
July 3.\* } COOKE v. BLAKE.

*Trespass — Right of Way — Grant — Merger — Termination of Trustee's Estate — Pleading — Non concessit.*

*Trespass for breaking and entering the close of the plaintiff. Pleas—first, right of way under the Prescription Act; second, a user of the way for forty years. Replication to the first plea, that the corporation of L. being seised in fee of the locus in quo, demised it to H. for a term of lives and years; that the corporation delivered seisin of the same to H, who became seised of the said term, and that the said term so demised was existing in full force. Replication to the second plea stated, as in the former replication, the seisin and possession of H. for the said term, and that H. being so seised of the locus in quo, and during the continuance of the seisin, by indenture between C. of the first part, H. of the second part, and M. & W. of the third part, granted to M. & W. a right of way over the said close. Rejoinder to first replication traversed the existence of the term during the period of twenty years in the plea mentioned. Rejoinder to second replication, that H. did not grant to M. & W. the right of way modo et formâ. At the trial, it appeared that the corporation of L, being seised in fee of the locus in quo, by indenture of the 17th of February 1800, demised the same to H. for a term of lives and years. By indenture of the 23rd of July 1803, H. assigned to C. his interest in the demised premises, to secure payment of 1,200*l.* lent by C. to H. By indenture of the 9th of February 1804, reciting the two former indentures, and also that H. had agreed to sell part of the land to M. & W. for a sum, out of which the sum due from H. should be paid to C, C. bargained, sold, assigned, and transferred, and H. granted, bargained, sold, assigned, and transferred to M. & W. part of the demised premises, together with the right of way in question. In 1812 H. died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised the same, after her death, to J. & M. in manner following, "upon trust to pay and apply the rents, issues, and profits of the same to and*

\* Decided in the sittings after Trinity term.

*for the life and benefit of my daughter Mary and her assigns during her life, and independent of her present or any future husband; and from and after the decease of my said daughter, I give, devise, and bequeath my real and leasehold estates as aforesaid, unto and equally among all and every the children of my said daughter Mary, share and share alike, as tenants in common." In 1816 the wife of H. died. By indenture of the 11th of December 1817, the corporation of L. assigned to the trustees the reversion in fee simple of the locus in quo:—Held, that as the trustees took only an estate during the life of Mary, the lease for lives did not merge in the grant of the reversion; secondly, that the rejoinder to the second replication only put in issue the fact of a grant, and that the seisin of H. was admitted.*

**Trespass.** The declaration was for breaking and entering a certain close and yard of the plaintiff, situate in Liverpool, and belonging to a certain dwelling-house of the plaintiff.

The defendant (amongst other pleas) pleaded, thirdly, under the Prescription Act, 2 & 3 Will. 4. c. 71, a private right of way over the said close, enjoyed for twenty years; and, fourthly, a plea of forty years' user.

Replication to the third plea, that before the commencement of the said period of twenty years in the said plea mentioned, and before any user of the said supposed right of way in that plea mentioned, and before and at the time of the making of the indenture next hereinafter mentioned, the mayor, bailiffs, &c. of the borough of Liverpool, &c. were seised in their demesne as of fee, of and in the said close and yard in which, &c., and being so seised, heretofore and before any user of the said supposed right of way in the said plea mentioned, to wit, &c., by a certain indenture then made between the said mayor, bailiffs, &c. of the one part, and Thomas Herbert of the other part, (which said indenture having been lost by lapse of time, the defendant cannot produce to the Court here,) the said mayor, bailiffs, &c. did demise, grant, let, and to farm let to the said Herbert, his executors, &c. the said close and yard in which, &c., to have and to hold the same with the

appurtenances unto the said T. Herbert, his executors, &c. for the term of the several and natural life and lives of Mary Herbert, daughter of the said T. Herbert, John Cukit, and J. A. Jee, and the life of the survivor of them, and for the further term of twenty-one years next after such survivor's decease, under the yearly rent, and subject to the covenants and provisoes in the said indenture contained; and the said mayor, bailiffs, &c. then, to wit, on &c. delivered seisin of the said close and yard in which, &c. to the said T. Herbert, by virtue of which said demise the said T. Herbert then became and was seised and possessed of the said close and yard in which, &c., with the appurtenances, for the said term so to him thereof granted as aforesaid. That for and during the whole of the said period of twenty years, in the said plea mentioned, and at the said several times in the said declaration and plea respectively mentioned, the said J. A. Jee, one of the lives mentioned in the said lease, was living, and the said term so demised and granted by the said mayor, bailiffs, &c. of and in the said close and yard in which, &c. was existing in full force and undetermined, and not expired, surrendered, forfeited, or otherwise become void. Verification.

Replication to the fourth plea, after stating the grant to T. Herbert, as in the former replication, went on to aver that T. Herbert, being so seised of the said close and yard in which, &c., and during the continuance of the said demise, to wit, on the 9th of February 1804, &c. by a certain indenture then made between one J. Cukit of the one part, the said T. Herbert of the second part, and T. Morland and J. Williamson of the third part, (which said indenture, being in the possession of the defendant, the plaintiff cannot produce the same to the Court here,) the said T. Herbert did grant unto the said Morland and Williamson, their executors, &c. liberty of ingress, egress, and regress into and out of the said close and yard in which, &c. for and during the residue of the said term by the said last-mentioned indenture created and granted; that during a part of the said period of forty years in the said plea mentioned, to wit, during ten years thereof, the respective occupiers of the said messuages in the said plea mentioned had used and enjoyed the said liberty of ingress,

egress, and regress, or right of way for themselves and their servants, to go, return, pass, and repass on foot from the said messuage towards, into, through, over, and along the said close and yard in which, &c., and from thence, &c. at all times of the year, at his and their free will and pleasure, as in the said second plea alleged (being the said liberty of ingress, egress, and regress, or right of way aforesaid) under and by virtue of the said grant thereof, by the said T. Herbert, and not otherwise. Verification.

Rejoinder to the replication to third plea, that the said term so demised and granted by the said mayor, &c. of and in the said close and yard in which, &c. was not so existing in manner and form as in the said replication mentioned for and during the whole or any part of the said period of twenty years in the said third plea mentioned *modo et formâ*.

Rejoinder to the replication to the fourth plea, that the said T. Herbert did not grant to the said Morland and Williamson, their executors, &c., liberty of ingress, egress and regress into, through, and out of the said close and yard in which, &c. for and during the residue of the said term in the said indenture in the said replication mentioned and granted, *modo et formâ*.

This cause came on to be tried before Rolfe, B., at the Liverpool Spring Assizes for 1847, when it appeared that by indenture dated the 17th of February 1800, the mayor, bailiffs, &c. of Liverpool being seised in fee demised amongst other premises the (*locus in quo*) to T. Herbert, for the several lives of M. Herbert, Cukit, and Jee, and the survivor of them, and for twenty-one years after the death of the survivor. Herbert took possession; and by an indenture, dated the 23rd of July 1803, between himself of the first part and Cukit of the other part, reciting the indenture of the 17th of February, 1800, granted, bargained, sold, assigned, transferred, and set over the demised premises to Cukit for the several lives of the said M. Herbert, Cukit, and Jee, and for the life of the survivor, and for the term of twenty-one years from the death of such survivor, upon trust at any time to sell the same for the purpose of securing payment to Cukit of 1,200*l.* lent by Cukit to Herbert, with interest.

On this second indenture, a memorandum of livery of seisin was indorsed, and it was further proved that Herbert had always been in possession of the premises. By a third indenture, dated the 9th of February 1804, between Cukit of the first part, T. Herbert of the second part, and Morland and Williamson of the third part, after reciting the two former indentures, and also reciting that there was then due to Cukit the principal sum of 1,200*l.*, and that T. Herbert, with the consent of Cukit, had come to an agreement with the said Morland and Williamson for the absolute sale and disposal to them of part of the premises so as before mentioned demised to T. Herbert for the sum of 1,500*l.*, out of which sum it had been agreed that the sum of 1,200*l.* should be paid to the said Cukit and the residue to the said T. Herbert, it was witnessed that in consideration of 1,200*l.* paid by the said Morland and Williamson to the said Cukit by and with the direction and consent of the said T. Herbert, testified by his being made a party to and executing those presents, and also in consideration of the sum of 300*l.* by the said Morland and Williamson paid to T. Herbert, he, the said Cukit, at the request and by the direction and appointment of T. Herbert, testified as aforesaid, granted, bargained, sold, assigned, transferred, and set over, and the said T. Herbert granted, bargained, sold, assigned, transferred, and set over, ratified, and confirmed, with the said Morland and Williamson, all that piece or parcel of land, &c. (being part of the premises demised to T. Herbert by the said mentioned indenture), together with liberty of ingress, egress, and regress, in and through a gateway to the front of Wood Street, and a common yard behind the same, &c., to have and to hold the said piece or parcel of land, &c., with the appurtenances, unto the said T. Morland and J. Williamson, their executors, &c., as tenants in common and not as joint tenants, from the day of the date thereof for and during the term of the natural and several life and lives of the said M. Herbert, Cukit, and Jee, and for the life of the survivor of them, and for the further term of twenty-one years next after the death of such survivor.

It also appeared that in the year 1812 T.

Herbert died, having on the 28th of March 1812, duly made his last will and testament, whereby, after bequeathing all his freehold and leasehold estates to his wife for her life, he devised the premises in question as follows:—"And I give, devise, and bequeath all the rest, residue, and remainder of my real and leasehold estates, from and after the decease of my said wife, unto William Field and William Moss, of &c., to hold to them and the survivor of them, his executors, administrators and assigns, according to the respective estates, rights, and interests whereof I may be possessed, of, in and to the same respectively, upon trust to pay and apply the rents, issues, and profits of the same residue and remainder of my real and leasehold estates to and for the use and benefit of my said daughter, Mary Jee, and her assigns, during her life, independent of her present or any her future husband; and from and after the decease of my said daughter, Mary Jee, I give, devise, and bequeath all the said residue and remainder of my real and leasehold estates, as last aforesaid, unto and equally among all and every the children of my said daughter Mary Jee, lawfully to be begotten, share and share alike, to take as tenants in common, and not as joint tenants; and if the said Mary Jee shall die without leaving lawful issue her surviving, then I give, devise, and bequeath such residue and remainder as aforesaid unto my granddaughter Mary Ann Shaw, her heirs, executors, &c."

T. Herbert's wife died in the year 1816; and in the following year, by a fourth indenture of the 11th of December 1817, between the mayor, bailiffs, &c. of Liverpool, of the one part, and William Field and William Moss (the trustees named and appointed in and by the will of T. Herbert) of the other part, after reciting the indenture of the 17th of February 1800, also reciting that the said W. Field and W. Moss, as trustees of the said late T. Herbert, were entitled to the said piece of land, &c. for the remainder of the said indenture of lease, and that they had agreed with the said mayor, bailiffs, &c. for the purchase of the reversion and inheritance in fee simple of and in the same, expectant on the determination of the said indenture of lease, it was witnessed, that in con-

sideration of 532*l.* to the said mayor, bailiffs, &c. by the said W. Field and W. Moss paid, the said mayor, bailiffs, &c. granted, bargained, sold, aliened, released, and confirmed unto the said W. Field and W. Moss, as trustees as aforesaid, their heirs and assigns, all that the reversion in fee simple expectant and to take effect in possession immediately from and after the determination of the several estates and terms for lives and years granted by the said recited indenture of lease of and in all that piece or parcel of land, &c., to have and to hold the said reversion in fee simple so expectant as aforesaid, thereby granted and released of and in the said hereditaments and premises, &c., unto the said W. Field and W. Moss, their heirs and assigns, to the only proper use and behoof of them the said W. Field and W. Moss, their heirs and assigns, for ever, to the uses and upon the trusts and to and for the several ends, intents, and purposes mentioned, expressed, and declared in and by the last will and testament of the said T. Herbert, deceased, and for no other use, trust, intent, or purpose whatsoever.

In the year 1820 Mary Jee, the daughter of T. Herbert, died.

On the trial it was contended, by the counsel for the defendant, first, that the issue on the third plea ought to be found for him, inasmuch as the trustees under the will of T. Herbert took an absolute legal estate in the demised premises, and that therefore the lease for lives had merged in the grant of the reversion. The defendant's counsel further contended, that the issue on the fourth plea ought also to be found for the defendant,—first, because at the time of the supposed grant Herbert had no estate in the demised premises, and consequently that the grant could not operate as his grant; and, secondly, that on the face of the instrument itself, considering the recitals, Herbert did not appear to grant the right of way. On the other hand, it was contended, on the part of the plaintiff, as to the issue on the third plea, that the legal estate which the trustees took in the premises was limited to the life of Mary Jee; and as to the issue on the fourth plea it was urged, that the rejoinder admitted the seisin of Herbert, and only put in issue the fact of the grant; and further, that if

the seisin was admitted, the indenture shewed on the face of it a grant by Herbert. A verdict was found for defendant on both issues, leave being reserved for the plaintiff to move to enter the verdict for him.

*Knowles* having accordingly obtained a rule,—

*Crompton* shewed cause (June 22).—As to the third plea the question is, did the lease for lives merge in the grant of the reversion? We shew that Herbert devised to two parties, according to the estate he had. The words of the will are quite large enough to vest the whole legal estate in the trustees, and there is nothing to shew that the *primâ facie* meaning of the words should not be taken. It would be just as well that the children should take an equitable as a legal interest, and probably better. Then the trustees, having the absolute legal estate, the term granted by the indenture of lease would merge in the subsequent grant of the reversion, and the issue on the third plea be properly found for the defendant. As to the fourth plea the question is, did Herbert grant the right of way? The deed of the 9th of February 1804, which was put in to prove it, shewed a grant by Cukit, and not by Herbert. The whole of this deed must be taken together, and looking at the whole it shews, *ex facie*, that Herbert had no right to grant. Then a grant without right is absolutely void. This question is properly raised on *non concessit*. In *Baddeley v. Leppingwell* (1), Wilmut, J. says, “*Non concessit* puts the operation of the grant in question”—*Taylor v. Needham* (2). We traverse here the efficiency of the deed; we do not, therefore, admit the seisin. The law on this subject is laid down in a note to *The King v. the Inhabitants of Great Wakering* (3), *Eden's case* (4), *Martaine v. Hardy* (5). There could be no estoppel here, because the effect appears on the case itself. We could not directly traverse the seisin.

[PARKE, B.—But you might have shewn that it had ceased: must you not, therefore, be taken to admit its continuance?]

(1) 3 Burr. 1545.

(2) 2 Taunt. 278.

(3) 3 Nev. & Man. 47; s.c. 3 Law J. Rep. (n.s.) M.C. 51.

(4) 6 Rep. 15 b.

(5) Dyer, 122 b.

*Hynde's case* (6), *Helyer's case* (7). The law is laid down in *Stephen on Pleading*, p. 228. In *Cowlishaw v. Cheslyn* (8), the argument seems not to have brought the old cases before the Court. That case was an action of trespass *qu. cl. fr.* The defendant pleaded that A. C. was seised in fee, and being so seised granted a right of way by non-existing grant. The plaintiff replied by traversing the grant. Held, that it was not competent on that issue to shew that A. C. was not seised in fee, for the purpose of rebutting the presumption of the grant; also, in that case, the plaintiff might have traversed that A. C. was seised in fee.

*Knowles* and *Aspinall*, *contrâ*.—First, the leasehold interest did not merge in the grant of the reversion to Herbert's trustees. It cannot be presumed that the trustees did anything except what was necessary to carry out their trusts, which was to collect the rents and profits, and then pass the estate to those who should be entitled. It was never contemplated that there would be an attempt to divide the piece of land into compartments, and give the right of way to the holder of each. The right of way originally granted was appurtenant to the whole. Now they want to divide the premises, and establish a right of way in respect to each division. The words of the will are express: their meaning clearly is, “I give the trustees the estate, to hold during the life of Mary; and at her death I give the same property to be divided amongst the children.” The trust evidently terminates with the life of Mary; and the rule is, that trustees take such an estate only as the nature of the trust requires. Here it is not acquired after the death of Mary.

[ROLFE, B.—Suppose the rents are payable on Michaelmas-day, and Mary dies the day after, how are the trustees to get the rent?]

They certainly could not distrain; but that difficulty is the same in all the cases. There is nothing to distinguish the case of *Edwards v. Symons* (9) from that before the Court. There A. devised his estate to trustees for the maintenance of his six younger

(6) 4 Rep. 71.

(7) 6 Rep. 24 a.

(8) 1 Cr. & Jer. 48.

(9) 6 Taunt. 213.

children; and, immediately on the youngest attaining the age of twenty-one, then to his said six children, B, C, &c., and the survivor and survivors of them, their heirs, &c. as tenants in common; and it was held, that B. having died without issue and intestate, after the testator's death, and before the coming of age of the youngest child, had at the time of his death a fee simple estate in reversion in one sixth part—*Doe d. Budden v. Harris* (10).

[PARKE, B.—He gives the residue to the children in terms as distinct and clear as he gives to the trustees. We all think that, under this will, the estate of the trustees ceases with the life of Mary. The issue on the third plea must, therefore, be found for the plaintiff.]

Then as to the deed of the 9th of February 1804, this clearly operates as the grant of Herbert. If it be critically looked at it will be seen that the word "grant" is only made use of by Herbert. The words used by Cukit are those only of a bargain and sale; and a right of way will not pass by bargain and sale. The deed recites livery of seisin; and the Court can only decide from what appears on the face of the deed. The land to be demised is described to be part of the land demised to Herbert. The words of Herbert are larger than those of Cukit; and it does not appear, on the face of the deed, that Cukit had any right to grant, but rather that he had not. The words used by Cukit will not pass a right of way—*Baudeley v. Brook* (11).

[PARKE, B.—It does not appear on the face of the deed that the tenement was ever conveyed to Cukit at all.]

Then the fact of a grant by Herbert appearing on the face of the deed, the issue on the fourth plea must be found for the plaintiff as the rejoinder of *non concessit* admits the seisin of Herbert. On the point of pleading, *Cowlshaw v. Cheslyn* is expressly in point; nor are the cases cited by the other side at all inconsistent with the decision in that case. In *Baddeley v. Lepingwell*, the question was on a copyhold estate, and the only matter in dispute was, whether the right person had been admitted. Then they would not have been allowed to

dispute the fact of the seisin. In *Eden's case* the argument was put as in that of *Morris v. Dimes* (12); and there the Court did not decide upon the present point. By analogy to the rules of pleading it would be anomalous to allow these facts to be put in issue by the traverse of another. The case of *Cowlshaw v. Cheslyn* is expressly in point.

*Cur. adv. vult.*

The judgment of the Court was subsequently delivered (July 3) by—

PARKE, B.—The only question which remained for consideration in this case was, how the issue ought to have been found on the rejoinder to the replication to the fourth plea. That replication states that the corporation of Liverpool were seised in their demesne as of fee of the *locus in quo*, and being so seised, by indenture between the corporation and Herbert, demised it to Herbert and his executors, administrators, and assigns for three lives and twenty-one years; that the corporation delivered seisin to Herbert, who thereby became and was seised and possessed of the *locus in quo*, and that Herbert being so seised of the *locus in quo*, and during the continuance of the seisin, by indenture between Cukit of the first part, Herbert of the second part, and Morland and Williams of the third part, granted to Morland and Williams a right of way over the *locus in quo*. The rejoinder to this replication is, that Herbert did not grant the right of way *modo et formâ*. On the trial, the indenture was produced, which recited the demise to Herbert by the corporation; the assignment of the lease by Herbert to Cukit by way of mortgage to secure 1,200*l.*; that Herbert had agreed to sell part of the land comprised in the lease to Morland and Williamson for a sum out of which the sum due from Herbert should be paid to Cukit, and by the same indenture Cukit, at the request of Herbert, bargained, sold, assigned, and transferred, and Herbert granted, bargained, sold, assigned, and transferred to Morland and Williamson, part of the demised premises, together with the right of way in question.

(10) 2 Dowl. & R. 36.  
(11) Cro. Jac. 189.

(12) 1 Ad. & El. 654; s. c. 3 Law J. Rep. (N.S.) K.B. 170.



Two objections were made by the defendant: first, that at the time of the supposed grant Herbert had no estate in the *locus in quo*, and therefore the grant did not operate as his grant; and, secondly, that on the face of the instrument itself, considering the recitals, Herbert did not purport to grant the right of way. To this it was answered by the plaintiff, that the seisin of Herbert was admitted by the rejoinder, and the fact of the grant only was in issue, and that the indenture did prove, if the seisin was admitted, a grant by Herbert. We intimated our opinion that if the title of Herbert to make the grant was not in issue on the rejoinder of "*ne grantia pas*," the grant in fact was proved by the indenture; so that the only question is, whether the title was in issue upon the replication denying the grant. When in a pleading, one of several material and traversable averments is denied, the others are admitted in that suit (and indeed in others between the same parties, if the issue be joined against the party traversing), and therefore in a case in which it is averred that one was seised in fee at the time of the grant, and being so seised granted, the denial of the grant would seem to admit the seisin in fee; and this is the case of *Cowlishaw v. Cheslyn*, which was rightly decided, unless there be some technical rule that in all cases the traverse of a grant puts in issue the power to grant. Mr. Crompton contended that it did; but the authorities cited do not support the position. In *Eden's case*, the averment was, that the Queen was seised, and granted by her letters patent under the great seal, and the traverse was, that she did not grant the tenements by the said letters patent; and it is stated by Lord Coke that the letters patent being of record and shewn to the Court, cannot be denied, and therefore the effect of the issue *non concessit* is that the Queen had nothing in the land, or that the tenements did not pass by the letters patent; and the same point was decided in *Hynde's case*. This is a peculiarity belonging to grants from the Crown, by reason of their being made by matter of record. In *Baddeley v. Leppingwell*, the denial of the grant of the lord of the manor in the rejoinder, where the replication stated that he was seised in fee, and granted to the plaintiff and an-

other, was held not to traverse the admittance only, but the power to admit from the nature of the copyhold tenure, for the admission is nothing without title. The traverse there admitted the seisin in fee of the manor, and put in issue the admittance and the right of the lord so seised in fee to admit. Supposing the pleading had been of a surrender to the lord to the use of A. B. and a grant by him to A. B. the traverse of the grant would have put in issue the admittance only.

Again, in *Taylor v. Needham*, where Lord Chief Justice Mansfield says that the plea of *non demisit* puts in issue the title, the declaration was on a *quod cum demississet*, it did not state the seisin or title as a distinct fact. So it would be in an ejectment, if instead of not guilty *non demisit* were pleaded; the issue should exclude the title of the lessor. In *Martaine v. Hardy* it is said, that on a traverse of a lease for years by parol, it was held that the defendant might shew that the lessor had nothing in the land at the time of the demise. No doubt this was between lessor and lessee; and thus, *Litt. sect. 58.* applies where it is said the lessee may say that the lessor had nothing at the time of the lease, unless the lease be made by deed indented; and Lord Coke says, in his comment on this passage, he may plead that the lessor *non demisit*, and give in evidence the other matter. That the case in *Dyer* was a case between lessor and lessee may be collected from the comparison to a formedon, in which the tenant must plead *non dedit*, which puts in issue the title as well as the gift, and in declarations in formedon the seisin is not (commonly at least) averred—*Rastall*, 'Formedon,' 362, &c. In the case there referred to in the *Year Book*, 43 Edw. 3. 19, pl. 3, in a writ of intrusion, where the seisin and lease of the ancestor were averred, the traverse allowed to be good was of the seisin; so that the case does not shew that under the traverse of the lease the title to the lease would have been in question.

There is another case which has a most important bearing on this question. It is that of *Hudson v. Jones* (13). In replevin the avowant made title by grant of a reversion expectant on an estate for life to the

plaintiff, to which reversion the rent was incident, to which grant the plaintiff attained. Upon *non concessit*, it was a question whether the want of attornment should be proved, and it was urged, that on that plea the effect and operation of the grant was first in issue, and that the grant, if ineffectual, was void; but it was held that the attornment need not be proved: and the reason of the opinion was, because it was traversable, and what is not traversed is admitted, and the grant is perfect so far as the grantor can perfect it. Upon the whole, therefore, we think that the case of *Cowlshaw v. Cheslyn* was rightly decided; and that when the pleading states a title to demise or grant, and so gives an opportunity to the opposite party to traverse it, the traverse of the demise or grant does not include the title, but only the fact of the grant. The case cited, however, does not precisely agree with that now under consideration, for there is no positive averment here that Herbert was seised in fee at the time of the grant. His title is derivative; it is deduced to him from the corporation of Liverpool, and he is said to have been thereby seised and possessed, and being so seised, and during the continuance of the demise by indenture granted the right of way. The question therefore arises, which the Court, in *Morris v. Dimes*, refused to decide; we think, however, that the same reason applies to this case as to the supposed case of a positive averment of a seisin in fee at the time of the grant. By the traverse of the grant, the previous steps of the derivative title not being traversed are admitted; and supposing that the statement of Herbert's being so seised is not an averment that he was actually seised at the time of the grant, so as to be traversable, it is clear that he must be presumed to be so, the term continuing until the contrary is shewn by the defendant, by shewing that his interest had ceased in some way—*The Bishop of Meath v. the Marquis of Winchester* (14); and as there is no plea shewing this, the seisin of Herbert must be taken to continue to the time of the grant: and then the only matter in issue on the traverse of the grant is the grant itself. And if this were not so, the effect of denying a grant, where it was

(14) 10 Bli. 330; a. c. 4 Cl. & Fin. 445.

NEW SERIES, XVII.—EXCHEQ.

made by a person having a derivative title shewn on the pleadings from the owner in fee, would be the same as a denial of every previous step by which the title to lease is shewn.

For these reasons, we are of opinion that the issue on the rejoinder to this replication ought to be found for the plaintiff; and there must be a new trial, unless the counsel on both sides agree to have the verdict so entered to avoid further expense.

*Rule accordingly.*

1848. } WALKER, BARBER AND ANOTHER  
June 8. } v. MACDONALD.

*Bill of Exchange—Special Indorsement—Liability of Indorser.*

*A bill of exchange, bearing several indorsements in blank, was subsequently indorsed by the defendant to the plaintiffs specially in these terms: "Pay Messrs. B. and W. & Co. or order, W. Macdonald." Then followed an indorsement, "Per proc. of the Eastwood Company.—Thos. Goodwill." The Eastwood Company and the firm of Messrs. B. and W. & Co. consisted of the same persons. The bill afterwards came into the hands of other parties, and being presented by the holder to the acceptor, was refused payment on the ground of its not having been indorsed in terms by B. and W. & Co. The defendant, on the bill being returned to him and payment demanded, suggested that the words "B. and W. & Co." should be inserted on the bill under his indorsement; but ultimately, after his suggestion had been complied with, refused to pay the bill. B. W. & Co. accordingly brought an action against him, to which he pleaded non-presentment of the bill:—Held, that the defendant had no right to restrain the negotiability of the bill by a special indorsement; that the presentment was sufficient; and that the plaintiffs were entitled to recover.*

This was an action of debt by the plaintiffs as indorsees of a bill of exchange, dated the 21st day of October 1846, drawn by E. Bliss upon and accepted by J. Williams, for the payment to the order of the said E. Bliss of 86*l.* 18*s.* 4*d.* four months after date. The declaration stated that the said E.

Bliss indorsed the bill to J. Crowley & Co.; that J. Crowley & Co. indorsed the bill to S. F. Stephens; that S. F. Stephens indorsed it to Bartlett, Parrott & Co.; that Bartlett, Parrott & Co. indorsed it to the defendant, and that the defendant indorsed it to the plaintiffs. The defendant pleaded, first, a denial of the indorsement by him to the plaintiffs; secondly, a denial of the presentment of the bill for payment; and thirdly, a denial of the notice of dishonour.

The cause came on for trial, before Parke, B., at the Middlesex sittings, in Trinity term, 1847, when a verdict was found for the plaintiffs for the amount of the principal and interest on the bill, subject to the opinion of this Court upon the following

#### CASE.

The plaintiffs produced and read at this trial the bill of exchange mentioned in the pleadings, and which was as follows:—

“London, 21st October 1846.

£86 18s. 4d.

Four months after date, pay to my order eighty-six pounds eighteen shillings and fourpence, value received.

Per proc. Edwin Bliss,  
Chas. Jeffreys.”

The indorsements were as follows:—

“Mr. John Williams, brushmaker, Cheltenham; per proc. Edwin Bliss, Chas. Jeffreys; James Crowley & Co.; Saml. F. Stephens; Bartlett, Parrott & Co.

“Pay Messrs. Barber and Walker & Co., or order, W. Macdonald; Barber and Walker & Co., per proc. of the Eastwood Company, Thos. Goodwill; per proc. Nottingham and Notts Banking Company, Ade. Lassall, pro manager.

“Pay Messrs. Ormerod and Hardcastle, or order, Elliott and Cragg; Ormerod and Hardcastle.”

There was also a reference in case of need at the bottom of the back of the bill, as follows, “At Cunliffe’s, b.”

The above indorsement in the name of “Barber and Walker & Co.” was not on the bill prior to or at the time when it was presented for payment, but was written upon the bill afterwards, under the circumstances hereinafter stated. The bill of exchange in question was drawn and indorsed as mentioned in the declaration, and was,

previously to its being presented for payment as hereinafter mentioned, accepted by the drawer, payable at the London and Westminster Bank. The indorsement by the defendant to the plaintiffs was a special indorsement, in the words and figures following, “Pay Messrs. Barber and Walker & Co., or order, W. Macdonald.” When the bill became due it was in the hands of Messrs. Jones, Loyd & Co., bankers, of London, as holders thereof. The bill was presented on their behalf for payment, when due, at the London and Westminster Bank, and payment was refused by such bank, and the answer then given by them was “No advice,” which is the usual answer when country bills are refused payment; and that answer was given at once, without referring to the indorsements. At the time of such presentment the indorsement “Barber and Walker & Co.” was placed thereon under the circumstances hereinafter stated; all the other indorsements above set out were on the bill at the time of the said presentment. After the dishonour, Messrs. Jones, Loyd & Co. took the bill to Messrs. Cunliffe & Co., but they refused to take up such bill in consequence, as they stated, of the want of indorsement in the name of “Barber and Walker & Co.” Due notice was given to the defendant by the plaintiffs, and in due time.

The plaintiffs after receipt and in consequence of the last-mentioned letter wrote the indorsement of “Barber and Walker & Co.” on the said bill, in the manner in which the same now appears, as stated in this case, and immediately returned the bill to the defendant, who thereupon returned the same to the plaintiffs. The plaintiffs proved at the trial that they were the parties and the only parties constituting the several firms of Barber and Walker & Co. and the Eastwood Company, and that these firms respectively carried on the business of two separate collieries; but the business of both the said firms was carried on by the said plaintiffs, at the same place of business in Nottinghamshire, and the object of using the names of the two firms was to keep the accounts of the two collieries distinct. The plaintiffs also proved that Thomas Goodwill, the party who indorsed the bill for the plaintiffs under the name of the Eastwood

Company, was authorized by the plaintiffs to indorse bills for them, and was in the habit of so indorsing bills in the name of both firms. The following evidence was offered by the defendant, and objected to by the plaintiffs, and was received by the learned Judge, subject to the opinion of this Court as to its being admissible, and is to be considered and treated as part of the case only in the event of the Court being of opinion that it was admissible evidence for the defendant. Several clerks in banking-houses in London were called for the defendant, and stated that it was the usage and custom of merchants, and of merchants and bankers in London, that when bills of exchange were specially indorsed to any parties by a particular name or firm, the same name or firm should be used in the indorsement by such last-mentioned parties, and that it was the usage of London bankers not to pay bills indorsed by any parties in a different form or manner from that in which they had been previously indorsed to such parties, not even if the deviation was only in a single letter.

The question for the opinion of the Court was, whether the presentment of the bill indorsed as above stated, was sufficient as against the defendant, and whether the defendant is liable to the present plaintiffs under the circumstances in this action. If the Court should be of opinion in the affirmative, the verdict for the plaintiffs was to stand for the amount of the principal and interest until final judgment. If the Court should be of opinion in the negative, a nonsuit was to be entered; and either party, with the consent of the Court, was to be at liberty to convert this case into a special verdict.

*Crompton* for the plaintiffs (June 7).—The defendant is liable upon the indorsement. The question arises upon the presentment, and that presentment is good. It is contended on the other side that the bankers to whom the bill was presented for payment were not bound to pay it unless a valid title to the bill were shewn; and it is said that a valid title was not shewn because the plaintiffs indorsed the bill, not in the names in which it was indorsed to them, but in the name of the Eastwood Company. They however, constituted the Eastwood Com-

pany. *Leonard v. Wilson* (1) is precisely in point, and shews that parties to whom a bill has been indorsed specially may give a title by indorsement, although they indorse it in a different name. The defendant in this case had no right to restrain the negotiability of the bill by a special indorsement—*Smith v. Clarke* (2).

*Bovill*, for the defendant.—Bankers are not bound by their usage to pay bills of exchange unless all the indorsements are regular. The defendant's case is, that he placed his name upon the back of the bill, and directed the acceptor to pay it only in the event of there being a written order of Barber and Walker & Co. in a particular form. That written order was not given.

[*POLLOCK*, C.B.—The defendant was not competent to impose that restriction.]

This was not a good presentment by the plaintiffs as against the defendant, for the latter cannot be charged unless title is shewn through him. *Leonard v. Wilson* is not in point, for there the action was against the previous indorser and not against the party making the indorsement.

*Crompton* replied.

*Cur. adv. vult.*

On the following day the judgment of the Court was given by—

*POLLOCK*, C.B.—We all think that in this case the plaintiffs are entitled to the judgment of the Court. The case of *Smith v. Clarke*, which was cited in the course of the argument, establishes the proposition which has ever since been acted upon, that where a bill has once become negotiable, no person can afterwards restrain its negotiability. Now, in the present case the only question is that which arises upon the second plea, denying the presentment for payment. Was then the acceptor bound to pay this bill upon its being presented to him for payment under the circumstances of this case? The presentment in the plea, as was stated by my Brother Alderson in the course of the argument, must mean a presentment which, upon the bill being dishonoured, would make the defendant

(1) 2 Cr. & Mee. 589; s. c. 3 Law J. Rep. (N.S.) Exch. 171.

(2) Peake, N.P.C. 235.

liable on his indorsement to the plaintiffs. What then is the defendant's promise to pay? The promise is, that the indorser will pay to the indorsee and those claiming under him if the acceptor does not pay to a person entitled to call on him for payment of the bill when due. Here the presentment was by the holder, and the holder was

entitled to claim from the acceptor. The case of *Leonard v. Wilson* is a decisive authority upon this point. For these reasons, we think that the plaintiffs are entitled to recover, and inasmuch as we have no doubt whatever upon the subject, there will be no special verdict.

*Judgment for the plaintiffs.*

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The case of *Goode v. Burton*, mentioned in last year's Volume, page 318 of the Exchequer, amongst the cases to appear in this Volume, was inadvertently inserted there, it being then already reported, *ante*, page 309 of that Volume. The case of *Chamberlain and others v. the Birkenhead and Chester Railway Company* was also inserted there by mistake, it being then undetermined: it has since been decided, and will appear in the Volume for 1849. Also the following cases:—

ACKLAND *v.* BULLER.  
 BATES *v.* TOWNLEY.  
 BLACKBURN *v.* SMITH.  
 BRYMER *v.* THAMES HAVEN DOCK AND  
 RAILWAY COMPANY.  
 EDMONDS *v.* BLAND.  
 ENTWISTLE *v.* DENT.  
 FREEMAN *v.* COOKE.  
 GAWLER *v.* CHAPLIN.  
 HAIGH *v.* JAGGER.  
 HESELTINE *v.* SIGGERS.  
*In re* SMITH *v.* WILSON.  
 JONES *v.* SMITH.

LOCKETT *v.* NICHLIN.  
 MOULTON *v.* CAMROUX.  
 NEWRY AND ENNISKILLEN RAILWAY *v.*  
 EDMUNDS.  
 RILEY *v.* WARDEN.  
 ROBINSON *v.* HARMAN.  
 SALKELD *v.* JOHNSON.  
 TURNBULL *v.* PELL.  
 VAN CASTEEL *v.* BOOKER.  
 VENABLES *v.* THE EAST INDIA COMPANY.  
 WATSON *v.* PEARSON.  
 WHITWELL *v.* HARRISON.

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END OF TRINITY TERM, 1848.

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## IN THE HOUSE OF LORDS,

### Cases on Appeal and Writs of Error.

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| <p><b>Boughton v. Boughton (1848).</b> Appeal from the Court of Chancery. Decree affirmed, with costs.</p> <p><b>Boughton v. James (1848).</b> Appeal from the Court of Chancery. Decree varied. Costs to be paid out of the fund in court.</p> <p><b>Brunswick, The Duke of, v. the King of Hanover (1848).</b> Appeal from the Court of Chancery. Order affirmed, with costs.</p> <p><b>Camoy's, Lord, v. Blundell (1848).</b> Appeal from the Court of Chancery. Decree affirmed, with costs.</p> <p><b>Farmer v. Farmer (1848).</b> Two appeals from the Court of Chancery. Decrees affirmed, with costs.</p> <p><b>Foley v. Hill (1848).</b> Appeal from the Court of Chancery. Order affirmed, with costs.</p> <p><b>Glasgow College, v. the Attorney General (1848).</b> Appeal from the Court of Chancery. Decree reversed.</p> <p><b>Harrison v. Stickney (1848).</b> Writ of error from the Court of Exchequer Chamber. Judgment for the defendant in error, with costs.</p> <p><b>King v. Simmonds (1848).</b> Writ of error from the Court of Exchequer Chamber. Judgment for the defendant in error, with costs.</p> | <p><b>Ledsam v. Russell (1848).</b> Writ of error from the Court of Exchequer Chamber. Judgment for the defendant in error, with costs.</p> <p><b>London, Mayor and Citizens of, v. the Attorney General (1848).</b> Appeal from the Court of Chancery. Order affirmed, without costs.</p> <p><b>Ricketts v. Turquand (1848).</b> Appeal from the Court of Chancery. Decree affirmed with a variation, with costs.</p> <p><b>Saward v. Macdonnell (1848).</b> Appeal from the Court of Chancery. Decree affirmed, with costs.</p> <p><b>Squire v. Whitton (1848).</b> Appeal from the Court of Chancery. Decree affirmed, with costs.</p> <p><b>Thornycroft v. Crickett (1848).</b> Appeal from the Court of Chancery. Order affirmed, with costs.</p> <p><b>Thynne v. the Earl of Glengall (1848).</b> Two appeals from the Court of Chancery. Decrees and orders affirmed, with costs.</p> <p><b>Wilde, Sir T. v. Gibson (1848).</b> Appeal from the Court of Chancery. Decree reversed.</p> <p><b>Wilson v. Wilson (1848).</b> Appeal from the Court of Chancery. Decree affirmed.</p> |
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# INDEX

TO THE SUBJECTS OF THE

## CASES AT COMMON LAW,

IN THE

## LAW JOURNAL REPORTS,

VOL. XXVI.—XVII. NEW SERIES.

[In the following Index, Q.B. refers to the QUEEN'S BENCH REPORTS, C.P. to the COMMON PLEAS, and Ex. to the EXCHEQUER OF PLEAS.]

*Abatement*—Plea in, for non-joinder of co-contractor, set aside where affidavit verifying it incorrectly stated place of residence. Place of business not sufficient, C.P. 95

— Rule that where over demanded, defendant has same time for pleading after it is granted as at time of demand, applies to plea in abatement, Ex. 203

— To declaration in *sci. fa.* stating recovery against public officer of banking copartnership of 51,373*l.* 12*s.* 7*d.*, defendant pleaded in abatement issuing writ of *sci. fa.* on judgment recovered against said public officer, &c. for 51,373*l.* 12*s.* 7*d.*; and plea then stated declaration in *sci. fa.* against one J. D.; and that judgment against J. D. and that against defendant were one and same judgment; and it averred identity of companies described in writs as L. and W. R. Banking Company, and that G. S. was public officer of latter company at time of judgment; that J. D. was still living, and that writ and suit against J. D. were still depending. Affidavit verifying plea, stating that paper writing thereunto annexed was a true copy of issue in action against J. D.; and that judgment was signed in such action against J. D. on &c. for 51,373*l.* 12*s.* 7*d.*,—insufficient, and judgment signed by plaintiff regular, Ex. 294

*Acknowledgment of Married Women*—Sufficiency of certificate of acknowledgment by married woman taken before Commissioners in India, by person describing himself as "Major General," on affidavits of General's handwriting and rank, C.P. 1

— Affidavit verifying certificate of acknowledgment of married woman to *bar her dower*, written on paper, instead of parchment, according to usual practice; received and filed, C.P. 107

— Certificate of acknowledgment of deed by married woman, described her as Mary, reputed wife of A, otherwise Mary —, spinster; she was similarly described in deed.—Certificate and affidavit received and filed, C.P. 110

— Certificate of acknowledgment of married woman under 3 & 4 Will. 4. c. 74. s. 83. need not state spe-

cific place at which it has been taken; it is enough if deed appear to have been executed within terms of commission. British consul abroad has no authority *per se* to administer oaths verifying documents required by this act; but if a public notary of foreign country certify that by laws of that country British consul is competent to administer oaths, certificate and other documents sworn before him will be received, C.P. 111

*Action*—Where statute confers a right and annexes penalties for its infringement, action for damages will not lie against party infringing right by party aggrieved, Q.B. 163

— Declaration that defendant, an attorney, wrongfully and without consent or retainer of plaintiff, entered an appearance for him in an action brought by D. (a third party,) against plaintiff, and took upon himself to conduct action, and such proceedings were thereupon had that D. recovered judgment, and issued execution, and plaintiff was obliged to pay amount recovered and costs of execution, and "by reason of the premises" was injured in his credit and character,—is bad after verdict, Q.B. 286

— maintainable by new incumbent against former perpetual curate for leaving house and lands out of repair, Q.B. 366

— Where declaration states that plaintiffs, manufacturers of cutlery, were accustomed to mark their knives with certain marks denoting their manufacture, and that defendants, intending to injure plaintiffs, did fraudulently impose similar marks on knives made by defendants to induce public to believe that knives made by defendants were manufactured by plaintiffs, &c.,—it is properly left to jury to consider, whether there was such resemblance between defendants' mark and those used by plaintiffs as was calculated to deceive the public, and whether defendants used marks with intention to deceive. No person has a right to sell his own goods as and for goods manufactured by another person, C.P. 52

— Declaration that defendant wrongfully and in-



- juriously kept a ferocious dog, well knowing him to be ferocious; and that he kept his said dog so negligently that he bit and worried divers sheep of the plaintiff.—*See* *Interlocutory* a material averment in declaration, and is put in issue by not guilty, C.P. 124
- *See* Assumpsit. Attorney. Case. Contract. Negligence. Money had and received.
- Adverse Possession.* *See* Ejectment.
- Affidavit*—Upon motion against an attorney to pay over a sum of money received for his client in a cause, affidavits may be entitled in matter of the attorney, Q.B. 232
- not admissible to correct Secondary's notes of trial, C.P. 302
- when admissible on appeal against Judge's order for arrest, Ex. 53
- *See* Abatement. Arrest. Bankruptcy. Costs.
- Alteration of Record*—Effect of, (see Record), Ex. 56
- *See* Contract.
- Amendment*—Costs of the day not allowed to defendant who refused to assent to amend an informal record at trial, Q.B. 113
- Court will not authorize alteration in date of writ of summons to save Statute of Limitations, C.P. 63
- Application for leave to amend issue under Reg. Gen. Hil. t. 4 Will. 4. should be made to Judge at chambers, C.P. 81
- Declaration alleging that in consideration plaintiff would go to L. for purpose of marrying defendant, defendant promised to marry plaintiff within reasonable time after her arrival,—amendable at trial by stating that in consideration plaintiff promised defendant to marry him, and would go to L. for purpose of marrying him, and would within reasonable time marry him, defendant promised, &c. Not sufficient objection to amending declaration, that it will deprive defendant of means of moving in arrest of judgment, C.P. 298
- of writ of summons by adding new defendant, to save Statute of Limitations, not allowed, Ex. 90
- at Nisi Prius, of declaration in slander (see Slander), Ex. 151
- Animals.* *See* Action.
- Annuity*—*Quære*, whether annuity payable out of suitors' fund, chargeable with judgment, Ex. 13
- Sufficiency of following statement in memorial required by 55 Geo. 3. c. 141, under column "Consideration, and how paid":—"5,000*l.* made up of five several sums of 300*l.*, 200*l.*, 2,000*l.*, 1,500*l.*, and 1,000*l.* previously lent and advanced to C. H. to or for use of J. L. and E. J. L. and owing to C. H. on security of five several bills of exchange, drawn by E. J. L. upon and accepted by J. L. and indorsed by E. J. L. said consideration being paid and satisfied by cancellation of said bills and a release, &c. Statement of pre-existing debt need not shew how such debt has arisen, Ex. 43
- Appeal.* *See* Highway. Poor Law.
- Appraiser.* *See* Pleading.
- Apprentice.* *See* Poor Law.
- Arbitration*—Inadmissibility of award on trial of indictment for perjury (see Evidence), Q.B. 187
- Upon reference of cause and all matters in difference, with power to enter verdict for either party,—arbitrator no power to order judgment *non obstante veredicto*. Award of mutual releases in general terms is sufficient. Award directing verdict to be entered for plaintiff on certain issues, with 1*s.* damages, "which sum, except for my finding upon other issues, plaintiff would be entitled to recover in said cause," as regarded the damages sufficiently final, C.P. 201
- Court has power, under 3 & 4 Will. 4. c. 42. s. 39, to enlarge time for arbitrator to make award, where arbitrator having the power omitted to do so, C.P. 324
- Award directed that plaintiff should pay defendant 12*s.* 0*d.*, amount which umpire found to be due to him; a demand of 26*s.* 16*s.* 2*d.*, costs of the cause, had been made upon plaintiff, and payment refused, but no demand had been made of the 12*s.* 0*d.*—Court refused to make absolute a rule for payment of sum demanded, Ex. 208
- Award not set aside on ground of arbitrator having made mistake in point of law, in awarding damages in action of debt in respect of extra work where remedy was by action for breach of covenant; there being no misconduct, and the arbitrator having acted within his jurisdiction. Rule to set aside order of reference by corporation, because not made under seal, and attorney who entered into it not appointed under seal,—refused, Ex. 223
- An attorney appeared for a corporation in action of debt, and consented to Judge's order, referring "all claims made in the action" to arbitration. Arbitrator having awarded to plaintiff a sum actually claimed in action,—Held, that question, whether that sum a debt or not was submitted to arbitrator, and his decision final, even if erroneous. An attorney authorized to appear for a party in a suit has incidentally authority to refer it, and corporation having appeared by attorney, to knowledge of directors, they were bound by his acts as attorney, though he had not authority under seal, Ex. 297
- *See* Railway.
- Arrest*—Departure from England, for purpose of returning to Scotland, not a *fuga* within exception in 18th section of Scotch Sequestration Act; and defendant, arrested by Judge's order made after warrant of protection granted by Lord Ordinary, entitled to his discharge, Q.B. 186
- Warrant of protection from arrest, granted by Lord Ordinary to bankrupt, under Scotch Sequestration Act, inoperative if bankrupt already in custody. In such case proper course is to apply for a warrant of liberation under section 17. of that statute, Ex. 201
- Plaintiff having been nonsuited, defendant made up judgment roll, and entered thereon award of *ca. sa.* for taxed costs: Plaintiff brought writ of error and assigned as error entry of *ca. sa.*—Error assigned not frivolous. *Semble*,—That plaintiff, by 7 & 8 Vict. c. 96. s. 57, is protected from being taken in execution for costs, C.P. 200
- Upon appeal against Judge's order, to hold to bail under 1 & 2 Vict. c. 110. s. 3, affidavits in denial of plaintiff's cause of action admissible; but Court will not interfere unless there is clearly no cause of action. Where upon Judge's order, and copies defendant gave bail to sheriff, and on appeal against order it appeared that defendant had no intention of leaving England for two months, but that plaintiff would not be able to get judgment in that time.—Court cancelled bail-bond, but directed order and copies to stand, Ex. 53
- Insufficiency of affidavit to hold to bail in stating that defendant "before and at time of commencement of this action was and still is justly indebted to deponent in 100*l.* for work done, and materials provided, and goods manufactured and made by the said deponent for said defendant, and at his request," Ex. 55
- without reasonable and probable cause (see Pleading), Ex. 99
- Under Malicious Trespass Act, owner of land not justified in apprehending person who in fact is not an offender under act, merely because he reasonably supposed him to be an offender, Ex. 218
- *See* Execution. Parliament. Sheriff.
- Assault*—A party, supposed to appear before two

Justices for an assault, appeared, and pleaded "not guilty:" prosecutor withdrew his complaint, and defendant was discharged.—This a hearing and dismissal, which entitled defendant to certificate that charge dismissed as not proved, under 9 Geo. 4. c. 31. s. 27; and plea, stating those facts, and that certificate had been granted, a good defence under section 28. to action of trespass for assault, C.P. 176

— See Pleading.

**Assignment**—Where A. verbally assigned all his goods to plaintiff in trust, &c. and portions were removed and sold under orders given from time to time by plaintiff with A.'s consent,—sales were made under mere licence, and did not convey the whole property, Q.B. 297

— See Bankruptcy.

**Assumpsit**—Declaration that defendant possessed of ship, and plaintiff, master mariner, having interest in N. for loading a vessel: and it having been proposed that defendant should give plaintiff command of said ship, for a voyage to West Indies and back, it was agreed that in consideration of plaintiff having interest in N. for loading vessel defendant would give plaintiff command of her, with understanding that plaintiff would use all possible exertions for benefit of ship and owners: and that for such services defendant would pay plaintiff 8*l.* per month, and other sums during voyage, with outward and homeward primage. Allegation of mutual promises. Averment, that defendant gave plaintiff command of ship, and that he set out on voyage, and carried and delivered outward cargo: that plaintiff arrived at N, and finding that homeward cargo could not be obtained without disadvantage, proceeded to R, and there took in homeward cargo, and delivered same at London, and then resigned command to defendant, who accepted same; that from time command was given to him till he so resigned it, plaintiff used all possible exertions for benefit of ship and owners. Breach, non-payment by defendant of monies due to plaintiff. Plea, that plaintiff did not use all possible exertions, &c. *modo et forma*.—Held, on demurrer, that declaration imported sufficient consideration; and that plaintiff, having taken command of ship, might maintain the action. Plea traversed only part of consideration and therefore insufficient, Q.B. 31

— Declaration alleging that in consideration plaintiff and W. D. would sell and assign to defendant their co-partnership business, defendant promised plaintiff to pay him all money he had advanced in respect of co-partnership, and for which co-partnership was accountable to plaintiff; averring performance by plaintiff and W. D, and that plaintiff, at time of promise, had advanced sum of money in respect of co-partnership, for which co-partnership was, at time of promise, accountable to him; and alleging, as breach, non-payment of that sum by defendant,—discloses sufficient consideration to entitle plaintiff to sue alone, Ex. 36

**Attachment.** See Railway. Sheriff. Subpoena.

**Attorney**—London agent of S. & J, attorneys in country, by their directions, issued *fi. fa.* and warrant to levy on goods of debtor in Wilts, at suit of one of their clients, and referred officer to S. & J. for instructions. Officer not being able to meet with S. & J. paid amount of levy to undersheriff, who without any instructions from S. & J. remitted money to London agent, whose name was on warrant, and who refused to pay money over to client, claiming to apply it in reduction of general balance due from S. & J, for agency business.—No privity of contract to support action by client against town agent for money had and received to his use. But money appearing to have been paid under a

mistake, and retained against express directions of S. & J,—Court, upon application by client, compelled town agent to refund it, Q.B. 77

— A creditor who sues in superior court for debt for which he might have sued in county court cannot be considered as within jurisdiction of county court; and section 67. of 9 & 10 Vict. c. 95. being that privilege shall not exempt "from the jurisdiction" of county court, and not "from the provisions of the act."—Attorney is not deprived of his privilege of suing in superior court for a cause of action within jurisdiction of county court, Q.B. 179

— Declaration in debt on decree of Supreme Court of N: plea that decree was in respect of an amended bill, and before filing thereof defendant was out of jurisdiction and so continued, and was never served with copy of said bill, nor had notice of any process calling on him to answer it, and that proceedings were taken in his absence and *ex parte*: replication, that at commencement of suit defendant was within jurisdiction, and duly served with process in respect of original bill in said suit, and appeared and appointed H. E. attorney for him in suit, and H. E. accordingly became and was attorney of defendant, and authorized to conduct his defence in suit, and that while he was such attorney, and so authorized, he had notice of amended bill: rejoinder traversed that H. E. had notice of amended bill *modo et forma*, on which issue was joined.—Traverse an admission that H. E. had such an authority as would render replication good, viz. to act as attorney as well in respect of amended as original bill. Also, that such authority given by defendant about to leave jurisdiction would support the decree, Q.B. 209

— Privilege of attorneys to be sued as defendants in their own court abolished by London Small Debts Act, Q.B. 290

— of superior courts entitled, by 6 & 7 Vict. c. 73. s. 27, to be admitted to inferior courts of law, and where mandamus directing presiding officers of Lord Mayor's Court to admit A. B, described it as an "inferior court," without stating it to be a court of law,—On error, writ held bad, and defect not cured by court being described in return to writ as court of law, Q.B. 330

— An attorney's bill of costs was by Judge's order, on application of client, and by consent, referred to taxation: order contained no undertaking nor any direction to pay what should be found due on taxation, and was made without prejudice to client disputing retainer: by agreement between parties, question of retainer submitted to Master, who decided it was made out to his satisfaction, and allocatur accordingly.—Order and allocatur authorized Court to order judgment to be entered up, under 6 & 7 Vict. c. 73. s. 43, for amount as "certified to be due and directed to be paid," C.P. 222

— Delivery of attorney's bill to member of provisional committee at his place of business is insufficient as against other members of committee liable. The bill should be delivered at office of company, or at least to some person who can reasonably be considered to represent committee, C.P. 293

— Rule to strike off the rolls for misconduct, applied for on production of similar rule granted by Common Pleas against same party—refused, there being no evidence of identity of parties. Such rule ought not to be moved for on last day of term, Ex. 20

— What a sufficient delivery of attorney's bill against a company, Ex. 24

— Privilege of, as to producing in evidence his client's title-deeds (see Evidence), Ex. 119

— Rule to strike attorney off the roll who has been convicted of misdemeanour in Queen's Bench, and struck off the roll of that court, is  *nisi* only in first

instance, which in Exchequer makes itself absolute unless cause is shewn, Ex. 128

**Attorney (continued)**—An attorney may sue in superior courts for debt recoverable in county court, and his right to costs in respect thereof is not affected by 67th and 129th sections of 9 & 10 Vict. c. 95, Ex. 163

— authorized to appear for party in a suit has incidentally authority to refer it (see Arbitration), Ex. 297

— A bill of costs delivered under 6 & 7 Vict. c. 73. s. 37, contained charges for business done in Chancery suit, headed *Churchill ats. Marks*, and also charges relating to suit between defendant and E, which from items must have been in one of superior courts of law; but in which did not appear: for such items as bill contained charges were alike in all the superior courts of law.—No delivery of sufficient bill under statute: it should have stated in what court common law business was done, Ex. 165

— Conclusion of replication to plea of privilege of, (see Pleading), Ex. 313

— for plaintiff, where defendant has been taken in execution upon *ca. sa.*, has authority to receive fruits of judgment, but not to enter into arrangement with defendant for his discharge from custody. And where attorney acting *bond fide* upon receiving portion of debt in money from execution debtor, and for residue his warrant of attorney, ordered sheriff to discharge him from custody, who accordingly did so,—sheriff liable for an escape, Ex. 319

— uncertificated, disabled by 6 & 7 Vict. c. 73. s. 26, only from suing for business, &c. done in some suit or proceeding in one of the courts mentioned in the act, and not for business done which has no reference to such suits or proceedings, Ex. 362

— See Action. Contract. Railway. Release.

**Attorney and Client**—Where a sheriff's bailiff employed by attorney to execute writ of execution against defendant,—attorney and not client is liable to bailiff for his fees, Ex. 336

— See Contract.

**Attorney General.** See Prerogative.

**Auduit Quereld.** See Pleading.

**Bail.** See Arrest. Costs.

**Banking Company**—In order to issue *sci. fa.* against retired shareholders in joint-stock banking company, under 7 Geo. 4. c. 46. s. 13, it is sufficient if reasonable and *bond fide* attempts have been made to obtain satisfaction from existing shareholders; and not essential that executions should have been issued against every existing shareholder, if probable that such executions would have been ineffectual. What sufficient *prima facie* evidence that party was shareholder when contracts entered into, where judgment signed against public officer of banking company in action brought on contracts entered into at various dates. Fact that party not then a shareholder may be pleaded to *sci. fa.* No answer to application that there has been a fraudulent transfer of shares from a person who might have been proceeded against, but to which plaintiff is not shewn to have been party. Plaintiff not compelled to proceed against insolvent shareholder, who is entitled in equity to reimbursement from other solvent persons. If *sci. fa.* issues against person who was a shareholder when part only of contracts recovered upon were entered into, Court will limit execution against him to amount for which he is liable. Judgment having been signed in action of debt against public officer by default for nominal debt in declaration, Court will grant leave to issue *sci. fa.* on that judgment against former shareholders upon undertaking not to levy for more than is really due, Q.B. 9

— Memorandum to bind lands of member of banking company on judgment recovered against public officer, C.P. 15

— Rule for *sci. fa.* against former partners of banking company under 7 Geo. 4. c. 46. s. 13, not set aside because plaintiff had collateral security from bank, which might have been made productive, and which he omitted to mention in affidavits on which rule granted, C.P. 98

— Insufficiency of declaration in *sci. fa.* on judgment recovered against public officer of banking co-partnership which alleges that defendant at time of judgment recovered was and from thence hitherto hath been and still is a member of the said co-partnership. *Semble*—That writ in that form would be quashed on application to Judge at chambers, Ex. 13

— *Scire facias* on judgment against public officer of banking co-partnership, alleging that A. B. "at the time of the commencement of the said action and at the time of the recovery and giving of said judgment was, and from thence continually has been, and still is a member of the said co-partnership," quashed, Ex. 92

— Deed of settlement of joint-stock bank provided "that the directors should have a lien on the shares and stock of every shareholder for all debts due to the company, and that such lien should at all times be the paramount lien on the shares and stock of such shareholder; and that directors were empowered to cancel and declare forfeited the shares, or to sell and dispose of them, or otherwise deal with the same to obtain payment of the said debts."—Company had a lien against shareholder who had overdrawn his account, both on shares and dividends arising from them, Ex. 269

— Where under 7 Geo. 4. c. 46. s. 13, rule to issue *scire facias* upon judgment recovered against public officer of joint-stock banking company, obtained against former member of company, was afterwards enlarged, and finally abandoned upon terms of payment of costs by plaintiff,—plaintiff not precluded from again coming to Court for leave to issue such *scire facias*. No answer to such motion that such judgment was fraudulently concocted; but that defence must be raised by plea, or by application to set aside proceedings as fraudulent. Right course is in first instance to issue writs of *scire facias* against those who are members of company at time *scire facias* applied for, and not against those who were members at time action was commenced. Plaintiff allowed to issue *scire facias* against members of company at time contract entered into, if there is reasonable certainty that execution issued against those members of company who are primarily liable would be fruitless. Persons who have become members of joint-stock banking company after contract entered into, and have ceased to be so at time judgment was signed, are not within provisions of 13th section of 7 Geo. 4. c. 46, and are exempt from all legal liability, Ex. 321

**Bankrupt**—Warrant of attorney not set aside by Court, on ground that it has been given by way of fraudulent preference, Q.B. 49

— Affidavit in bankruptcy for 99*l.* 19*s.* 7*d.* in account previously delivered, 104*l.* 1*s.* was given credit for as set-off, but balance was made by mistake to appear 99*l.* 19*s.* 7*d.* instead of 80*l.* 1*s.* 7*d.* Plaintiff recovered 86*l.*—Defendant not entitled to his costs. *Quere*—Whether creditor justified in making affidavit for whole amount of his demand, without noticing any set-off, which he knows to exist, Q.B. 184

— Protection under Scotch Sequestration Act (see Arrest), Q.B. 184, and Ex. 301

— Notice of prior act of bankruptcy to clerk of attorney who issued execution, at office and in absence of his master, such clerk not being shewn to have had conduct of the suit in which execution issued, will not operate to defeat execution under 2 & 3 Vict. c. 29, s. 1, until communicated by clerk to his master, Q.B. 282

— Though petitioner no assets, Court of Bankruptcy has jurisdiction to grant final order for protection and distribution, Q.B. 348

— Under 5 & 6 Vict. c. 122, s. 22, filing declaration of insolvency a complete act of bankruptcy, without advertisement in *Gazette* under 6 Geo. 4. c. 16, s. 6; and notice by trader to execution creditors that he had filed declaration of insolvency, and thereby committed an act of bankruptcy, sufficient notice of prior act of bankruptcy to deprive creditors of protection of 2 & 3 Vict. c. 29, C.P. 76

— Trader, being indebted to defendants, on 1st of July files declaration of insolvency, pursuant to 5 & 6 Vict. c. 122, and on following day gives notice thereof to defendants; at subsequent period of same day defendants levy an execution on trader's goods. Fiat in bankruptcy issues day following.— Act of bankruptcy dates from filing declaration of insolvency, and defendants, having had notice thereof, not entitled to proceeds of execution within meaning of 2 & 3 Vict. c. 29, s. 1, Ex. 61

— Plaintiff, defendant, and another were co-sureties for one A: defendant became bankrupt, at which time plaintiff had not paid his share of debt, but subsequently he paid more than his proportion.— Bankruptcy of defendant no answer to action for contribution, as case was not within 52nd section of 6 Geo. 4. c. 16, plaintiff not being a "person liable for" the bankrupt's debt within the meaning of that section, Ex. 169

— In 1843, H, residing in Australia, being indebted to B. in 77*l.* 3*s.* 4*d.*, B. on 8th of January 1844 assigned debt to W, and on 22nd of January joined W. in letter to H, apprising him of assignment, and requiring him to pay debt to W: this letter was posted by W. to H, in Australia, in ordinary way in that country, and could not have reached Australia before 10th of February had it been posted on 8th of January: on 10th of February fiat in bankruptcy issued against B: on 29th of January 1844 bill for 50*l.* remitted by H. in Australia, who had no notice of bankruptcy, to bankrupt, and by him handed over to W. In action by assignees for amount of bill,— held, that W. having done all in his power to prevent debt from remaining in possession of bankrupt it was not by consent of true owner in order or disposition of bankrupt at time of bankruptcy, and assignees could not recover, Ex. 219

— Deed of assignment amounting to act of bankruptcy under 6 Geo. 4. c. 16, s. 3, not void as against future creditors of assignor, Ex. 234

— As against assignees trustees not estopped from relying on their own title to property under deed, whereby bankrupt allowed to carry on business in his own name. Horses employed in business but let out on hire at time of bankruptcy not in possession, order, or disposition of bankrupt within 6 Geo. 4. c. 16, s. 72, Ex. 346

*Bankruptcy Commissioner*—whether right or not in discharging prisoner from a judgment in action of tort has such jurisdiction in matter as to protect the keeper of the Queen's Prison, who obeyed the order, Ex. 365

*Baron and Feme*—An issue, whether husband conveyed to plaintiff reversion, of which he and his wife were seized in right of wife, to hold to plaintiff during coverture,—is proved by indenture, purport-

ing to be made by husband and wife, but executed by him only, by which he professed to convey estate during their joint lives, Q.B. 201

— Liability of party cohabiting with woman not his wife (see *Principal and Agent*), Q.B. 271

— See Acknowledgment of Married Women.

*Barlady*. See Indebitatus assumpsit. Poor Law.

*Battersea Park Act*. See Compensation. Mandamus.

*Beer Act*—Overseer not compellable to grant a certificate that person real resident holder and occupier of house under provisions of 3 & 4 Vict. c. 61. Mandamus commanding overseer to give such certificate to T. H: return that he had no evidence that T. H. was real resident holder and occupier, and that he had reason to believe that T. H. was not real resident holder, &c., because he was rated jointly with T. D: plea, that when certificate demanded, defendant (the overseer) well knew that T. H. was real holder and occupier.—Defendant not responsible on facts as they appeared on pleadings, if he judged wrong but honestly. Writ insufficient, Q.B. 332

— Conviction of seller of beer for permitting drunkenness and other disorderly conduct need not be by two Justices of division within which licensed house situate. Unnecessary to allege that conviction took place within three calendar months after offence. Offence properly stated to be contrary to form of statutes. Need not state names of persons permitted to be drunk, or allege that they were unknown. Offence charged to have been committed not double. Licence need not be set out. Conviction not bad for not ascertaining costs. Conviction need not be on parchment, Q.B. 355

*Bigamy*—Marriage with deceased wife's sister void, and proof of subsequent marriage with another woman during life of deceased wife's sister will not support indictment for bigamy, Q.B. 81

*Bill of Exchange*—To declaration on bill drawn by A. on, and accepted by defendant, payable to A.'s order, and by A. indorsed to B, and by B. to plaintiff, plea, that defendant accepted bill for accommodation of A. and B, and without consideration, &c., and on terms that it should not be negotiated after it was due, and that it was indorsed to plaintiff after it was due, without defendant's privity, is bad, Q.B. 4

— Declaration by indorsee against acceptor of bill, payable three months after date, "which period has elapsed;" alleged promise by defendant to pay according to tenour and effect of bill. Breach, that defendant has disregarded his said promise, and has not paid said sum, &c.—Demurrer, that declaration did not sufficiently shew that three days of grace had elapsed before action, set aside as frivolous, Q.B. 7

— Debt by drawer against acceptor of bill of exchange: plea, that bill indorsed by plaintiff to M. D, who then became and thence hitherto remained holder thereof: replication, that plaintiff was holder of bill at commencement of suit, *absque hoc* that M. D. from time of indorsement hitherto remained holder thereof.—Replication not too large, and plaintiff at liberty to traverse material allegation in plea, and not bound to state specially how he acquired bill from M. D, Q.B. 69

— Drawer of dishonoured bill being told by holders that they understood he had received the money from H, the acceptor, to take up bill, said that H. still owed him 10*l.*, and he should keep the 10*l.* he had received, and leave holders to sue H. on bill.—Evidence for jury of notice of dishonour to drawer, Q.B. 142

— In action by indorsee of bill of exchange and issue denying indorsement, plaintiff rested his case, in first instance, on proof of indorser's handwriting: Defendant then gave evidence that plaintiff was too

poor to have discounted bill, or to have it indorsed to him.—Held, that plaintiff ought not to be allowed to give evidence in reply to shew plaintiff's ability to discount bill, and that, in fact, he had discounted it, as such evidence was merely confirmatory of plaintiff's *prima facie* case, and not in contradiction of defendant's witnesses, Q.B. 194

**Bill of Exchange** (continued).—Principal who authorizes an agent to accept bill of exchange, liable as acceptor, though wrongly described by his agent in acceptance. Where bill accepted by drawee's wife in her own name, she having authority from her husband to accept bills,—husband liable on bill as acceptor, C.P. 121

Notice of dishonour:—"I am the holder of a bill drawn by you on L. M. for 98*l.* 15*s.*, which became due yesterday, and is unpaid; and I have to state, that unless the same is paid to me immediately, I shall proceed against you without delay for the amount. Amount of bill 98*l.* 15*s.*, noting 5*s.*, total 99*l.*."—Word "noting" held to be part of notice; that it implied presentment and non-payment; and that notice was good, C.P. 181

To action upon bill for 25*l.*, drawn by defendant, indorsed by him to K, and by K. to plaintiff, defendant pleaded that K.'s indorsement was in blank, and that after bill was indorsed and became payable, K. paid plaintiff 25*l.* in satisfaction; that plaintiff delivered bill to K, who then and until and at time of commencement of action hath been and still is holder thereof. Replication, that at commencement of suit plaintiff was holder of bill; without this, that at time of commencement of suit K. was holder. Defendant having demurred to replication, Judge set aside demurrer as frivolous. Replication good, as it puts in issue so much of plea as is necessary to make K. holder of bill, Ex. 8

Plea by E, one of three persons sued as acceptors of bill of exchange, that before and at time, &c., defendants were partners, upon terms that neither of them should, without consent of others, accept any bill of exchange in name of firm, otherwise than for *bond fide* debts or liabilities of firm; and that said bill was accepted by other defendants in name of firm without consent of defendant E, and in fraud of him, and in violation of said terms of partnership, and was delivered by other defendants to plaintiff for money owing to plaintiff from one of them, and not for any debt or liability of firm, of all which plaintiff had notice at time of delivery of bill to him; and that there never was any value or consideration, except as aforesaid, for acceptance of bill, or for payment thereof by defendant E; and that he held and now holds same without value or consideration, concluding with a verification.—Plea, an argumentative denial of acceptance, Ex. 70

Declaration by indorsee against acceptor, that bill drawn on 20th of September 1847, payable four months after date, and that defendant then accepted said bill: plea, infancy: defendant became of full age on 24th December 1847.—This no evidence of defendant's being an infant at time of acceptance, Ex. 233

A dishonoured bill was sent in due time to place of business of indorser, for purpose of giving him notice of dishonour: place was closed and no one there, and no written notice of dishonour was left.—These facts not prove issue that notice of dishonour given, their legal effect being to dispense with necessity for giving notice, and pleading must be according to legal effect. *Semble*—That holder may elect to treat absence of indorser as extending time for giving notice; and notice of dishonour given at place of business, if given at first reasonable opportunity afterwards, will support averment of due notice having been given, Ex. 291

Assumpsit by indorsee of bill of exchange for 25*l.*, drawn by defendant, indorsed by him to T. R. K, and by him to plaintiff. Plea, that indorsement by T. R. K. to plaintiff was in blank; that after such indorsement and on day of bill becoming due T. R. K. paid plaintiff 25*l.*, in bill specified, in full satisfaction of said sum of 25*l.*, and plaintiff then delivered bill to T. R. K, who, at and after commencement of action, was and still is holder of bill. Replication, that at commencement of suit plaintiffs were holders of bill, without this, that at commencement of suit T. R. K. was holder thereof. Verdict for plaintiffs.—On application for replender, issue held to be material, Ex. 345

After several indorsements in blank an indorser has no right to restrain the negotiability of the bill by a special indorsement. Sufficiency of presentment, Ex. 377

See *Oceana*. County Court. Pleading.

**Bill of Lading**. See Ship and Shipping.

**Bishop**.—Confirmation of (see Ecclesiastical Law), Q.B. 253

**Bond**.—One of two co-sureties received from principal promissory note for sum secured by bond. In action for contribution,—held, a question of fact for jury, whether note given in pursuance of arrangement between parties that defendant should be thereby discharged, or as collateral security to plaintiff; in which latter case defendant would not be discharged, Ex. 225.

See Pleading.

**Borough Fwd**.—Three persons were indicted as assizes for county of S. for forging will of C. D.: C. D. died in borough of O, and one of prisoners took away deeds, &c. of deceased to his own house, in county of S. and not in borough of O: forged signatures of testatrix and witnesses were written in borough of O, and offence was completed in county of D, where forged signature of second witness was written: borough of O. did not contribute to county rate, but had a fund of its own.—Order for payment of expenses of prosecution properly made on treasurer of borough; and mandamus would lie to treasurer to compel payment, Q.B. 223

**Bottomry Bond**. See Ship and Shipping.

**Breach of the Peace**. See Pleading.

**Broker**.—Defendants, share-brokers at Liverpool, on 30th of August 1845, bought for plaintiff, also share-broker, thirty-eight T. and D. railway shares, according to advice note, at 2*l.* 8*s.* 6*d.* per share; scrip had not issued, and the 2*l.* 8*s.* 6*d.* was premium: deposit of 11*l.* 7*s.* 6*d.* per share first appeared in printed share lists (which were sent daily to plaintiff) on 2nd of September, and 4*l.* 1*s.* deposit was paid by defendants to persons from whom they bought shares; and defendants omitted to charge deposit, and plaintiff, who purchased for other persons, as broker, (though he dealt with defendants as principal,) only charged 2*l.* 8*s.* 6*d.* per share, and had settled with such other persons on that footing before any claim made for deposits. Defendants, also, on 18th of September, bought for plaintiff eighty S.S. railway shares, according to advice notes at 4*l.* 10*s.* per share: that did not include deposit of 2*l.* 10*s.* per share, which first appeared in share lists about 26th of September; and settling with vendors defendants paid them deposits, amounting to 360*l.* in addition to 4*l.* 10*s.* per share; but on 26th of September shares were sold by defendants for plaintiff at 7*l.* per share, which sum included deposits, and plaintiff was credited with full amount: an account furnished to plaintiff by defendants on 2nd of October, and also in subsequent accounts, plaintiff was only debited with 4*l.* 10*s.* per share, and he only de-

bited his principals with that amount, and settled with them on that footing: on 19th of November, defendants, having received letter from plaintiff demanding a balance of 605*l.* 1*4s.* 1*0d.*, discovered mistake with regard to deposits, and immediately acquainted plaintiff with it.—Held, that they were entitled to set off the 200*l.*, and also the 41*l.* 5*s.*, Q.B. 247

**Building Society**—By rule of Metropolitan Building Association proceedings not to be taken without approbation of majority of members present at "special meeting," and president on receiving written request, signed by twelve members, was to convene "special general meeting."—Action brought with approbation of majority of members present at special general meeting, well brought within meaning of rule. By rule 28, committee to determine "all disputes which may arise respecting construction of rules or any of clauses, matters, or things herein contained," but if decision not satisfactory, reference to be made to arbitration, pursuant to 10 Geo. 4. c. 56. s. 27.—Rule referred only to disputes as to construction of rules, and did not prevent trustees suing for recovery of subscriptions and fines. By rule 11, if committee were satisfied premises offered by any member to whom shares have been awarded, a sufficient security, they are to direct trustees to pay to such member money he is entitled to receive, on his executing deed in trust to sell, or other valid conveyance, mortgage, or assurance.—Society might lend money on mortgage to its own members as well as to strangers. By rule 8, as often as funds amounted to a share or sum of 120*l.*, share was to be awarded to highest bidder, purchaser to have privilege of taking as many additional shares at same rate as he might choose.—*Quare*—Whether, as society enabled its members to hold unlimited number of shares, each of which might be maximum share, it was within 6 & 7 Will. 4. c. 32. s. 2, Ex. 177

**Capias**—For costs of nonsuit (see Execution), C.P. 288  
—into different county without testatum clause (see Execution), C.P. 288

**Carrier**—Liability of, for expenses of plaintiff's clerk, who has been sent down to receive goods and sell them at market, and in consequence of their non-arrival has been detained until another market, where he has attempted to sell them, Ex. 50

—Goods which carrier had contracted to deliver from A. to B. were conveyed over portion of journey, by sub-contractor.—Sub-contractor, and every person employed by him in performance of contract, was "a servant in the employ" of carrier within 11 Geo. 4. & 1 Will. 4. c. 68. s. 8. A delivery ticket issued by a railway company, as common carriers, described J. as a porter in their employ.—In action brought for non-delivery of goods stolen on their journey by J.,—semble, that company not estopped from giving evidence that J. was not their servant, Ex. 271

—See Contract.

**Cases**—There is no legal obligation upon trespasser to replace what he has pulled down or destroyed upon land of another, though liable in an action of trespass to compensate in damages for loss sustained. Case for breaking and entering a coal mine, before plaintiffs were possessed, and keeping open and unstoppered up an aperture and excavation made therein by defendant, whereby water deluged and damaged plaintiff's mine: pleas, not guilty; and a plea in substance alleging former recovery by an award in former action in respect of such damage and all consequential damages: new assignment that defendant after such recovery kept and continued aperture open and unfilled up, whereby, &c.: plea thereto, former action and award, and

averring that grievances newly assigned were merely consequential damages arising to plaintiffs by reason of matters and injuries in declaration in former action alleged: plaintiffs set out award, *abique hoc*, that damages were consequential arising to plaintiffs by reason of matters and injuries in declaration in former action alleged: at trial it was proved that defendant broke and entered and took away boundary coal; that in 1840 plaintiffs worked mine till they came to place where excavations were made by such breaking and entering, and water came in and had continued to flow in ever since: it further appeared that, in 1841, an action was brought against defendant for breaking and entering above mentioned, and that cause was referred to an arbitrator, and that substantial damages were awarded.—Defendant entitled to verdict on not guilty, and on plea to new assignment, Q.B. 233

—Declaration in case that defendant possessed a wharf on the Thames, near which there was a wood-work, placed there by defendant, and being at bottom of river, and over which after-mentioned ship at certain states of tide would float, but not at other states of tide: that plaintiff possessed of a ship then being by sufferance of defendant at and alongside wharf for reward to defendant in that behalf; that defendant had management and controul of wharf, and mooring and stationing of ships at and near it whilst they were at wharf for purpose of using it: Breach, that defendant unskillfully, &c. placed, moored and stationed plaintiff's ship in river, near wharf and over wood-work, and detained it there for a long and improper time, and until ship, on fall of tide, struck against wood-work, and thereby was greatly injured: Plea, that defendant had not management and controul of wharf, and mooring and stationing of ships, &c. *modo et formd.*—After verdict for plaintiff, Court refused a rule nisi for arresting judgment, which decision was affirmed on error; and it was held, declaration sufficiently shewed a duty on the part of defendant safely to moor and station the vessel, and a breach of it, Ex. 301

—See Action.

**Certiorari**—though taken away by Excise Act, 7 & 8 Geo. 4. c. 53. from Queen's Bench may still issue if conviction obtained by fraud, Q.B. 319

—See Costs. County Court.

**Charity**. See Parish Lands.

**Churchwardens and Overseers**—not personally liable for attorney's bill of costs, where copy of rule for mandamus to Justices to hear appeal served on churchwardens, one of whom signed retainer, but afterwards countermanded it; and before rule argued, churchwardens re-elected, and new overseers elected, one of whom often asked about rule; and upon delivery of bill of costs all of them expressed readiness to pay, but said there was a grudge in the parish, Ex. 94

**Circuity of Action**. See Pleading.

**Clergy**—Perpetual curate possessed of house and lands in right of his curacy, bound to keep them in repair; and action for dilapidations maintainable by new incumbent against his predecessor, Q.B. 366

**Coal Acts**. See Pleading. Statute.

**Cognovit**—Where cognovit, in simple form, given before appearance, and nothing further done for several years, plaintiff entitled to enter an appearance, and proceed on cognovit, notwithstanding Reg. Gen. Hil. term, 4 Will. 4. r. 35, and without obtaining leave of Judge, or giving term's notice, Ex. 4

**Commitment**—under 43 Eliz. c. 2. s. 4. until payment of arrears of poor-rate and costs awarded, is bad, and trespass lies against Justices. Backing

- a warrant a ministerial act only. What damages recoverable. Demand of perusal and copy of warrant signed by plaintiff's attorney though not left by him, sufficient. What sufficient compliance with demand. Constable not entitled to redress merely because sued jointly with the Justices, *Ex. 349*
- See Master and Servant.
- Common pur cause de voisinage*—*Semble*, that common pur cause de voisinage may exist between two proprietors of neighbouring farms, independently of any rights of common on either side. But claim of such right by individual, as annexed or incident to a private estate, cannot be good by custom, but must be pleaded as a prescription in a *que estate*, *Q. B. 121*
- Company*—Implied authority to borrow money (see *Mine*), *C. P. 17*
- See Banking Company. Joint Stock Company. Pleading. Railway.
- Compensation*—Duty of jury under 9 & 10 Vict. c. 38, Act for making Battersea Park, only to estimate value of property taken, and estate and interest, if it appeared to be divided among several persons; and they have no power to decide whether title is in the claimant; and prohibition to restrain recording of verdict affecting title granted, *Q. B. 336*
- See Railway.
- Condition*—against disputing testator's competency (see *Devise*), *Ex. 106*
- Constables*—Appointment of, under 5 & 6 Vict. c. 109, (see *Slander*), *Ex. 129*
- See Commitment.
- Contract*—By agreement, of 25th of May, defendant agreed to purchase growing crops of plaintiff, price to be paid on 5th of June, valuation to be made by 3rd of June by two persons, one named by each party by 31st of May; and in case either party neglected or refused to nominate a referee within time appointed, referee of other party alone to make final decision. Word "nominate" means not only the choice of referee, but communication of appointment to other party; and appointment by plaintiff of referee on 31st of May, and communication thereof to defendant by letter, which reached him 1st of June, does not entitle plaintiff to proceed *ex parte*, *Q. B. 1*
- The meaning of particular words used in, is for the Judge, except there is evidence that they were used in a sense peculiar to particular trade or business, or that their meaning depends on usage of particular place. "Months" *prima facie* means lunar months, and subsequent conduct of parties to contract inadmissible to shew that it meant calendar months. *Quare*—As to admissibility of evidence to shew that, by usage of auctioneers, "month" meant calendar month, *Q. B. 81*
- Declaration by payee against maker of promissory note; plea, that after note had become due it was agreed between plaintiff, defendant, and A. B. that A. B. should, at request of plaintiff, pay to plaintiff in trust for E. B., 200*l.* for her sole use and benefit, or 25*l.* per annum, so long as the 200*l.* should remain unpaid, and that the rights and causes of action of plaintiff upon and in respect of note should be suspended, so long as A. B. should continue to pay the 25*l.*; averment, that A. B. had paid said sum, &c.—On writ of error, plea bad in substance, legal effect of agreement being not to suspend plaintiff's right of action upon the note, but only to subject him to action if he sued contrary to the agreement, *Q. B. 114*
- A material alteration of a sold note by buyer, without privity of seller, avoids contract. An alteration in a material part of a written contract, without consent of both parties, is a material alteration which avoids contract, although it may not have altered duty of party sought to be charged, *C. P. 47*
- Plaintiff, by written agreement, undertook to do work to houses of defendant in South Street and Southampton Street: defendant had no houses in Southampton Street.—Construction of agreement was for Judge, and it was not a question for jury whether word "and" inserted by mistake, *C. P. 145*
- Defendant agreed to supply plaintiff with 150 tons weight of iron girders, at certain price per ton, according to plans to be furnished by plaintiff: within reasonable time fourteen tons weight of girders, for which plans were furnished at same time were ordered: four months after date of agreement fourteen tons were demanded; and orders were given for sixty tons more girders, plans for which were furnished: defendant then repudiated contract.—This an entire contract; and as plaintiff had not furnished plans for whole 150 tons within reasonable time, he could not recover for non-delivery of fourteen for which plans had been furnished within reasonable time, *C. P. 155*
- By agreement under seal, plaintiff undertook to supply for three years, all such pipes as should, from time to time, during the said period, be required by the company, at certain specified rates: company ordered and had large quantities of pipes in stock when contract expired, for which plaintiff sought to recover difference in price between current value and that paid under contract. Contract not limited to pipes required for use at time of orders; but plaintiff bound to supply all pipes ordered by company for works which they were carrying on and authorized to undertake by their act of parliament, *C. P. 237*
- Clerk of county court personally liable upon contract made by him with builder, to fit up hall and offices, in which business of court to be transacted, *C. P. 304*
- between insurance company and plaintiff that plaintiff, as attorney of company, should receive salary of 100*l.* per annum, in lieu of rendering annual bill of costs for general business, &c.; and in consideration that plaintiff had promised to fulfil agreement on his part, company promised to fulfil same on their part, and to retain and employ plaintiff as such attorney:—Held, by Court of Exchequer Chamber, reversing judgment of Court of Common Pleas, that agreement created relation of attorney and client, and amounted to promise, on part of defendants, to continue that relation at least for one year, *C. P. 307*
- Where sufficient consideration disclosed to entitle a party to sue alone, *Ex. 36*
- H., joint owner with defendant of estates in Berblie, advanced to latter large sums on account of defendant's share of liabilities in respect of those estates, and received on account thereof defendant's acceptance for 3,000*l.* on terms contained in letter by defendant:—"Should the crops (of the estates) not come forward in time to provide for these notes, I shall expect to have them renewed for each period as may be found necessary from the condition of the properties." Crops being and still continuing unproductive, bills were renewed on three several occasions; but ultimately H. refused to renew further. Plaintiff, indorsees of H., with notice of agreement, entitled to recover, as agreement stipulated for one renewal only, *Ex. 71*
- Declaration that plaintiff was attorney of railway company; that it was intended to apply for act to incorporate same, and in consideration that managing committee of railway would, by permission and at instance of plaintiff, retain defendant as attorney about performing certain business for company, and in, &c. if an act of parliament should be

obtained, he, defendant, promised to allow plaintiff one-third part of profits of business: avowment, that managing committee did, with permission and at instance of plaintiff, retain defendant as attorney, &c.: breach, non-payment of third part of profits.—Held, bad, meaning of contract being, that work to be done, and not retainer, was to be contingent upon passing of act, *Ex. 246*

—In general there is sufficient privity of contract to maintain action if party actually making contract with defendant was acting for plaintiff, and intended at time to make it for him, though defendant was not aware it was made for plaintiff. The name in which contract is made is *prima facie* evidence of party for whom it was made; but not conclusive (except by custom of trade in case of bills of exchange). Where a banking account was opened in name of one of two plaintiffs they may show that it was opened on behalf of both; but it lies on them to prove this intention affirmatively, and fact that plaintiffs were partners, and that money paid into account belonged to partnership, not alone sufficient evidence to go to jury that contract intended to be made on behalf of the two, *Ex. 286*

—Where goods are delivered on board ship under bill of lading; captain is in possession and carries for and on behalf of vendor, and delivery does not vest goods in vendee as in case of common carrier, though ship be expressly hired for vendee. Legal meaning of "appropriation" of goods, under contract of sale, and what amounts to an appropriation in law, so as thereby to vest goods in vendee, *Ex. 307*

—See Assumpsit. Landlord and Tenant. Master and Servant. Principal and Agent. Railway.

**Conviction**—Maltster by collusion, and to exonerate himself from penalties, procured conviction of servant for same offence he had himself committed, and certificate of Justices which operated as discharge of himself,—conviction quashed, *Q.B. 319*

—for assault directing penalty to be paid to treasurer of county, bad, *C.P. 176*

—See Master and Servant.

**Copyhold**—Reversionary grant, by rector and lord of manor of B, of copyhold premises, comprising, in one aggregate holding and at one aggregate undivided rent, three ancient tenements, originally held of manor, under distinct grants and at distinct rents. Same rector afterwards sells and conveys reversionary fee, under powers in Land Tax Redemption Act, to redeem portion of land tax on living, and sale is confirmed by Land Tax Commissioners under that act. In ejectment by subsequent rector to recover the premises, title of defendant, who claims under parliamentary sale and conveyance, cannot be impeached, on ground that sale was of a reversion expectant on a void grant, *Ex. 1*

**Copyright**—Plaintiff was original composer of music of narrative character, which he sang publicly for profit and accompanied by gesture and expression: defendant announced, by handbills, performance of and performed plaintiff's song at Crosby Hall, licensed for music and dancing under 25 Geo. 2. c. 36. In action for penalties under 5 & 6 Vict. c. 45,—held, first, that plaintiff's song was a musical composition within section 20. of that act. Secondly, that Crosby Hall was a place of dramatic entertainment within 3 Will. 4. c. 15. Thirdly, that an allegation in declaration in terms of statute, that plaintiff had "sole liberty of representing a certain musical composition," was sufficient statement of plaintiff's right. Fourthly, that it was not necessary that plaintiff, who was assignee of copyright of words, should be registered under section 14. before bringing action, *Q.B. 225*

—An alien lawyer, author of a work first published in England, has a copyright in it whether composed in this country or abroad. Contemporaneous publication abroad does not defeat copyright here. Copyright was sold by letter to plaintiff, which was a valid sale by law of country where it was made.—Plaintiff an "assign" of the author, under 5 & 6 Vict. c. 45. ss. 2, 3, and as such entitled to copyright, *C.P. 273*

—See Pleading.

**Coroner.** See Quo Warranto.

**Corporation**—In April 1839, prior to grant of separate Court of Quarter Sessions to borough of Birmingham, situate within county of Warwick, a resolution was come to, for paying 11d. per head per day for one year, for maintenance of borough prisoners in county gaol, there being no gaol in borough, and this was agreed to by county Justices. In September 1839, after grant of Court of Quarter Sessions, account made out and allowed on above principle. In January 1841 county Justices resolved that borough Justices had no power to commit to county gaol, and such prisoners were detained at expense and inconvenience to borough, till county Justices could attend to commit them. In consequence of doubts as to validity of charter of borough of B, no other accounts were sent in, in reference to above charges, till September 1842, when an account was sent in to council charging for prisoners confined in gaol at rate of 11d. per head up to 30th of June 1842. Statute 5 & 6 Vict. c. 98. passed on 10th of August 1842.—In pursuance of that statute such accounts rightly altered, so as to charge actual expense of borough prisoners instead of 11d. per head per day; statute rendering borough liable to actual expenses, both prospectively and retrospectively, and no deduction could be made in respect of prisoners committed by borough Justices to county gaol, subsequently to January 1841. The 5 & 6 Vict. c. 110. provides that gaol of city of Coventry shall be a gaol of county of Warwick, to be purchased and paid for by county out of monies in hands of treasurer.—Borough of Birmingham, which had separate Court of Quarter Sessions, liable to pay its proportion of county rate for purchase of gaol, *Q.B. 85*

—See Arbitration.

**Costs**—Defendant pleaded non assumpsit to all but 12*l.* To 11*l.* parcel of 12*l.* payment and acceptance in satisfaction, after action brought. To residue, payment of 1*l.* into court. Plaintiff traversed payment of the 11*l.*, and took the 1*l.* out of court. Amount due to plaintiff at commencement of suit did not exceed 12*l.*, and 11*l.* was paid after action brought, and accepted by defendant in satisfaction of that amount. Plaintiff, after payment of the 1*l.*, not entitled to proceed for costs, in respect of the 11*l.*; but defendant entitled to have verdict entered for him, and to general costs of action, *Q.B. 29*

—of Chancery suit not recoverable in action at law (see Vendor and Purchaser), *Q.B. 85*

—A cause was called on for trial; and after jury were sworn it was discovered that record did not contain a *similitur* to one of the replications, nor any award of *venire*; defendants withheld their consent to an amendment, and Judge discharged the jury:—Defendants not entitled to costs of the day, *Q.B. 113*

—Judgment for, where plaintiff ought to have sued in court of requests, erroneous (see Writ of Error), *Q.B. 137*

—The 9 & 10 Vict. c. 95. s. 129, which prohibits plaintiff recovering costs in an action brought in a superior court, for which a plaint might have been entered in county court, applies to actions on nego-



tible instruments. Upon application to enter suggestion to deprive plaintiff of costs under that section, defendant need not aver that Judge did not grant certificate that cause was fit to be tried in superior court, Q.B. 179

**Costs (continued)**—A cause in Lord Mayor's Court (goods having been attached) was removed into Queen's Bench, and defendant paid money into court in lieu of bail: he then obtained order for plaintiff, who lived in Scotland, to give security for costs, with usual stay of proceedings. After long delay, defendant entitled to rule calling on plaintiff to put in security within a limited time, and, on default, to have money paid out of court, Q.B. 215

— The general rule that an unsuccessful party must pay costs, applicable to cases where party, who has obtained erroneous decision in his favour at Quarter Sessions, unsuccessfully opposes mandamus to correct it. Court, however, may, exercising its general jurisdiction, make an exception under particular circumstances. *Scrabble*—If no opposition were offered costs would not be incurred, Q.B. 272

— Right to proceed for, in action of debt after payment in satisfaction (see Debt), Q.B. 339

— In action for infringement of patent, plaintiff obtained verdict. New trial granted; but before second trial, plaintiff insolvent.—Court refused to order plaintiff to give security for costs, as it could not be fairly presumed that action adopted and promoted by assignees, C.P. 109

— Administrators no right to, upon consent rule in ejectment (see Ejectment), C.P. 147

— To deprive plaintiff of costs under section 129, of County Court Act, defendant must shew affirmatively that case not within exceptions in section 128, C.P. 212

— Defendant must also shew that he dwelt or carried on his business, at time of action brought, within jurisdiction of county court; and it is not sufficient that cause of action arose within jurisdiction, C.P. 221

— To deprive plaintiff of costs under 9 & 10 Vict. c. 95, a 129, defendant must shew cause of action arose wholly or in some material point within jurisdiction of county court within which defendant dwelt or carried on business at time of action brought, C.P. 248

— Declaration containing four counts: defendant pleaded general issue to the whole, and special pleas to each count: verdict for defendant on general issue to first, third, and fourth counts and on all other issues for plaintiff: judgment on second count (upon which plaintiff succeeded), arrested.—Defendant was entitled to general costs of cause. *James v. Brook* overruled, C.P. 277

— The Court will entertain motion for leave to enter a suggestion to deprive plaintiff of costs, upon affidavits of new and material facts, though leave has been refused by a Judge, on ground that affidavits produced were insufficient. The City of London Local Court Act gives a concurrent jurisdiction to the superior courts "where the plaintiff dwells more than twenty miles from the defendant."—That means twenty miles from place where defendant dwells. An affidavit stating that defendant carried on business at No. 133, Fenchurch Street, in city of London, does not sufficiently shew defendant's dwelling-place to entitle him to suggestion to deprive plaintiff of costs. Court, however, gave leave to suggest that plaintiff did not live more than twenty miles from place where defendant carried on business, C.P. 290

— To trespass in three closes, A, B, and C, in one count, defendant pleaded public way over all three, and other pleas of justification; plaintiff traversed

all pleas except so much of plea of public way as related to close C, as to which he new assigned trespasses *extra viam*. Jury found for defendant on plea of public way over closes A. and B, and for plaintiff on not guilty to new assignment, with a farthing damages: other pleas all found for plaintiff. No certificate under 3 & 4 Vict. c. 24. Trespasses in three closes divisible causes of action; and plaintiff entitled under 4 & 5 Anne, c. 16, ss. 4. and 5. to costs of issues found for him as to closes A. and B, on which he had failed; but under 3 & 4 Vict. c. 24. entitled to no costs in respect of close C, on which he had succeeded, but had recovered less than 40s. damages. Effect of 3 & 4 Vict. c. 24. combined with 4 & 5 Anne, c. 16, ss. 4. and 5. as construed by decided cases is that plaintiff is in better condition by bringing action, in which he fails altogether, than by bringing a frivolous one in which he succeeds. Defendant when he succeeds is punished by one statute if he improperly plead pleas which he cannot support, and plaintiff when he succeeds is punished by other statute if he brings a frivolous action, Ex. 32

— Debt for goods sold; pleas as to all but 15s., parcel, &c., *assumpsit indebitatus*; as to that sum, payment into court of 15s. Replication, *similiter* to first plea; to second, that plaintiff accepts the 15s. in full satisfaction and discharge of cause of action in introductory part of that plea mentioned, with prayer of judgment for his costs sustained in that behalf. Jury found defendants never indebted to plaintiff to greater amount than 15s.—Plaintiff entitled to costs, on replication to second plea, Ex. 74

— The 129th section of 9 & 10 Vict. c. 95, which deprives parties of costs who, after its passing, sue in superior courts for causes "for which a plaintiff might have been entered in any court holden under that act," does not apply where action is commenced after act passed, but before Order in Council establishing county court in district where cause of action arose, &c. Ex. 101

— The Queen, by Order in Council, directed that Small Debts Act, 9 & 10 Vict. c. 95, should be put in force in every county on 15th of March 1847: on 25th of March following an action was commenced in Court of Exchequer for cause of action within jurisdiction of County Court of Kingston; but there was not then in existence at that place any county court, at which a plaintiff could have been entered.—Plaintiff, who had recovered a verdict for 40s., entitled to costs, Ex. 131

— A rule was made absolute for entering suggestion depriving plaintiff of costs, and for his paying defendant his costs of suit. The suggestion was traversed by plaintiff. As the costs of suit depended upon trial of suggestion, Court had no power by rule to compel plaintiff to pay them, Ex. 205

— To obtain leave to enter suggestion under 9 & 10 Vict. c. 95, a 129, it is sufficient if affidavit brings case within sections 128, and 129; it need not negative any grounds for refusing suggestion not mentioned in those sections; if they exist they are to be shewn by other party. If a *prima facie* case be made out Court will not inquire into doubtful point of law, which may be raised upon record after suggestion entered. Leave to enter suggestion granted in action on bill of exchange in which plaintiff had recovered less than 20l.; and *quære*—Whether bills of exchange are within jurisdiction of county courts, Ex. 265

— See Attorney. Bankruptcy. Malicious Prosecution.

**Counsel**—Right to address the jury for different defendants (see Practice), Ex. 229

*County Court*.—Tenant, after notice to quit, refused to deliver up possession of premises: plaintiff entered and summons issued out of county court, under 9 & 10 Vict. c. 95. s. 122.—The fact of tenant appearing and shewing cause, not sufficient to oust county court of its jurisdiction to grant warrant of possession; it is for that Court to determine whether the cause shewn is sufficient or not. Decision of county court conclusive upon question, whether tenancy "duly determined by a legal notice to quit." Q.B. 161

— Judge of county court has no power to alter verdict in cause tried by jury. After trial and entry of judgment for defendants, they left the court; and, subsequently, and, as defendants swore they believed, after Court had broken up, Judge rescinded his decision, and ordered new trial, when he gave judgment for plaintiff: affidavits in answer did not shew affirmatively when alteration made, but copy of entry in register was produced, in which it was stated to have been at the same court.—Judge exceeded his jurisdiction, and prohibition granted, Q.B. 170

— The sufficiency of proof of service of a summons entirely a question for discretion of Judge of the county court, and a superior court will not interfere by prohibition, where he has exercised such discretion. *Semble*.—That due service under the rule of practice is not a condition precedent to jurisdiction of county court, Q.B. 174

— On motion for new trial of plaintiff, tried by Judge alone, Judge ordered second trial to be had before a jury, costs of motion to be paid to opposing party.—Opposing party, having accepted those costs, could not afterwards object to the order, Q.B. 183

— Summons out of county court described defendant as executor of A. B. and on his appearance, plaintiff opened the case against him as executor of C. D.: cause of action accrued in 1842: Judge directed a fresh summons to be issued, describing defendant as executor of C. D. bearing same date as first summons, in order to save Statute of Limitations.—Queen's Bench refused to interfere, Q.B. 230

— Jurisdiction of county court not ousted by mere claim of title: Judge is to inquire and decide whether title really in question; but decision not final, and if superior Court be satisfied that title in question, prohibition will be granted, Q.B. 357

— Refusal of prohibition to Judge of, where, notwithstanding an admission by plaintiff that plea of judgment recovered in another court for the same debt was true, judgment was given for the plaintiff, C.P. 16

— Declaration on replevin bond for not prosecuting suit with effect, according to condition, that plaintiff made his plaint at Whitechapel County Court, and "that it was adjudged by the said Court that the said plaintiff should take nothing by his said plaint:" plea, *nil tiel record*: replication, there is such a record: The order made in county court minute book was, "struck out for want of jurisdiction, a disputed title having been sworn to."—Entry did not support declaration, and defendant entitled to judgment, C.P. 190

— Jurisdiction of county court not excluded in action of trespass *qu. cl. fr.*, by claim of defendant, as inhabitant of B., to enter plaintiff's land for purpose of asserting right of fishing there; custom for all inhabitants of B., as such, to enter plaintiff's close and take fish there without limit, being bad; and right claimed under it not a hereditament, and therefore not within proviso in 9 & 10 Vict. c. 95. c. 58, C.P. 206

— The term "cause of action" in 9 & 10 Vict. c. 95. s. 63. means *cause of one action*, and is not limited to an action on one separate contract: that

definition, however, does not embrace all contracts executed, however unconnected and dissimilar in character, which could be included in one *indebitatus* count: but applies certainly to cases of tradesmen's bills, in which one item is connected with another, in the sense that dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, and form an entire demand.

*Quere*.—Whether that section applies to all debts which can be comprised in one description in one count, *ex. gr.* "for goods sold." Certain alleged agents of defendant had given to several persons tickets for goods, which were to be supplied by plaintiff, who had brought 228 actions in county court against defendant, in respect thereof, upon claims none of which exceeded 5*l.*, and many fell short of 20*s.*, the whole amounting to 303*l.* 19*s.*—Prohibition granted. *Quere*.—Whether it would have been granted if the whole of the claims had amounted to 20*l.* only, and items had been sued for by separate plaints, *Ex.* 157

— A local act of parliament imposed rates one half on landlords, other half on tenants; and enacted, that tenants should first pay whole rate and deduct a moiety out of rent, and that every landlord should allow of such deduction "notwithstanding any agreement to the contrary:" after the passing of this act certain premises in the parish were leased, tenant covenanting to pay all rates and taxes; landlord refused to deduct half the rate, and tenant served him with a plaint from the county court. The Court refused a prohibition, "the title to any corporeal or incorporeal hereditaments," within 9 & 10 Vict. c. 95. s. 58. not being in question; *and semble, per Parks, B.*,—the local act did not apply to agreements entered into subsequently to its passing, *Ex.* 168

— Defendant was sued in county court, and without any notice thereof, judgment was given against him and his goods seized in execution: he then applied to Judge under the 80th section of 9 & 10 Vict. c. 95. to set aside judgment and execution; but Judge having imposed certain terms, he declined to accede to them, and paid debt and costs under protest.—Judge had jurisdiction over matter, and prohibition refused, *Ex.* 174

— A *certiorari* to remove plaint may issue *ex parte*, and without notice to the other party, if the Judge, in exercise of his discretion, thinks proper to grant leave, under 9 & 10 Vict. c. 95. s. 90, *Ex.* 247

— *Quere*.—As to jurisdiction of, in actions on bills of exchange, *Ex.* 265

— See Attorney. Costs.

*Court of Requests.* See Writ of Error.

*Covenant*.—A., by indenture, demise to B. certain land, and B. covenanted for himself, his heirs, executors, administrators and assigns, to build certain houses thereupon within two years; B. underlet to C., and covenanted for himself, and his heirs, executors, and administrators, to observe and perform, or effectually to indemnify C. against covenants in first indenture; B. assigned his reversion to D. A having entered and ejected C. by reason of non-performance of first-mentioned covenant.—Held, that B.'s covenant with C. did not run with the land, and D. was not liable to C., Q.B. 111

— Lease contained proviso that on notice being given by lessee eighteen months before end of eighth year, and all arrears of rent being paid, and all covenants and agreements on part of lessee having been observed and performed, lease should determine at end of eighth year; "nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements here-

inbefore contained."—Performance of all covenants by lessee a condition precedent to right to determine lease, notwithstanding concluding clause. In action by lessor on lease declaration alleged specific breaches of covenant, and lessee pleaded that he gave eighteen months' notice to determine lease at end of eighth year, and that at expiration of that year all arrears of rent had been paid, and all covenants and agreements on part of lessee had been observed and performed, and thereupon lease determined; and plaintiff replied, setting out specific breach of covenant assigned in declaration, *abique hoc* that all covenants and agreements on part of lessee had been observed and performed by him at end of eighth year, concluding to country.—Plaintiff may put defendant on proof of his averment in general terms in which it was made, and replication properly concluded to country, Q.B. 301

*Covenant* (continued)—to pay rent until payment and satisfaction of a mortgage is a covenant running with the land, and does not become a covenant in gross till event happens, Q.B. 343

—Declaration in covenant that plaintiff and defendant had agreed to enter into partnership as surgeons, &c. until January 1, 1846, and that it was further agreed that plaintiff should after that time introduce defendant to his patients as his successor in business, &c.; in consideration whereof defendant covenanted to pay 50*l.* on 25th of March 1846, in addition to another sum covenanted to be paid: Breach, non-payment of the 50*l.* Plea, that after 1st of January 1846, and before 25th of March 1846, plaintiff refused to introduce defendant as plaintiff's successor to, &c., wherefore defendant refused to pay said sum of 50*l.*, verification.—Introduction to patients an independent covenant, and not a condition precedent to payment of 50*l.*; and plea bad, Ex. 172

—Plaintiff and defendant, attorneys and solicitors in co-partnership, dissolved partnership by indenture, whereby defendant covenanted with plaintiff that defendant would not thereafter, within next seven years, directly or indirectly, by himself or in partnership, carry on business of attorney or solicitor within fifty miles from Ely Place, nor interfere with, solicit or influence clients of said co-partnership; and if he should infringe covenant, he would immediately pay to plaintiff 1,000*l.* as and for liquidated damages, and not by way of penalty. Intention of parties was, that 1,000*l.* was to be considered as liquidated damages, and not as a penalty, Ex. 226

—Agreement under seal, dated 27th of April 1843, as follows—that sum of 60*l.* shall remain in hands of J. H. from date hereof for one whole year; that at expiration of that period (if interest shall be then paid, and no notice be then given to call in same,) 60*l.* shall continue in hands of J. H. for another year, and so on from year to year, until notice in writing shall be given by W. B. to call in same; that twelve calendar months' notice in writing shall be given to call in the 60*l.*, and that at expiration of notice, same shall be paid by instalments of 10*l.* every third month, until whole amount be paid, first payment of 10*l.* to be made at expiration of fifteen months from date of notice, so that whole amount of 60*l.* shall be paid by end of two years and six months from date of notice.—Held, (*Platt, B. dissentiente*), that notice to pay principal sum might be given at any period of year, and that time of payment of instalments was to be calculated from date of notice, and not from end of current year under agreement, Ex. 278

—By indenture between plaintiff and defendants, plaintiff sold letters patent to defendants, and defendants covenanted to pay by instalments: provided, that if within twelve months from date of

indenture defendants should disapprove of patent, and of their disapprobation and intention to sell it should give notice to plaintiff, payment of instalments should be suspended; and if defendants should within six months after notice sell patent, and retaining to themselves 246*l.* pay over surplus to plaintiff, covenant for payment of entire sum should cease: but if defendants having given such notice should neglect or refuse to observe all other matters or things in proviso, covenant for payment of 840*l.* should stand.—Defendants not having actually sold liable to pay instalments though they had given notice, and were ready and willing and had endeavoured to sell, Ex. 305

—Declaration that by indenture plaintiff conveyed all coals and mines of coal within and under certain premises to defendant, who covenanted to pay 40*l.* for every statute acre of coal; and that he would, till consideration money paid, pay 40*l.* part, &c. annually by half-yearly instalments, commencing from date of indenture, whether a whole acre should have been gotten in any such year or not: averment that at time of making indenture there had been, and still was, coal within and under premises, and that two half-yearly instalments were in arrear.—On error, declaration good, and finding of coal not a condition precedent to payment, Ex. 367

—Where A. covenanted with B. & C, their executors, administrators, and assigns, to pay money, to be held by them on certain trusts, and C. did not assent to or execute deed, and subsequently by indenture, to which neither A. nor B. were parties, disclaimed all trusts of covenant, B. could not alone sue A. upon covenant during lifetime of C, Ex. 338

—See Lease. Pleading. Vendor and Purchaser. Criminal Law. See Commitment. Conviction. Felony. Forgery. Information. Indictment. Perjury. Custom. See County Court. Landlord and Tenant. Mine. Railway.

*Damages*—Power of Court to assess, Q.B. 343

—That damage is too generally stated in declaration, no ground for arresting judgment, C.P. 52

—by reason of carrier not forwarding goods in time for market, Ex. 50

—See Detinue. Malicious Prosecution. Sheriff. Trespass. Vendor and Purchaser.

*Debt*—Where after action brought debt is paid and accepted in satisfaction, and costs are offered but refused, damage merely nominal independently of costs, and plaintiff cannot proceed for costs.—To action on cheque for 25*l.* plea of payment of 60*l.*, after action brought, in satisfaction of debt, damages, and costs: it was proved that after action brought defendant paid cheque, and offered to pay any costs, which offer plaintiff refused. Defendant entitled to verdict on the plea. Q.B. 339

—*Quare*—Whether since 3 & 4 Will. 4. c. 27. s. 26, debt lies for arrears of a rent in fee. But where a party covenanted that he would duly pay certain yearly chief rents,—held, that debt would lie for arrears thereof, Ex. 289

—on simple contract, does not lie where money secured by mortgage had been further secured by bond, though after sale under mortgage defendant admitted correctness of amount and promised to pay it, Ex. 355

*Dead*—or other writing speaks from its execution, and not from day of its date, Q.B. 49

—Delivery presumed where document proved, or admitted, to be signed and sealed, Q.B. 317

—which may operate either at common law or under Statute of Uses, must, in pleading, be taken to operate at common law, unless there is an express averment of an election that it shall operate under statute. *Quare*—Whether an entry by lessee under

such a deed will not be conclusive of an election that it shall operate at common law. *Semble*—That, under a grant to A, B, and C, their *executors*, &c. of liberty to get coals under certain closes until all coals in said closes should be gotten, an interest passes to executors of survivor, if deed operates under Statute of Uses, Ex. 110

— See Banking Company.

*De injuriâ*. See Pleading.

*Demurrer*—to declaration by indorsee against acceptor of bill of exchange, that it did not sufficiently shew days of grace had elapsed before action, frivolous, Q.B. 7

— to declaration on ground that defendant described as "William Henry W. Collier," the initial letter W. being used for an unexpressed name,—not frivolous, C.P. 91

— Where frivolous, Ex. 8

*Detinue*—In detinue for detention of railway scrip re-delivered to plaintiff after action brought and before verdict, jury may as measure of damages take into consideration difference between value of scrip at time of demand and at time of re-delivery. In such case a subsequent delivery being impossible, jury may find facts specially, and so confine themselves to an assessment of damages. Form of judgment may be simply that plaintiff do recover his said damages and costs, C.P. 82

*Devise*—A will is to be construed so as to reconcile words *primâ facie* repugnant. Testator devised certain freeholds by name to his wife for life, remainder to A. in fee; and also devised to his wife in fee "all his real and personal estates both freehold and copyhold, and now surrendered to the uses of my will."—Word "all" to be read "all the residue" to satisfy testator's intention: and A. on death of wife took remainder in fee in estates first devised, Q.B. 119

—"I give, devise, and bequeath all my real and personal estate, monies, securities for money, and all other my real and personal estate of what nature or kind soever, and wheresoever the same may be, which I am now possessed of, or which at any time hereafter I may be possessed of, or entitled unto, subject to the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will, unto my dear wife, to and for her sole and separate use and benefit," gives devise an estate in fee in lands of testator, Ex. 51

— of lands to P. M., testator's brother, for life, remainder to use of first son of P. M. for life; remainder to use of first son of said first son and his heirs male; and in default of such issue, to use of all and every other the son and sons of P. M. severally and successively for like interests and limitations as before directed with respect to first son of P. M. and his issue; and in default of issue of P. M., or in case of his not leaving any at his decease, then over. P. M. never had issue:—All the limitations subsequent to that to use of first son of P. M. void for remoteness; and if P. M. had had sons they would not by application of *cy-pres* doctrine have taken an estate tail, inasmuch as by such construction estate would devolve in line of succession different from that expressly designated by testator, Ex. 81

— Testator by will duly executed to pass real estate, gave considerable interests in his real estate to his daughter, and, subject thereto, gave his property to her children, &c.; proviso, that if testator's said daughter, or her husband, or any person or persons on her, or his, or their behalf, should dispute the will or his competency to make it, or should refuse to confirm it so far as he or she lawfully could, when required by the executors to do so, the disposition in favour of daughter should be revoked:—Held, a good and valid condition in law, Ex. 106

— Word "estate" in operative part of will passes not only the corpus of property, but all testator's interest in it, unless controuled by context: and neither do superadded words of local description more applicable to corpus of property, nor words apparently explanatory of meaning of term in devise itself, prevent it from passing whole interest: but where word "estate" not used in operative clause of devise itself, but introduced in another part of will referring to it, it cannot be construed as extending operative clause, whether prior or subsequent.—Words "who have issue" construed to mean who *have* when will takes effect, and not applicable to children born after testator's death, Ex. 337

— Devise of three several estates to testator's three daughters, M, C, and L, for their respective lives, remainder to their children as tenants in common in fee, provided "that if any or either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then and in that case the property hereinbefore given to such daughter so dying shall go and accrue to the survivors or survivor of my said daughters, their heirs," &c., "in equal shares and proportions as tenants in common; and if all my daughters, except one, should depart this life without having lawful issue, then that the share of such daughters so dying shall go to the survivor of my said daughter, her heirs and assigns for ever." C died October 3, 1841, leaving a son; and on the 25th L. died without having had issue. On 22nd of December M. and her husband conveyed to trustee property devised to her for life, and also that devised to L, to hold to use of M. for joint lives of herself and her husband, with remainder to survivor in fee:—Word "survivor," in will, read in its ordinary sense, and upon death of L. estate devised to her for life vested absolutely in M. in fee. Son of C. could not, under any contingency, become entitled to any interest in property devised to M. Under will and conveyance husband of M. in her right, had estate in possession during joint lives of himself and his wife, Ex. 331

— A corporation, seized in fee of *locus in quo*, by indenture of 17th of February 1800, demised same to H. for term of lives and years. By indenture of 23rd of July 1803, H. assigned to C, to secure payment of 1,200*l.* lent by C. to H. By indenture of 9th of February 1804, reciting former indentures, and also that H. had agreed to sell part of land to M. and W. for a sum, out of which sum due from H. should be paid to C, C. bargained, sold, assigned, and transferred, and H. granted, bargained, sold, assigned, and transferred to M. and W. part of demised premises, together with right of way. In 1812 H. died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised same, after her death, to J. and M. in manner following, "upon trust to pay and apply the rents, issues, and profits of the same to and for the life and benefit of my daughter Mary and her assigns during her life, and independent of her present or any future husband; and from and after the decease of my said daughter, I give, devise, and bequeath my real and household estates as aforesaid, unto and equally among all and every the children of my said daughter Mary, share and share alike, as tenants in common." In 1816 wife of H. died. By indenture of 11th of December 1817, corporation assigned to trustees reversion in fee simple of *locus in quo*. Trustees took only an estate during life of Mary, that lease for lives did not merge in grant of reversion. Under rejoinder *ne granta pas*, facts of grant only in issue, and seisin admitted, Ex. 370

— See Will.

**Distress**—Sufficiency of plea under 11 Geo. 2. c. 19. s. 1, Q.B. 35

— Relpelin : avowry, that A. held land, as tenant to B. under demise, subject to certain rents, provisions, conditions and stipulations, *inter alia*, that H. should not during continuance of tenancy sell any hay off premises, under penalty of 2s. 6d. for each yard of hay so sold, to be recovered by distress as for rent in arrear : averment of sale of 800 yards of hay by A, contrary to said stipulation, by reason whereof 2s. 6d. per yard became due to B ; non-payment thereof ; and distress for same : Plea, *non tenet* : Verdict for the defendant, and judgment under 17 Car. 2. c. 7, and Court of Queen's Bench, on error, affirmed judgment.—On error, brought upon that judgment Court of Exchequer Chamber decided that sum distrained for not being rent service, judgment under 17 Car. 2. c. 7. was erroneous although after verdict avowry might have sustained judgment for defendant at common law. Court no power under circumstances to give judgment for defendant *pro retorno habendo* at common law, but could simply reverse judgment, Q.B. 291

— See Trespass.

**Ecclesiastical Law**—Under 25 Hen. 8. c. 20. s. 5, after election of a bishop by dean and chapter of cathedral church by virtue of *congé d'élire* and letters missive, person so elected is to be reputed and taken by name of lord elected of the see, and the king is thereupon to issue letters patent to archbishop commanding him to confirm election, and to invest and consecrate him, and if he fail to do so for twenty days he is to incur penalties of *promoveance*.—Held, by Lord Denman, C.J. and Erle, J., that archbishop acting merely ministerially is bound to confirm bishop elect, and has no authority to hear any opposition advanced against person so elected : per *Patteson, J.* and *Coleridge, J.*, that confirmation a judicial act, which archbishop is to conduct according to principles of canon law, and parties opposing are entitled to appear in his court and enter their objections. Also, per *Patteson, J.* and *Coleridge, J.*, that opposers not having been allowed to appear and be heard, there was a declining of jurisdiction by archbishop, for which a mandamus would lie, Q.B. 253

**Ejectment**—Where interest in a mine recoverable by, Q.B. 34

— Two of three females, coparceners in tail, suffered recoveries, but third did not : all married, and husbands entered into agreement for partition by deed of lands held in co-parcenary, but for nothing more : no such deed had been executed, but lands had been held according to agreement from its date. In action by heir in tail of parcener who did not suffer a recovery, within twenty years after her death, and before 3 & 4 Will. 4. c. 27, to recover her share from husband of one of other co-parceners.—Possession was under agreement, and not adverse. Also, that nothing could be presumed beyond what agreement contemplated, which provided for a deed and not a recovery, Q.B. 202

— Right to begin (see Trial), C.P. 127

— Consent rule a personal undertaking only, character of which not altered by 1 & 2 Vict. c. 110. s. 18 ; and right to costs upon such rule does not survive to personal representatives of successful party, C.P. 147

— Notice to tenant in possession to appear in next term but one, insufficient, C.P. 176

— A. (tenant in tail) made a lease for years to B. not conformable to 32 Hen. 8. c. 28 : A. died, and C. next tenant in tail in remainder applied to B. to attorn, and after some negotiation, refused to

pay any rent, because D. was entitled to estate.—B. did not become tenant to C, and C. could maintain ejectment against B. without notice to quit ; that confession of entry in consent rule sufficient foundation to support ejectment ; and that setting up D.'s title amounted to disclaimer of C.'s title, C.P. 268

— On motion for judgment against casual ejector, service on wife of tenant in possession, by delivering a copy of declaration and notice to her, and reading them over to her, is sufficient, Ex. 176

**Error.** See Execution. Felony. Writ of Error.

**Escape.** See Bankruptcy Commissioner.

**Estate in Fee**—Whether devise passes, Ex. 51

**Evidence**—The reception in evidence of a document which is not legal evidence of facts contained in it, if it consist of an enumeration of items otherwise legally proved, — is no ground for a new trial, Q.B. 166

— At trial of indictment for perjury, on occasion of making affidavit to hold C. to bail, it was proved that A. had prosecuted action against C ; that verdict was taken for A, subject to reference ; and that arbitrator awarded in favour of C.—Award not admissible against A. on trial of indictment, Q.B. 187

— Agent of lessor of plaintiff not being in *possession* town when deed was required material to proof of title, deed was produced from his carpet bag, which was cut open in court by attorney for lessor of plaintiff, who also identified deed.—Sufficient *prima facie* evidence of proper custody, Q.B. 199

— under not possessed (see Trover), Q.B. 229

— A document admitted to be "signed, sealed, and executed as it purports to be" was produced by party who was to take benefit under it, and concluded "as witness the hands and seals of" (the parties), and attestation was as to signing and sealing only.—Delivery inferred and deed proved, Q.B. 317

— Inadmissibility of parol evidence to contradict terms of charter-party, Q.B. 350

— An insolvent's schedule which was offered in evidence, as containing admission by insolvent of a debt, consisted of several sheets, each of which was signed by insolvent, and first one only (not the sheet containing admission) was signed by an attesting witness.—Attestation applied to signature of all the sheets, and schedule not admissible without calling attesting witness, C.P. 149

— In covenant upon lease, executed on behalf of lessor under power of attorney, there being notice to defendant to produce power but no *subpoena duces tecum* to party who executed lease.—Power belonged to party who executed lease under its authority, and secondary evidence of its contents not admissible. An attorney served with a *subpoena duces tecum* to produce a title-deed being privileged from producing it, secondary evidence of its contents receivable. He is not compellable to state its contents, but if he willingly does so, his evidence is admissible, Ex. 119

— In support of plea of coverture, alleging marriage with one J. G. copy of marriage register was put in evidence, and witness stated he was acquainted with one J. G. and that one of signatures to original register was in his handwriting.—Evidence of identity, and original register need not be produced, Ex. 200

— Admissions. See Guarantee.—Proof of new lease. See Lease. And see Bill of Exchange. Execution. Joint-Stock Company. Sheriff. Stamp. Witness.

**Excise.** See Conviction.

**Execution**—may issue on a rule of court under 1 & 2 Vict. c. 110. s. 18. after expiration of a year and a

day, without a *sci. fa.* or any application to Court, Q.B. 68

— A *ca. sa.* may issue for costs of nonsuit, notwithstanding 7 & 8 Vict. c. 96. s. 57, which applies only to cases where plaintiff recovers something for debt and something for costs, and where sum recovered for debt does not exceed 20*l.* Under 1 & 2 Vict. c. 110. s. 17, interest is recoverable on a judgment for costs of nonsuit. An award of *ca. sa.* into a different county, without *testatum* clause, is error on the record, C.P. 288

— Returns of names of shareholders under 7 & 8 Vict. c. 110, sufficient *prima facie* evidence that parties named in them are shareholders, to justify Court in issuing execution against them under s. 68. Notice under that section need not be personally served, Ex. 264

— See Arrest. Banking Company. Joint Stock Company. Sheriff.

*Executors.* See Pleading.

*Extent*—Writ of, may be made returnable in vacation, Ex. 204

— See Prisoner.

*Extortion.* See Sheriff.

*False Imprisonment*—Where B. voluntarily attended before magistrate to answer charge of embezzlement, which C. then preferred against him, and before taking depositions formally, magistrate said, "Do you intend giving him into custody for it?" and C. replied, "I do give him into custody;" and B. was then told by a constable to go into the dock.—The act of C. only a calling on the magistrate to exercise his jurisdiction; and the placing C. in dock must be referred to authority of magistrate, and C. not liable in trespass for imprisonment, C.P. 329

*Feigned Issue.* See Lunatic.

*Felony*—The first count of an indictment charged a stealing in dwelling-house of D. above 5*l.*; second count charged simple larceny of monies of D: jury process was to try "whether prisoners are guilty of felony aforesaid;" record stated that jury found prisoners were "guilty of felony aforesaid:" judgment of transportation for ten years. On error to Exchequer Chamber,—held, (affirming judgment of Queen's Bench) that entry of verdict and judgment uncertain, "felony" in this *venue* meaning no more than one felony. *The King v. Powell* is not overruled, Q.B. 163

*Fines and Recoveries.* See Acknowledgment by Married Women.

*Fire.* See Negligence.

*Fishery.* See Action.

*Fistules.* See Stamp.

*Foot-Race.* See Gaming.

*Fraud*—Any false statement knowingly made for purpose of inducing party to enter into a contract is fraud in law. Fraud in one contracting party does not render contract void, but only defeasible at option of other contracting party. Money had and received by agent under such a defeasible contract ceases to be had and received to use of principal when contract is defeated; and agent may shew this as a defence against principal, though fraud was entirely his, and principal was innocent of it, Ex. 256

— See Pleading.

*Fraudulent Conveyance.* See Bankrupt.

*Freehold Rent.* See Debt.

*Frisolous Demurrer.* See Bill of Exchange. Demurrer. Pleading.

*Gaming*—Where, after 8 & 9 Vict. c. 109, money was deposited by two persons with a stakeholder to abide

event of wager on trotting match; and before its determination one of depositors repudiated wager,—in action for money had and received, deposit recoverable from stakeholder, notwithstanding 18th section of that act. *Semble*—That if that section be a bar to such action, it must be specially pleaded, C.P. 102

— Since 8 & 9 Vict. c. 109, a foot-race is a lawful exercise. Two persons deposited 10*l.* each with stakeholder to abide event of foot-race to be run between them.—Money deposited was "a subscription" for a sum of money to be awarded to winner of "a lawful game," within 8 & 9 Vict. c. 109. s. 18, C.P. 215

*Geol.* See Corporation. Prisoner.

*Gifts*—Information for receiving in India, Q.B. 347

*Goods sold and delivered*—Carrier having by mistake delivered goods to defendant of better quality than what he had ordered, may maintain action for goods sold and delivered upon evidence of verbal agreement by defendant "to pay for the same he had ordered" C.P. 302

— See Pleading.

*Grant*—A ren-charge, with power of distress, cannot be created except by a grant binding some legal interest in land, and ceases to exist when person who is owner of rent becomes entitled to the whole legal estate in land out of which it issues. Interest of mortgagor in possession not a legal estate at all, and cannot support rent-charge with powers of distress. Grant, purporting to be grant of rent-charge, with power to distrain, made by persons having no legal estate in land, may operate as an irrevocable licence by grantor to seize goods on land at time grantee seizes, and to treat them as a distress, and may therefore justify seizure of goods of grantor himself, and give grantee an interest in them after seizure; but it does not give any interest in goods of grantor before seizure, and does not justify seizure of goods of third persons at all: therefore, in trespass *de bonis asportatis* by assignees of bankrupt, plea setting forth indenture or mortgage of copyholds in fee, by which mortgagor granted that mortgagee might distrain for arrears of interest; and averring surrender and admission of mortgagee in pursuance of it, and justifying seizure of goods on premises, whilst still in possession of bankrupt, but after bankruptcy, as a distress,—held bad after verdict, Ex. 258

*Guarantee*—B. gave A. this memorandum in writing:

—"In consideration of your agreeing to supply S. with goods upon credit (the amount to be in your discretion), I hereby guarantee you the due payment of such sum as he may now, or at any time and from time to time hereafter, owe you. My liability under this guarantee is to be limited to principal sum in running account of 100*l.*": declaration thereon, that confiding in B.'s said promise A. did afterwards supply S. with goods amounting to 85*l.*; that S, though requested, had not paid for the same, of all which B. had notice: breach, non-payment by B. on request, of 85*l.* On general demurrer, declaration good without an averment of reasonable notice of goods having been supplied; and guarantee disclosed sufficient consideration for B.'s promise, C.P. 209

— The following was signed and delivered by defendant to plaintiff in exchange for an indenture afterwards executed by plaintiff:—"In consideration of your having, by indenture, agreed to accept payment of the debt owing to you by A. B, by the following instalments, that is to say, 10*l.* in the pound, on the 18th day of August next, &c., I promise to guarantee the payment of the instalments." True construction was, that defendant made his promise in consideration that plaintiff would execute an indenture, and release A. B; and, consequently,

- execution of instrument not an admission by defendant that plaintiff had released A. B. and furnished no evidence of his having done so, *Ex. 283*
- Habeas Corpus*—not granted after conviction and sentence at Nisi Prius, as effect would be to review the judgment of one of the superior courts. The remedy is by writ of error, *C.P. 97*
- See Infant Prisoner.
- Highway*—If a road has been used by public for a great number of years, dedication thereof by owner of soil may be presumed; it is immaterial who owner was, or whether he intended to dedicate, *Q.B. 177*
- The 5 & 6 Will. 4. c. 50. s. 85. requires certificate of Justices for stopping up a highway to be read at a "Quarter Sessions to be holden for the limit" within which highway shall lie, next after four weeks from day of certificate having been lodged with clerk of peace, and section 88. gives appeal to "said Quarter Sessions" upon giving ten days' notice thereof. This means General Quarter Sessions for county, and not any adjournment thereof; and where Sessions held on certain fixed days at different places for different divisions of a county, but on each by adjournment from preceding, the four weeks under 85th section, and the ten days' notice of appeal required under 88th section, must be reckoned with reference to commencement of sessions for first division, though highway not situate within such division, *Q.B. 217*
- See Waste.
- Indebitatus Assumpsit*—Where father of illegitimate child, to prevent mother from applying for bastardy order, promised to pay her 2s. 6d. per week for child, and time for applying for order had expired, —*indebitatus assumpsit* by mother against father for maintenance maintainable, consideration, originally executory, having been executed, *C.P. 106*
- See Master and Servant.
- Indictment*—Trial of indictment removed by *certiorari* from Central Criminal Court by a Middlesex jury, *Q.B. 50*
- Immateriality — Conclusion — Surplusage (see Perjury), *Q.B. 72*
- Indictment that defendant on Henry Bennett did make an assault, and him the said William Bennett did beat, &c.,—good, in arrest of judgment, *Q.B. 214*
- An indictment, caption being in usual form, commenced "The jurors of our Lady the Queen," and laid offence as "in the tenth year of our Sovereign Lady Victoria," &c.—On writ of error, taking caption and indictment together, no error in statement of jurors; and statement of time, if incorrect, cured by 7 Geo. 4. c. 64. s. 20, *Q.B. 286*
- Infant*—Refusal to disturb custody of a boy of nine years of age, brought up by *habeas corpus*, where it appeared that upon occasion of husband's death, mother then in India, gave child into care of her late husband's mother, who, subsequently died, leaving all her property to this grandchild and his brother, and appointing two persons her trustees and executors, and guardians of child; these persons acted, and had continued to act, as guardians, and were recognized as such, and approved of by mother, and their conduct as guardians was not impeached in any way; but she, marrying again, and still residing in India, suddenly executed, conjointly with her husband, a warrant of attorney, authorizing parties, therein named, to demand and receive custody of child, which demand having been made, and refused by guardians, application was made under warrant of attorney, for *habeas corpus*. *Semble*—That party of right entitled to custody of an infant cannot, by warrant of attorney, empower another person to apply to this Court to change the custody, *Q.B. 21*
- See Bill of Exchange. Master and Servant.
- Inferior Court*—Plea of justification under writ out of inferior court, tested on a day not being a court day, is bad, *C.P. 328*
- See Attorney. County Court. Ship and Shipping.
- Information*—for receiving gifts in India, *Q.B. 347*
- Inkeeper*. See Lien.
- Insolvent*—Defendant, taken in execution upon a judgment, obtained interim order for protection, under 7 & 8 Vict. c. 96, and afterwards attended upon his first examination before commissioner, who dismissed his petition under 24th section, upon ground of debt having been fraudulently contracted. Defendant not being then in custody, commissioner did not make any order remanding defendant to his former custody, and defendant being at large, was afterwards, on 20th of August, taken in execution upon a fresh *ca. sa.* upon same judgment.—Motion made on 6th of November to set aside this writ, and to discharge defendant out of custody, too late. Under 6th section of statute plaintiff authorized in taking defendant in execution upon same judgment. *Semble*—First, this the correct form of process to use. Secondly, under circumstances commissioner had power to make an order remanding defendant to his former custody, *Q.B. 45*
- Right of official assignee of insolvent, under 5 & 6 Vict. c. 116. s. 1, to sue in his own name for outstanding debt due to insolvent, *Q.B. 50*
- A provisional assignee, in whom a prisoner's estate and effects are vested by order of Insolvent Debtors Court, under 1 & 2 Vict. c. 110. s. 37, has power, where such prisoner is a beneficed clergyman, to apply for sequestration under section 55, *Q.B. 57*
- Debt: Plea, set-off: Replication, that after set-off became due, plaintiff, by order of Court for Relief of Insolvent Debtors, was duly discharged, according to a certain act of parliament made and passed in first and second years of her Majesty, intitled, &c., from said set-off; without this, that said order and discharge still remains in full force.—Order and adjudication and discharge a legal answer to plea of set-off, if properly pleaded; but section 91. of 1 & 2 Vict. c. 110, which allows discharge to be "pleaded generally," only applies to a plea, and replication bad in form, for not sufficiently shewing that plaintiff entitled to his discharge under the statute, *C.P. 185*
- A final order under 7 & 8 Vict. c. 96. is an absolute bar to an action for the debt as to which it is a protection. In debt, defendant pleaded that after accruing of debt, and after 5 & 6 Vict. c. 116, and before 7 & 8 Vict. c. 96, and before commencement of suit, &c., petition for protection from process was duly presented by defendant to Court of Bankruptcy, and afterwards filed; and that after 7 & 8 Vict. c. 96, a final order for protection and distribution was made in matter of petition, by Commissioner of Court of Bankruptcy; and that debt accrued before filing of petition.—Plea good both in form and substance, *Ex. 249*
- See Costs. Pleading.
- Insurance*—Whether terms in condition of policy "commit suicide" include all cases of voluntary self-destruction whether felonious or not, or require that party shall die by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act so as to be a responsible moral agent, *C.P. 2*
- Policy on a vessel at and from Liverpool to

ports and places in China and Manilla, all or any, during ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of and at Cape of Good Hope: the vessel sailed direct from Liverpool to a port in China, having on board a cargo for that port, and also for Manilla: she discharged portion of cargo at a port in China, and thence proceeded to Manilla, where she discharged remainder: at Manilla captain took on board on freight 230 chests of opium for Tongkoo, and sailed from Manilla (vessel not being a tenth part laden), intending to seek there a freight back to England, and whilst sailing towards Tongkoo vessel was by perils of sea totally lost: Tongkoo is out of regular course from Manilla to England.—Held, and affirmed in error, that sailing from Manilla to Tongkoo not a deviation; words in policy meaning not "from Manilla" only, but "from ports or places in China and Manilla, all or any," Ex. 135

*Interest*—on judgment for costs of nonsuit (see Execution), C.P. 288

*Irregularity*—Where plaintiff obtained verdict upon writ of trial, and Judge at chambers instead of staying execution ordered verdict to be set aside on account of irregularity of notice of trial,—order not a nullity, but irregular, Ex. 52

— See Pleading. Practice. Variance.

*Issuable Plea*—Plea to declaration on bill for 20*l.*, drawn by L. accepted by defendant, and indorsed by L. to plaintiffs, that before indorsement by L. L. was indebted to defendant in 1*l.* 13*s.* 1*d.*, and that L. held bills on terms that said debt should be set off against sum due from defendant to L. upon bill; that L. in order to deprive defendant of his right of set-off in respect of 1*l.* 13*s.* 1*d.*, and in fraud of defendant, and in collusion with plaintiffs, indorsed bill to plaintiffs, who were suing as agents for L., not an issuable plea, Ex. 28

— A plea bad only on special demurrer not non-issuable, Ex. 169

*Joint-Stock Company*—Plaintiff obtained judgment against joint-stock company, and gave notice to shareholder that application would be made to Court or a Judge for leave to issue execution against him; and a summons was taken out and dismissed before Judge at chambers. Notice exhausted, and no further application could be made on same notice, C.P. 305

— In an action *ex contractu* against a joint-stock company, completely registered under 7 & 8 Vict. c. 110, plaintiff must prove a contract made by persons having authority from all the shareholders to bind them. Plaintiff is not confined to proof of authority conferred by the deed; but it is not enough to shew that contract was made or sanctioned by some of directors, without proving that by the deed or otherwise shareholders had authorized that number to act for them. Where the deed of a company appointed eleven directors and declared that five should be a quorum,—Company not bound by contracts made at a board meeting by three only. The company cannot object that contract not in writing, signed by two directors, and under seal of company, or signed by an officer of company; but it may object that persons making contract had no authority at all to bind the whole shareholders. *Semble*—That acts and admissions by a competent number of governing body of company are admissible as evidence against company, and have same legal effect as if made by company itself, Ex. 252

— See Banking Company. Execution. Pleading. Railway.

*Judge at Chambers*—has jurisdiction to set aside rule to change venue obtained on common affidavit, C.P. 326

— All powers possessed by superior courts at common law, as well as those given by statute to Courts in general terms, without any special limitation, may be exercised by a single Judge, as delegate of Court, Ex. 57

*Judgment*—Court will not interfere to direct senior Master to receive and register memorandum for purpose of binding real estate, pursuant to 1 & 2 Vict. c. 110. s. 19. Master received such memorandum to bind lands of member of banking company by judgment recovered against public officer, C.P. 15

— Validity of Judge's order, under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, charging annuity, payable out of suitors' fund, by order of Lord Chancellor, under 46 Geo. 3. c. 128. Question of validity open, and rule *nisi* to set aside the order discharged, Ex. 13

— Form of. See Detinue.

— against casual ejector. See Ejectment.

— of assets *quando*. See Pleading.

— *pro retorno habendo*. See Distress.

— See Banking Company. Distress.

*Judgment as in Case of Nonsuit*—Action against four defendants; two died before issue joined, and issue was joined against two survivors; plaintiff neglected to make up record and proceed to trial. Surviving defendants not entitled to judgment as in case of nonsuit unless the deaths of their co-defendants appeared by suggestion on record. *Semble*—If plaintiff fails to make up record and enter suggestion of death, defendant should call upon him to do so, and if he fail, apply for leave to do it; and (suggestion being entered) should move for judgment as in case of nonsuit, C.P. 120

— Peremptory undertaking to try not an engagement to try at all events, and a *bond fide* attempt to fulfil undertaking a compliance therewith. Plaintiff entered cause for trial according to peremptory undertaking, but it was not reached in course of business and made a remanet.—Defendant not entitled to judgment as in case of nonsuit, C.P. 213

— Terms of enlarging rule for, in action against allottee of shares, Ex. 18

*Jurisdiction*—of Judge. See Judge at Chambers.

— of Quarter Sessions. See Appeal.

— of county court. See County Court.

— See Perjury.

*Justices of the Peace*. See Lunatic. Master and Servant.

*Landlord and Tenant*—Agreement by A. under mortgage deed, to become tenant to B. of premises demised, "henceforth at will and pleasure of B. at yearly rent of 25*l.* 4*s.* payable quarterly," creates tenancy at will; and occupation for two years, and payment of rent under agreement, do not make B. tenant from year to year, Q.B. 3

— Defendant held under lease from A. for fourteen years and a half from Christmas 1831, and paid rent to A. until it expired on June 24, 1846; he continued in possession, and paid rent to lessor of plaintiff, who had become entitled to premises.—Notice to quit expiring on June 24, held good, Q.B. 108

— Sheriff who seizes goods in execution, and assigns to execution creditor, having notice that year's rent is due to landlord, may be liable to an action at suit of landlord, but landlord cannot distrain for his year's rent while goods are in possession of sheriff or his assignee. *Trespass qu. cl. fr.* of plaintiff: plea, entry to seize growing crops under distress for rent: replication, previous seizure under *f. fa.*, at suit of



- plaintiff against tenant of *locus in quo*, and assignment to plaintiff by sheriff: rejoinder, that seizure made after notice to sheriff and plaintiff that year's rent was due to landlord, &c.—Rejoinder bad; and replication not a departure from declaration, for although replication shewed a tenant from whom rent due at time of execution, yet that possession was consistent with possession of plaintiff at time of trespass, Q.B. 278
- Landlord and Tenant** (continued)—Custom of country applicable to all tenancies, whether verbal or in writing, unless expressly or impliedly excluded by written terms, Q.B. 319
- Declaration that, in consideration that B. had become tenant to A, upon terms that B. should, during his said tenancy, keep premises in repair, B. promised A. to keep premises in repair during his said tenancy upon terms aforesaid; that tenancy of B. continued until commencement of action, but B. did not, during his said tenancy, keep premises in repair. Plea, that after B. had become tenant to A, and before committing breach, A. assigned to C. all his interest in demised premises and in reversion expectant on determination of B.'s said tenancy; and A. thenceforth ceased to have anything in demised premises, and B. thence ceased to be tenant thereof to A. Plea no answer, contract to repair being contract to repair during tenancy, which was not put an end to by assignment, C.P. 192
- Where payment of rent unexplained would ordinarily imply yearly tenancy, payer or receiver of rent may give in evidence circumstances under which payment made, for purpose of repelling such implication, C.P. 263
- Notice to quit. See Ejectment. And see County Court.
- Land Tax Redemption**—Representatives of tenant for life who has redeemed land tax under 42 Geo. 3. c. 116. may be compelled by reversioner to accept consideration paid for redemption, together with arrears of interest, so as to render land no longer chargeable with interest. And, where defendants in replevin avowed as devisees of tenant for life in respect of yearly sum payable as interest on redemption money, and plaintiff pleaded in bar that he held a moiety of remainder in fee as tenant in common, and had, before the distress, tendered to defendants redemption money and interest,—Held, that the plea was good, Q.B. 273
- See Copyhold.
- Lease**—B, tenant for life, with power of leasing, made in April 1788 a lease to A. for ninety-nine years, determinable on three lives, of a portion of premises already demised to A. by two several leases of 1760 and 1784: lease of 1788 purported to be granted "for and in consideration of the surrendering up to B." of the leases of 1760 and 1784; "and in order to effectuate an agreement entered into between A. and one C. for sale to C. of residue of premises, which residue lease recited was intended to be demised by B. to C., by indenture of lease bearing even date therewith:" lease to A, of April 1788, was not a good execution of the power, but lease of 1784 was: lease of 1760 had determined: residue of premises, mentioned in lease to A. of April 1788, was demised to C, by indenture of that date, by a valid subsisting lease.—Held, that acceptance by A. of lease of April 1718, did not as to premises thereby demised to A, operate as an absolute surrender in law of lease of 1784; and on ejectment being brought by remainder-man after death of tenant for life, that lease of 1784 must be considered as subsisting, Q.B. 143
- In 1755, tenant for life, under a power of leasing demised lands to defendant for ninety-nine years, determinable on lives; and in 1812, under same power, a further lease in reversion of same lands for ninety-nine years on additional lives; that lease was not a valid execution of the power; but purported to be made "in consideration of the surrendering up into the hands of the lessor by the lessee" of lease of 1755, "which surrender is hereby made and accepted accordingly."—This did not operate as a surrender of lease of 1755, and one of lives named in that lease being still *in esse*, ejectment would not lie, Q.B. 151
- Proof of a conversation fourteen or fifteen years back with owner of property in dispute, under whom lessor of plaintiff claimed, in which owner of certain premises admitted they had been released, without stating term, or lives, or rent, or any other particulars, cannot be made available as proof of new lease having been granted, C.P. 263
- Where lease executed on certain day, *habendum* from previous day, tenant who has entered between the two days not liable on covenant to repair for breaches committed during interval, Ex. 17
- See Deed. Ejectment. Power. Stamp. Vendor and Purchaser.
- Leave and Licence**—Plea of, to assault or imprisonment (see Pleading), Q.B. 109
- Libel**—Allegorical terms of defamatory character of well-known import, such as imputing qualities of "froze snake" in the fable, are libellous *per se*. So is writing to charitable institution calling on members "to reject the unworthy claims of Miss H.," and stating "she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander D.," secretary of institution, Q.B. 306
- Licence**. See Appeal. Assignment.
- Lien**—An innkeeper received carriage and harness of a person not residing at his inn, but who took refreshments there occasionally, and whose friend resided there for some time at his credit and by his direction.—Innkeeper had no lien upon carriage, &c. for his bill, which included charges for keep of horses, standing of carriage, and refreshments for owner and his friend, C.P. 219
- See Deed.
- Limitations, Statute of**—To plea, under 3 & 4 Will. 4. c. 42. s. 5, that cause of action on a deed did not accrue within twenty years, replication, alleging written acknowledgment of debt within twenty years, need not set out writing, Q.B. 298
- In action for money lent defendant pleaded Statute of Limitations; and at trial plaintiff proved transmission of money to defendant, and payment of a half-yearly sum for interest up to a certain time, and produced an answer to a bill in Chancery, in which defendant admitted having paid the half-yearly sum within six years, but asserted that it was paid by way of annuity, and not as interest. Assuming that acknowledgment of payment must be in writing, and signed under 9 Geo. 4. c. 14. s. 1, in order to bar the statute, the above evidence for plaintiff was sufficient to go to jury. Construction of admission in answer for the Court, and the whole should be left to jury; but they might believe fact of payments having been made half-yearly, but reject residue, and infer from other evidence that payments were really made in respect of interest. Words used at time of making a payment qualify it; but it is for the jury to judge of truth of statement accompanying admission of previous payment, Ex. 35;
- See Amendment. County Court. Ejectment.
- Local Act**. See Vestry.
- Local Court**. See Costs.
- Lord's Day**—excluded in computation of time for giving notice of appeal in bastardy, Q.B. 181

— Lodging warrant of detainer with gaoler on, legal, *Ex. 54*

**Lunatic**—At hearing upon lunacy commission, it was agreed proceedings should drop in consideration of lunatic assigning her property to trustees; and agreement was signed by her counsel and her title-deeds given up. Upon issue to try whether lunatic entitled to deeds notwithstanding agreement, — Held, that title to deeds independently of agreement could not be disputed. Also that agreement was under duress, and not binding on lunatic, *Q.B. 105*

— See Poor Law.

**Malicious Arrest.** See Pleading.

**Malicious Prosecution**—Reasonable and probable cause is to be determined on facts, existence of which, in cases of doubt, can only be properly decided by jury; but it is not necessary for Judge, when there are a variety of facts, to leave each fact specifically to jury, but he should decide, on a general view of circumstances, whether there is or not reasonable and probable cause for prosecution. Where one of several defendants, in an indictment for conspiracy, pays costs of himself and others of defending indictment, he may recover such costs as damages in action for malicious prosecution, *Q.B. 65*

— In case for malicious prosecution for perjury, Judge left it to jury to say whether defendant believed, or had reasonable and probable cause for believing, that plaintiff was guilty of perjury, and whether he acted maliciously; and jury having found he did not believe that plaintiff was guilty of perjury, but had acted from improper motives, with view to exclude his evidence,—On motion for new trial, Judge right in holding there was evidence of malice. In such action not guilty does not put in issue the termination of prosecution by acquittal of plaintiff, *Q.B. 313*

— See Witness.

**Malicious Trespass Act.** See Arrest.

**Malster**—Mode of returning malt into couch-frame so as to ascertain increase, within penalty of 7 & 8 Geo. 4. c. 52. s. 33, *Ex. 69*

**Mandamus**—Writ of, in setting forth title and qualification of L. to have his name inserted in Burgess roll, alleged, *inter alia*, in terms of 5 & 6 Will. 4. c. 76. s. 9, that he had paid all such rates (including therein all borough rates directed to be paid under provisions of that act) as had become payable by him.—Return traversing this allegation in its terms, good on demurrer, *Q.B. 136*

— By 9 & 10 Vict. c. 38. Commissioners of Woods and Forests authorized to treat for and purchase lands for purpose of forming Battersea Park.—Where notice of intention to take lands given, but no actual taking, mandamus lies to compel Commissioners to issue their warrant to sheriff to summon jury to assess compensation: fact of Commissioners having no funds matter of return to mandamus, *Q.B. 341*

— See Attorney. Beer Act. Borough Fund. Costs. Ecclesiastical Law. Railway. Rate. Vestry.

**Marriage**—The 5 & 6 Will. 4. c. 54. renders absolutely void all marriages solemnised after its passing between persons within prohibited degrees, and which were previously voidable only by sentence of ecclesiastical court, pronounced during life of both parties. A marriage with deceased wife's sister contracted after passing of that act is void. The "prohibited degrees of consanguinity and affinity" in 5 & 6 Will. 4. c. 54. refer to decisions of ecclesiastical courts at that time. "The degrees prohibited by God's law" in 32 Hen. 8. c. 38. are those enumerated in 25 Hen. 8. c. 22. and 28 Hen. 8. c. 7, *Q.B. 81*

— Declaration states sufficient consideration for

promise to marry, which alleges that in consideration plaintiff would go to L. for purpose of marrying defendant, defendant would marry plaintiff within reasonable time after. *C.P. 293*

— See Amendment. Evidence.

**Married Woman.** See Acknowledgment by.

**Master and Servant**—No other instrument is necessary under 4 Geo. 4. c. 34. s. 3. than a warrant of commitment, founded on a sufficient information; legality of imprisonment must depend on legality and sufficiency of that instrument alone. *Semble*—Such an instrument is an order, not a conviction. Whether such an instrument is to be construed less strictly, as an order, or more strictly, as a conviction, it is bad if it does not shew on face of it, either that contract between master and servant was in writing, or that servant had entered into service, *Q.B. 111*

— Declaration on contract by defendant to employ plaintiff in his service until service determined by due and reasonable notice; breach, that defendant wrongfully dismissed him without notice; with count for work and labour. First plea, to special count, that plaintiff misconducted himself by refusing to work, and that defendant discharged him; second plea, also to that count, that defendant, in consequence of plaintiff's misconduct in absenting himself, summoned him before a magistrate under 4 Geo. 4. c. 34, and that magistrate discharged him. The proof was, that plaintiff was hired generally as an agricultural labourer, and left work before eight o'clock on a particular day because beer was not supplied, and that he was on following day taken before magistrate, who ordered his discharge from service.—Hiring being general, defendant was entitled to verdict on first count on ground of variance. Also, on both special pleas, though jury negatived wrongful absence. And facts stated in those pleas being proved, plaintiff not entitled to recover on count for work and labour, *Q.B. 132*

— Service for twelve months at weekly wages to serve at all times, provided that if steam engine stopped by accident, or any other cause, master might retain wages, void against infant, *Q.B. 352*

— The following agreement held not to be in restraint of trade or bad for want of mutuality.—Plaintiff agreed with T. P. in writing, among other things, that T. P. should, for seven years, serve plaintiff and his partner or partners for time being, or such of them as should carry on trade as a glass and alkali manufacturer, then carried on by plaintiff; that T. P. should not absent himself from such service without licence of such persons so carrying on business, nor serve other persons during term; that plaintiff should, during time T. P. continued employed, pay him 24s. per week for 1,200 tables, and other rates for extra tables, and when tables were not wanted should find him other work, so that he should not earn less than 24s. per week, except when a furnace was out, when he should have 21s. per week; and in case T. P. should become incapacitated to perform, or fail to perform such work, or if plaintiff or his partner, &c. should discontinue business during seven years, then they should be able to employ other persons, and not be bound to pay anything to T. P. *C.P. 84*

— Menial servant, discharged without cause, cannot, under common *indebitatus* count for wages, recover wages for month subsequent to his discharge; but should declare specially, *Ex. 18*

**Merger.** See Devise.

**Middlesex Sessions.** See Poor Law.

**Mine**—Custom for miner or boulder to enter and work land, in search of minerals (such working not having been commenced or prosecuted by owner or

- other person), rendering a portion of produce to lord or owner of soil, and giving due notice of his proceedings, not an illegal or unreasonable custom; and interest so acquired by virtue of custom is, if bounder continues in possession and works the mine, such an interest in mine as may be recovered in ejectment; but such customary right cannot exist unless there be a *bond fide* continuing by bounder to search for ore. Where plaintiff declared on his possession of a certain "tenement," to wit, "the right to dig and get ore, found and being within certain tin bounds," and charged defendant with disturbing him, and carrying away ore, &c. held, that although statement of plaintiff's right might properly describe that which existed when he first took possession of bounds under custom; yet in order to make out his right as claimed he must shew a *bond fide* continuing to work mine, and that annual renewal by new cutting turves, however useful for ascertaining limits, could not be considered as equivalent to such working. Such a claim is to be tried as a custom limited in local extent, and not as a local law of a particular district, Q.B. 34
- No implied authority to one adventurer from his co-adventurers in a mine to pledge their credit for money borrowed by him for purpose of mine, C.P. 17
- See Case. Deed.
- Misdemeanour*—*nomen collectivum*. See Perjury.
- Money Counts*. See Pleading. Railway.
- Money had and received*—Defendant purchased railway scrip in his own name for plaintiff, deliverable on 29th of August, for 148*l.* 10*s.*, which plaintiff paid defendant on 26th of August; on 22nd of August railway company called in scrip for registration, and share certificates were not delivered till December: in mean time a call was made in respect of shares, which was paid by holder: plaintiff having repudiated shares, defendant had declined to take them from holder, and they were sold at a loss exceeding 148*l.* 10*s.*, and defendant paid such loss to holder.—Held, that he being liable to original holder for such loss, and plaintiff not having supplied funds to meet call, money had and received could not be maintained by him against defendant for the 148*l.* 10*s.*, Q.B. 206
- will lie wherever a certain amount of money belonging to one person has improperly come into hands of another; and it is not necessary to shew in this form of action, that money is the same, as in trover or detinue. Trader, arrested on a *ca. sa.* at suit of defendants, who, as well as sheriff's officer, had notice of prior act of bankruptcy, paid over a portion of his assets to officer to procure his discharge, and officer paid over amount to defendants. —Bankrupt's assignees entitled to recover from defendants amount so paid, in action for money had and received, C.P. 76
- not supported by proof of money received upon a condition, C.P. 198
- See Fraud. Pleading.
- Mortgage*—7 Geo. 2. c. 20. s. 1. applicable to an action of covenant on a mortgage deed, and Judge at chambers, as well as Court, has power to order delivery up of deeds, Ex. 57
- See Grant.
- Municipal Corporation Act*. See Rate.
- Navigation*—Obstruction by sunken vessel in navigable river (see Ship and Shipping), C.P. 227
- Negligence*—Declaration that plaintiff was possessed of close A, and defendant of close B; that defendant wrongfully lighted a fire in close B, when by reason of wind and weather it was dangerous to do so; and that through negligence of defendant, the fire extended itself from close B to close A, and destroyed hedges, &c.—good in arrest of judgment. Defendant not relieved from liability by stat. 6 Ann. c. 31. and 14 Geo. 3. c. 78, which apply to fires the result of chance, or incapable of being traced to any cause, but not to fires which, though accidental, as contradistinguished from wilful, are occasioned by want of reasonable care, Q.B. 89
- See Action. Sheriff.
- New Trial*—not granted for misdirection on a bad plea (see Pleading), C.P. 132
- When Judge at Nisi Prius reserves certain facts for opinion of Court, with consent of parties, such facts are in nature of special case, and if verdict can stand consistently with facts, though they might lead to an opposite conclusion, Court, in its discretion, will order verdict to stand, rather than grant new trial, which could only end in same verdict, Q.B. 360
- If a Judge in leaving to the jury a question partly depending upon construction of an act of parliament, does not give the jury an explanation of the meaning of the act sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. Therefore, where the issue was whether a railway was at a particular spot passing "through a town within the meaning of the Railways Clauses Consolidation Act, section 11," and Judge merely told the jury that "town" was in the act to be understood in its ordinary sense, Court granted a new trial, Ex. 263
- See Evidence. Trial.
- Nonsuit*—Costs of. See Execution.
- See Judgment as in case of Nonsuit.
- Notice of Action*. See Paving Act.
- Nullity*—What an irregularity only, Ex. 59
- Nul tiel Record*. See County Court.
- Ordinance Act*—The 5 & 6 Vict. c. 94, for vesting and purchase of lands for Ordinance services, and for defence and security of realm, enacts, section 19, that in event of owners of lands refusing, &c. to treat with Ordinance officers for purchase of lands, two Justices may put the latter into immediate possession; and a jury is to "find the compensation to be paid, either for the absolute purchase of such lands, or for the possession or use thereof."—Jury could not award expenses of witnesses, counsel, &c., to a party whose lands had been taken for purposes of the act, Ex. 126
- Outlawry*—It is no ground for setting aside a writ of error *coram nobis* to reverse outlawry, that attorney for plaintiff in error has not made affidavit of authority of outlaw to issue such writ, nor that outlaw has not appeared to original action, Q.B. 103
- Overseer*—since 3 & 4 Vict. c. 26, compellable as well as competent to give evidence in proceedings before Justices touching relief or removal of the poor, Q.B. 208
- Oyer*—Demurring for misrecital, and effect of inrolment (see Pleading), C.P. 295
- Time for pleading after demand of (see Practice), Ex. 203
- Paper Books*. See Parliament.
- Parish Lands*—Lands conveyed in 1749 to A. and B, their heirs, &c., upon trust to permit and suffer churchwardens and overseers of D. to receive rents and profits to and for use and benefit of poor of parish D, with power to appoint new trustees and to grant leases for twenty-one years; and power of trustees extended and their title confirmed by local acts; by operation of which and by conveyances under powers of original deed of trust, legal estate

was vested in known existing trustees:—First, nature of trust not special, so as to prevent operation of 59 Geo. 3. c. 12. s. 17; secondly, that words of 17th section of that act imperative, and not merely enabling, in cases to which it is applicable. But lastly, in cases in which there are known living trustees, section 17. does not contain words sufficiently strong to divest legal estate from such trustees, and that property so circumstanced cannot be considered as “belonging to the parish” within meaning of statute, (overruling *Rumball v. Munt*, 15 Law J. Rep. (N.S.) Q.B. 180), Q.B. 59

*Parliament*.—Occupier of rooms in a house in which landlord also occupied a shop and parlour, but did not sleep, each party having a key to outer door, which stood open all day, but was shut at night, entitled to a vote as tenant of “a building,” under 2 Will. 4. c. 45, s. 27, C.P. 27

— Party occupied a counting-house in which landlord and others had counting-houses. There were a wooden gate and a door at outer entrance, which were open all day, but shut by night. A clerk of landlord’s lived on premises to protect them, and kept keys of gate and door, which could be locked and unlocked only on inside. It was clerk’s duty to open gate and door to any of occupiers, if required to do so, none of them having keys. This an occupation as tenant by claimant, which entitled him to a vote, C.P. 31

— Notice of objection sent by post, under 6 & 7 Vict. c. 18. s. 100, should have an address on outside as well as inside. Where notice sent by post had directions both on outside and inside, and paper produced as a duplicate to prove service, contained direction inside but none outside, paper not a duplicate, and service not proved, C.P. 32

— Notice of objection to voter for a borough:—“To Mr. C. S. 1, Olney Place. Take notice, I object to your name being retained on list of voters for borough of Cheltenham. (Signed) J. F. of No. 5, Sherborne Street, on list of voters for parish of Cheltenham.” Description of objector’s place of abode, No. 5, Sherborne Street, means Sherborne Street, Cheltenham, and a compliance with requirements of 17th section of Registration Act. Whether notice of objection designates on face of it objector’s place of abode, a question of law. Whether such designation is sufficiently particular, a question of fact, C.P. 34

— In appeal under Registration Act, paper books should be delivered four days before hearing, and Court will only allow them to be delivered *nunc pro tunc* upon reasonable excuse, C.P. 65

— Voter’s qualification in county register was described in third and fourth columns respectively, as “Land above 50L.” “Own occupation.” Within twelve months next before 31st of July, he changed his occupation, and took adjoining land, sufficiently designated by description in old register, and did not send in any new claim:—Voter erased from register. When right to vote depends upon occupation of premises in immediate succession, whole of subject-matter composing qualification must be fully described in register. County voter who claims under section 73. of 6 Vict. c. 18, must always send in a new claim to vote, C.P. 66

— A shed described by revising barrister as follows:—“The shed stands against a wooden paling, but not fastened thereto; six posts put into ground, support a tarpauling which forms roof; one of the sides is boarded up with boards nailed to posts; shed is used to put barrows, posts, &c. into, and wharfage is paid for use of it.”—is a “warehouse” or “other building” within 27th section of Reform Act. Decision of revising barrister will be affirmed,

unless it appears from facts stated in case that it was wrong, C.P. 68

— Qualification of borough vote described in overseers’ list in third column as “Houses in succession,” in fourth column as “Butcher Row.” Voter had occupied two houses during twelve months next previous to 31st of July, one in Coleham, the other in Butcher Row.—Barrister no power under 40th section of 6 & 7 Vict. c. 18. to amend description of qualification by altering “house” in third column to houses, and by adding “Coleham” in fourth column; he cannot amend so as to add to subject-matter of qualification, C.P. 70

— In consolidated appeal, under 6 & 7 Vict. c. 18. s. 44, the case after stating facts applicable to each voter, and reasons upon which barrister’s decisions were founded, concluded, “If Court should be of opinion that occupation and residence of each or any of appellants was sufficient, names of all or such as Court shall think fit, are to be retained on register, otherwise to be expunged.”—Appeals improperly consolidated, as decision on one would not govern the rest; and Court had no jurisdiction to entertain any of the appeals, and case struck out, C.P. 73

— When appeal from decision of barrister is called on, and respondent does not appear, appellant must prove service of ten days’ notice on respondent, or shew sufficient excuse for omission; otherwise appeal will be struck out, C.P. 142

— Notice of objection on borough voter served by putting notice, and leaving it, within entrance door of voter’s place of abode between nine and ten o’clock of night of 25th of August,—insufficient. Whether notice of objection has been properly served is a question of fact to be determined by barrister, C.P. 143

— By letters patent, management of a lunatic’s property was granted to a committee, who was to render a yearly account thereof to Court of Chancery: committee occupied land of lunatic worth 393l. per annum, and described himself as tenant, and debited himself with that sum as rent, in yearly account rendered to and allowed by Court of Chancery.—He did not occupy as tenant lands or tenements, within meaning of 20th section of Reform Act, C.P. 253

— *Privilege of*.—Members of House of Commons privileged from arrest on *ca. sa.* for forty days before and forty days after meeting of Parliament. Rule the same in case of a dissolution as in prorogation, Ex. 76

*Parties*. See Assumpsit. Contract.

*Partners*.—As to implied authority to borrow money, C.P. 17

— Right of partner to maintain trespass against another partner, after notice of dissolution, for entering on partnership premises, C.P. 50

— Partnership not created between trustees and a party who carried on business under a deed for benefit of creditors under controul and direction of trustees, Ex. 346

— See Assumpsit. Contract.

*Patent*.—By indenture, reciting that by deed of 1842 plaintiff had granted to defendant licence to make and vend a patent, subject to payment of royalty, with proviso for keeping royalty at an average of 16l. 13s. 4d. per month, and also reciting that defendant had agreed with plaintiff to purchase one half of patent, plaintiff, in consideration of 2,200l. for purchase of one-half patent and one half royalty, assigned to trustee for defendant patent and matters intended to be assigned: plaintiff covenanted in usual form for title, and defendant covenanted to pay 2,200l. by instalments: in an action for non-

payment of two instalments, defendant, setting out deed of 1842 and letters patent, pleaded a denial of validity of patent.—Held, no answer: first, because defendant, under deed of 1842, would be at all events bound to pay 16*l.* 13*s.* 1*d.* royalty per month; and, secondly, because defendant's covenant was independent of covenant for title by plaintiff, Q.B. 217

*Patent* (continued)—In action for infringing plaintiff's specification alleged that invention consisted in submitting hosiery to finishing process of a *press* heated by steam, hot water, or other fluid. The invention consisted of two cast-iron boxes filled with steam, between heated surfaces of which hosiery goods were introduced and subjected to pressure produced by hydraulic power. The pressure generally lasted three minutes, and might be produced either by screw or by hydraulic power. The specification stated that patentee did not claim finishing of woollen cloths by heat generally, but submitting of hosiery, &c. to pressure of hot boxes or surfaces heated by steam, water, or other fluid. The defendant's machine consisted of *rollers* heated by steam, between which woollen fabrics similar to those of plaintiff were introduced and subjected to pressure. The jury found that defendant's rollers were not a colourable imitation of plaintiff's patent:—Held, not an infringement, Ex. 122

*Pauper Lunatic.* See Poor Law.

*Paving Act*—The Metropolitan Paving Act, 57 Geo. 3. c. 29, gives power to apprehend all persons who, not being employed by or contracting with Commissioners under act, shall carry away any "dust, cinders, or ashes," within district:—Held, that ashes falling from furnace of brass-founder, containing particles of metal, which were by him subjected to a process whereby a portion of metal was extracted, and residue given by him to his apprentices as a perquisite, and by them sold to a brass refiner, for purpose of extracting further quantity of metal, were not "dust, cinders, or ashes" within act. By section 136. no action shall be brought against any person for anything done in pursuance of act until after twenty-one days' notice in writing; and "if it shall appear that such action was brought before twenty-one days' notice was given," jury shall find a verdict for defendant.—Want of notice of action must be specially pleaded, Ex. 117

*Payment*—Averment of payment of rent in arrear (see Trespass), C.P. 150

*Payment after Action.* See Debt.

*Payment into Court.* See Costs.

*Penally*—Distribution of. See Conviction. And see Copyright. Covenant. Distress.

*Perjury*—Trial before Secondary of London, properly described in indictment for perjury as before sheriff, to whom writ is directed. Two issues being joined on record, indictment properly alleged that they came on to be tried, though only one tried. Perjury may be assigned as to what a man has sworn he thought or believed; difficulty, if any, being in proof. Where witness swore he did not write certain words in presence of D, assignment of perjury that he did write them in presence of D, is good, Q.B. 72

—Indictment for perjury contained four counts, stating that defendant had retained U, an attorney, who had delivered his bill under 6 & 7 Vict. c. 73, and that after expiration of one month from such delivery, U. had taken out summons before a Judge to get bill taxed; that defendant, before shewing cause, made affidavit denying he had retained U, and perjury was assigned on this statement, indictment alleging that "it became and was material in shewing cause against the summons to ascertain whether the defendant did retain U:" each count

concluded, "and so the jurors, &c. did say that the said defendant, &c. did commit wilful perjury," &c.—Held, that "month" was to be construed with reference to 6 & 7 Vict. c. 73, and meant calendar month; that jurisdiction of Judge to issue a summons on application of attorney, was sufficiently shewn without negating a prior application within month by party chargeable; that fact of retainer was material; and that conclusion of counts might be rejected as surplusage. The record stated *venire* to be to try whether defendant was guilty of *perjury* and *misdeemeanor* aforesaid, and entry of verdict that "he is guilty of *perjury* and *misdeemeanor* aforesaid, in manner and form," &c., and a general judgment of imprisonment was given "on the premises."—Held, that "misdeemeanor" being *nomen collectivum*, *venire* and verdict applied to all the counts, and judgment of imprisonment was divisible, Q.B. 168

*Piracy.* See Copyright.

*Pleading*—Demurrer that declaration on bill of exchange not sufficiently shew days of grace had elapsed, frivolous, Q.B. 7

—Trespass for assault and imprisonment; plea to assault, that defendant was possessed of dwelling-house; that plaintiff making noise and disturbance there; and defendant *molitor manus imposuit* to turn him out. Replication, that house a common ale-house, and that plaintiff lawfully drinking there, wherefore he refused to depart; and defendant of his own wrong committed trespasses:—Replication, insufficient, as it must be taken to admit that plaintiff was making noise and disturbance, and was in that case no answer to the plea. Plea, to assault and imprisonment, that defendant was possessed of a tavern or alehouse, and plaintiff conducted himself in a rude and quarrelsome manner in it, assaulted defendant and others, and afterwards and before, &c., remained standing in street near door of house, using loud, menacing and disgusting language to defendant and his family, who were within hearing, and by reason thereof many persons congregated about the house and made a riot and disturbance; and at time when, &c. plaintiff was causing persons to congregate in breach of the peace, whereupon defendant, after requesting him to go, gave him in charge to police officer:—Held good, as sufficiently shewing matter amounting to a breach of the peace by plaintiff, Q.B. 73

—Declaration against maker of promissory note, indorsed by W. to plaintiff; plea set-off due to defendant from W. before indorsement to plaintiff, and W. to deprive defendant of his set-off, fraudulently indorsed to plaintiff, to enable him to sue on note as agent of W, and no consideration for indorsement to plaintiff, and that plaintiff sued as agent of W. according to said fraud.—*De injuriis* good, as substance of plea was, that indorsement to plaintiff was fraudulent, Q.B. 97

—In *indebitatus assumpsit* for goods sold and delivered, defendant cannot, under non assumpsit, shew that plaintiff had no legal title to goods at time of sale, Q.B. 103

—An assault *ex vi termini* excludes consent; and plea of leave and licence to declaration charging an assault amounts to general issue. *Quere*—If it can be pleaded to an action for imprisonment, Q.B. 109

—To declaration in assumpsit containing a set of counts for work done, and money paid by, and on an account stated with D, alleging promises made to D, and a similar set of counts by and with plaintiffs as executors of D, laying promises to the plaintiffs as such executors, a plea of indemnity by D. was held good, to avoid circuitry of action. A plea,

that D. in his lifetime caused and procured defendant to enter into promises in declaration by fraud and covin, was held to be well pleaded to whole declaration, as defendant had a right to treat work done, money paid by, and account stated with plaintiff as being done, paid, and stated in continuance and in respect of previous contract with D, and that fraud used in procuring that contract extended to implied promise arising from plaintiffs' performance of it, Q.B. 125

— Declaration on bill of exchange; plea, that defendant not being a trader, &c., at passing of 5 & 6 Vict. c. 116, duly presented his petition for protection to Court of Bankruptcy in London, which had annexed to it a full schedule of debts containing all matters mentioned in statute; that petition was filed, &c. that final order for protection and distribution was made by commissioner for protecting defendant from all process, and for vesting his estate in T. M. A., one of official assignees; that debts in declaration mentioned accrued before filing of petition, and that order was still in force, &c.:—Held, a good plea in form and substance, as shewing effect of a final order under 10th section of above statute, though it did not shew appointment of a creditors' assignee, Q.B. 129

— Upon a plea alleging an enjoyment of an easement as of right for thirty years, under 2 & 3 Will. 4. c. 71, if plaintiff under section 7. relies on existence of a life estate, that is a matter which not being inconsistent with simple fact of enjoyment, must under section 5. be pleaded specially, Q.B. 138

— Averment that bill of exchange given "for and on account of and in payment and discharge" of a debt, not equivalent to averment that bill was given in satisfaction, Q.B. 295

— To declaration for work and labour, plea that work, &c. consisted of appraisement of personal property which plaintiff appraised in expectation of reward to be therefore paid by defendant to him, without being duly licensed according to 46 Geo. 3. c. 43,—is good without stating that plaintiff did work as an appraiser, as it followed words of statute; and without negating that appraisement was for purpose of ascertaining legacy duty. Same rule applies to declarations and subsequent pleadings, as to negating exceptions in acts of parliament, Q.B. 299

— First count, that it was agreed between defendant and plaintiffs, that defendant should sell and deliver to plaintiffs certain iron rails to be made and delivered of certain weights and shapes at price stated, and said rails to be inspected and certified as then agreed on, and to be of certain quality; and that defendant did make and deliver certain rails as and for rails of such quality, alleging as breach that rails were not of said quality; plea that rails were, according to agreement, to be inspected by an agent of plaintiffs, who was at liberty to approve and accept same if he should think fit, and that rails were inspected and approved and accepted by such agent on delivery of same. Plea bad, in substance, as not answering breach complained of, and only shewing performance of one of stipulations of contract.—*Semble*, also bad in form, as amounting to general issue. Second count stated that defendant promised to deliver rails fit and proper for purpose of certain railway; alleging as breach that rails delivered were not fit and proper for railway; plea similar to plea to first count.—Plea bad in substance, for same reason, and, also, in form, as amounting to general issue, Q.B. 309

— In action for indorsing writ of *ca. sa.* and imprisoning the plaintiff thereon for a larger sum than was due on judgment, and for indorsing *fi. fa.* and

seizing plaintiff's goods for greater sum than was due on second judgment,—Declaration insufficient, if it does not contain averments of malice and of want of reasonable and probable cause, Q.B. 321

— The rule of Hilary term, 4 Will. 4. tit. 'Trespass,' r. 6. applies to actions on the case as well as trespass, and to declarations as well as pleas. In case for disturbance of ferry, plaintiff alleged he was possessed of an ancient ferry for passengers and goods to and from A, from and to B, and defendant pleaded not possessed, and traverse of ancient and entire right of ferry; and jury found that there was a ferry from A. to B. only,—Verdict might be entered distributively for plaintiff for so much as proved at trial, Q.B. 323

— Covenant running with the land. Defeasance. Duplicity in plea. Plea bad for not shewing payment and release of a mortgage debt. On demurrer, dates of assignments under *videlicet* taken to be true, Q.B. 342

— Action for use and occupation; plea, first, that plaintiff seized goods of defendant sufficient to pay rent and costs, and detained them for two years, when it was agreed between them that plaintiff should retain goods in satisfaction of debt; that he did so accordingly. Secondly, that after wrongful seizure by plaintiff of goods of sufficient value, &c., plaintiff and defendant agreed that plaintiff should retain goods, and that they should relinquish their claims on each other. Thirdly, that they agreed that plaintiff should retain goods so seized, and that they should relinquish their claims, and defendant give up possession. Replications, traversing seizure of goods of sufficient value, &c. On demurrer, pleas good, and replications bad for putting in issue matter which was only inducement to acceptance in satisfaction, which was material part of pleas, C.P. 92

— *Scienter* is in issue under not guilty, in case for negligently keeping a ferocious dog (see Action), C.P. 124

— Trover for hops; plea, that before plaintiff was possessed, M. & Co. were possessed as of their own property; that M. & Co. lost the same, which came by finding into possession of S. B., who immediately lost possession of same, which came by finding into possession of T. E., who immediately and just before said time when, &c. sold and delivered same to plaintiff, whereupon defendants, as servants and by command of M. & Co. took the hops, &c., which is the same conversion, &c. Replication *de injuriis*.—On this issue plaintiff could give in evidence a valid sale of the hops by M. & Co. to S. B., through whom plaintiff derived his title. On motion for new trial on misdirection of Judge in telling jury that if there was a valid sale to S. B. plaintiff was entitled to recover,—held, that plea must be taken after verdict to import a continuing title in M. & Co. down to time of conversion, which fact being material was put in issue by *de injuriis*, and so the evidence was admissible and the direction right: or, that plea was immaterial for not containing such allegation; and in either case that defendants were not entitled to a new trial, C.P. 132

— In action for infringement of copyright, a count on 5 & 6 Vict. c. 45. will not be allowed with a count for infringement of same copyright at common law. A count on that statute set forth the requisitions of the statute, and concluded *contra formam statuti*.—Plaintiff on such count may set up his common law right, if he fail to bring his case within the statute, C.P. 137

— One of two counts apparently on same agreement, introduced for the evident purpose of removing a difficulty as to legal effect of agree-

ment, ordered to be struck out. First count on an agreement by defendant to take plaintiff into his service for six months, and at expiration thereof, if no just cause shewn, to enter into fresh agreement for two years; first breach, that though no just cause shewn at expiration of the six months, defendant would not enter into further agreement for two years: second count, that whereas plaintiff had been six months in defendant's service, defendant agreed to continue him for two years; breach, that defendant would not continue him.—So much of first count as related to first breach, struck out as being in violation of rule Hil. term, 4 Will. 4. r. 5, C.P. 159

*Pleading* (continued).—First count in covenant stated that by deed between plaintiff and defendant, described as a "company registered and incorporated after a deed of settlement had been executed under 7 & 8 Vict. c. 110," defendants agreed to pay plaintiff 15,000*l.* as soon as conveniently could be out of money raised by first calls or instalments on shares of company; breach, that although divers instalments were paid, out of which company might have paid the money, they had not done so; second count set out articles of agreement stating that plaintiff had sold his patents to company, and containing covenant that company should pay him 15,000*l.* in cash as soon as conveniently could be done out of money raised on first instalments or calls on shares; breach, that though company could have raised the money, and a reasonable and convenient time for paying it had elapsed, yet they had not paid plaintiff: 3rd plea to 1st count, that the deed of settlement was obtained by fraud of plaintiff: 4th plea to 1st count, that registry and incorporation were obtained by fraud: 8th plea, that company was formed under deed of settlement to which plaintiff was a party, by which it was agreed that plaintiff was to be paid out of first instalments after paying necessary expenses of company, and that no instalments, &c. had been received sufficient to pay expenses and the 15,000*l.*: 21st plea, that company was not incorporated by charter or act of parliament, nor was the same "duly and lawfully" registered and incorporated: 22nd plea, that when company obtained a certificate of complete registration, it was not formed by deed or writing under hands and seals of the shareholders as required by the statute.—Held, that the 2nd count was good on general demurrer, and breach properly assigned; that the 3rd, 4th, 8th, and 18th pleas were bad on demurrer; that the 21st plea was bad, because defendants were estopped from denying fact of incorporation, and if that fact was not in issue, because plea raised a question of law; that the 22nd plea was bad for similar reasons, C.P. 166

—Action against surety upon bond under 1 & 2 Vict. c. 110. s. 8, for payment of a debt by H., or his rendering himself in any action to be brought: Plea, that plaintiff had brought action in Queen's Bench, and issued *ca. sa.* on judgment, on which H. was taken and detained in custody, according to practice of said court, and that from recovery of judgment until arrest, H. was ready and willing to surrender himself according to practice of court and condition of bond, and that by reason of his having been so taken and detained, "he was, by practice of said court, exonerated and discharged from rendering himself according to said condition."—On special demurrer, defendant was allowed to amend; and *semble*—that plea should either have shewn practice of court, and that H. did surrender, if facts alleged amounted to a surrender by such practice, or that it became impossible for H. to sur-

render, on account of act of plaintiff, and practice of court, C.P. 182

—Declaration that by articles of agreement plaintiff agreed to sell, and defendant to purchase, a piece of land, and plaintiff agreed to deliver an abstract of title and to deduce a clear title within a month from signing contract, or from being required so to do; that defendant agreed to pay portion of purchase-money on signing contract, and residue on or before a future fixed day, and to pay interest in mean time half-yearly; that plaintiff did, within one month from being required, deliver abstract of and deduce a clear title: breach, non-payment of half a year's interest: plea, that plaintiff did not deliver abstract of and deduce a clear title *modo et forma*.—On demurrer, plea held bad for raising an immaterial issue; delivery of abstract and deduction of title not being a condition precedent to payment of money. *Quare*—Whether the plea was not bad for duplicity, in denying both the delivery of abstract and the deduction of title, C.P. 234

—In action for money had and received *non assumptis* puts in issue the receipt and the existence of facts which make it a receipt to plaintiff's use. Defendant pleaded, that money claimed was paid to him and others, as members of a committee of management in a railway scheme, by way of deposits on shares allotted by them to plaintiff, at his request, and that plaintiff and other shareholders agreed to form a partnership for carrying on the undertaking: that plaintiff sought to recover his deposits, on ground that scheme had not been prosecuted for an unreasonable time: that after 9 & 10 Vict. c. 28, a meeting was duly held, at which it was resolved that the partnership should be dissolved, and undertaking abandoned: that affairs then became liable to be wound up as on dissolution of a partnership, by mutual consent: that plaintiff's claim was part of affairs to be wound up, and that they had not been wound up, nor had a reasonable time for winding them up elapsed at commencement of suit.—On special demurrer held bad, as amounting to general issue, C.P. 266

—Declaration in debt on bond given by defendants and L. for 8,000*l.* to be paid by them to plaintiffs, or Everett, on request, non-payment, &c.: Plea craved oyer and set out bond and condition and recitals; Condition that defendants and L. should pay over sums of money assessed and collected by L. and that L. should demand sums assessed and proceed against defaulters: averment that defendants performed all things on their part to be performed: replication, praying deed and condition to be inrolled, and being set out on inrolment, demurrer, on ground that they were falsely set out by defendants on account of recitals being introduced, and that plea of general performance bad:—First, not necessary to state request in declaration. Secondly, allegation "by reason of the non-payment," a sufficient denial of payment to plaintiffs or Everett, after plea. Thirdly, plea bad for not shewing performance by L. Fourthly, plea bad for averring general performance, instead of showing what done in performance of condition. *Semble*—Practice is not to demur for mis-recital on oyer; and effect of inrolment is to make matter set out part of declaration, C.P. 295

—To debt for goods sold and delivered, plea, in substance that goods were quantities of coals sold and delivered by him to plaintiffs, respectively exceeding 560*lb.* and respectively delivered within city of London, in divers, to wit, two carts, without delivering, before any such quantities of coal were unloaded, ticket signed by plaintiffs according to

form of statute an answer to the action,—the Coal Act, 1 & 2 Vict. c. ci. s. 3, being passed for the protection of purchasers. That statute applies if quantity at one delivery exceeds 560lb. though delivered in carts each containing less than 560lb. If vendor prevented, by purchaser, from delivering ticket, that is matter to be replied. Vendor's name must be written in ticket as a signature, though sufficient if written by agent. Negation, in above plea, of delivery of a ticket sufficiently applied to each delivery, C.P. 311

— Frivolous demurrer, Ex. 8

— Duplicity and uncertainty, Ex. 13

— To declaration containing three counts, defendant, appearing by attorney, obtained rule generally to plead coverture and Statute of Limitations, and pleaded those pleas to whole declaration. Pleas were set aside by Judge at chambers, on ground that defendant could not appear by attorney and plead coverture. Defendant, without obtaining fresh rule to plead, pleaded to first two counts, coverture, and to whole declaration, Statute of Limitations, and plaintiff signed judgment.—Judgment irregular, as rule to plead had not been set aside, and defendant was at liberty to plead pleas, and was not bound by terms of rule to plead them to whole declaration, Ex. 25

— Declaration that plaintiff agreed with defendants to act as their salesman for a year, and not to be connected with any other house in disposing of their goods, and defendants agreed to pay plaintiff 200l. for such servitude. Averment, that plaintiff entered into defendant's service, and was not connected with any other house, and had always until expiration of one year from agreement been ready and willing, and offered to remain in such employ. Breach, that defendants would not suffer plaintiff to act as their salesman during remainder of year, but discharged him from performance of his agreement, and had not paid him 200l. Plea, as to non-payment of 200l., that after plaintiff ceased to be in defendant's employ, and during said year, he entered into service of another house, and became connected with that house in disposing of their goods:—On special demurrer, plea bad, as amounting to an argumentative denial of plaintiff's readiness and willingness to continue in defendant's employment, Ex. 98

— Declaration that plaintiff being indebted to H. L. in 36l., H. L. sued out a writ of summons for recovery thereof; that afterwards plaintiff obtained a protection from process, whereof defendant had notice: yet defendant, well knowing that plaintiff was protected from process, but wilfully and maliciously intending to injure him, procured a judgment to be signed against him in the said action, and wilfully and maliciously intending, &c., sued out a *testatum ca. sa.*, under which sheriff arrested plaintiff:—Declaration bad, in omitting to state defendant arrested plaintiff without reasonable and probable cause, Ex. 99

— Declaration, that in consideration that plaintiff had become tenant to defendant of a farm, upon terms that if plaintiff should receive from defendant notice to quit, and should have made extensive improvements, for which subsequent crops should not have compensated plaintiff, farm should be looked over by two men, one to be appointed by each party, who should determine compensation, defendant promised that if tenancy should be determined, and plaintiff should have made improvements for which he should not have been compensated, defendant would, at plaintiff's request, appoint a person for such purpose. Averment, that tenancy was determined by defendant; that plaintiff had

made improvements for which he had not been compensated; that although plaintiff, after determination of tenancy, appointed J. D. to determine compensation, and J. D. was ready to act, of which defendant had notice, and was then requested by plaintiff to appoint some person on his behalf, yet defendant did not nor would appoint some person in that behalf:—Bad, on special demurrer, in omitting to state that plaintiff had requested defendant to appoint a valuer *before commencement of suit*, Ex. 100

— Declaration stated that company was a joint-stock company completely registered; that S. P. and C. L., then being two directors of company, made their promissory note, and thereby promised on behalf of said company to pay plaintiff or his order 32l. 4s. 9d., balance of his account due from company, three months after date, which note was signed by S. P. and C. L., and made by them in their names and on behalf of said company, and was expressed by them to be made on behalf of said company, and countersigned by secretary of company; that thereupon defendants, in consideration of premises, then promised plaintiff to pay him amount of promissory note:—Held, bad, on general demurrer, Ex. 118

— A proceeding by *audita querela* is an "action or suit" within 4 & 5 Ann. c. 16. s. 4, and a defendant may plead several pleas thereto, Ex. 121

— A special count in assumpsit stated in substance, that in consideration of plaintiff having, at defendant's request, contracted to sell to a third party on his own credit certain shares in a railway company, of which defendant was registered holder, defendant promised to deliver to him all new shares allotted in respect of such shares while he continued registered holder thereof, on payment to him of all payments made by him to the company in respect of such new shares, and to indemnify plaintiff from all loss which might arise by reason of non-performance of his said promise; alleging non-delivery of certain new shares so allotted, and that by reason thereof plaintiff had necessarily expended a large sum of money in purchase of other shares, in order to perform his said contract of sale.—Such count may be pleaded with a count for money paid, Ex. 146

— A declaration stated that certain persons drew a bill of exchange on G. & E. W., and indorsed it to defendant, who indorsed it to plaintiffs; defendant pleaded that plaintiffs made and indorsed the bill to him *before* he indorsed it to them; and that, at time of his so indorsing the bill to plaintiffs, they were liable to pay the amount to him, according to their previous indorsement: plaintiffs replied, stating an agreement between them and defendant and G. & E. W., to forbear and give time to defendant and G. & E. W. for payment of another bill accepted by G. W., and indorsed by E. W., the maker, to defendant and by him to plaintiffs, till time for payment of bill declared on had elapsed, and averring that plaintiffs had forbore accordingly.—Replication bad, as being a departure from declaration, Ex. 149

— Declaration containing a count on a bill of exchange and a count on an account stated: plea, that defendant did not indorse the bill in said first count mentioned *modo et forma*: defendant being under terms to plead issuably, plaintiff signed judgment on ground that the plea being pleaded to whole declaration, and containing no answer to last count, was not issuable.—Judgment irregular. A plea is not non-issuable which is only bad on special demurrer, Ex. 169

— Although agreement to convey equity of redemption must be in writing, yet a plea to an action



- of debt on an indenture of mortgage, which stated an agreement by plaintiff and other mortgagees to forego balance of their respective mortgages beyond the value of a bankrupt estate upon receiving their share of assets, would be good on demurrer, even though it expressly stated contract to have been by parol, inasmuch as agreement by plaintiff was binding on him and receipt of his share of assets was a satisfaction for the estate; because the agreement of the other mortgagees to take their shares of assets also was a good consideration for giving up the claim for residue of debt against defendants. *Quare*—Whether such plea, if proved, would be a good bar. Ex. 182
- Pleading* (continued)—A judgment of assets *quando acciderint* affects all assets then in hands of executor not administered, as well as those which may come into his hands subsequently. In action against executor, defendant pleaded *plene administravit prater*, and plaintiff replied that assets had come to defendant's hands since plea pleaded. Replication held to be unnecessary and bad, Ex. 198
- Declaration that it was agreed between plaintiffs and defendant, that plaintiffs should sell to defendant 1,000 barrels of flour, to arrive at Liverpool by the *Hottinguer*, from New York; that should vessel be lost before arriving at Liverpool the sale should be void: Averment, that vessel was not lost, but arrived at Liverpool from New York, having on board 1,000 barrels of flour: Breach, that defendant did not accept the flour.—This contract general and not confined to any particular voyage, and plea which stated that agreement was made with reference to a voyage at a particular period upon which vessel never sailed, wherefore defendant refused to accept flour, stated a different contract, and was therefore bad as amounting to non assumpsit, Ex. 281
- Declaration in trespass to goods charged defendant with taking and carrying them away, and converting them to his own use.—Such conversion merely matter of aggravation; and plea to whole declaration justifying taking, &c., but omitting to justify conversion, is a good plea, Ex. 299
- Declaration that plaintiff had divers dealings with defendants, and that divers accounts remained unsettled between them; that plaintiff had, for accommodation of one of defendants, accepted divers bills of exchange, and thereupon, in consideration that plaintiff then delivered to defendants three acceptances as follows, &c., as full settlement of debts, defendants promised plaintiff to return him acceptances drawn by defendant as follows, &c.: Breach, that defendants did not return acceptances.—On special demurrer, declaration bad for want of certainty, Ex. 303
- To plea of privilege by attorney alleging that defendant was an attorney of Court of Queen's Bench and not of Court of Exchequer, replication that defendant was an attorney of Court of Exchequer should conclude with verification by record, Ex. 313
- What in issue under rejoinder "*ne granta pas*" (see *Devise*), Ex. 370
- Adding pleas; and time to plead. See *Practice*.
- Departure. See *Landlord and Tenant*.
- Indebitatus Counts. See *Master and Servant*.
- New Assignment—Departure. See *Trespass*.
- Plea in bar. See *Insolvent*.
- Repugnancy. See *Sheriff*.
- Replication of discharge of insolvent. See *Insolvent*.
- Pleading several counts. See *Practice*.
- Setting aside informal replication. See *Practice*.
- Time for pleading in abatement. See *Practice*.
- See *Bill of Exchange*. *Common per cause de vicinage*. *Contract*. *Costs*. *Covenant*. *Demurrer*. *Guarantee*. *Lease*. *Limitations*. *Statute of Malicious Prosecution*. *Marriage*. *Prescription*. *Promissory Note*. *Ship and Shipping*. *Trespass*. *Trover*.
- Poor Law*—Appeal—Prior Order of Removal—Quashing for Deficiency of Examination—Estoppel—Decision on the Merits—Evidence, Q.B. 8
- Respondents precluded from giving evidence of either ground of removal, where document relating to one not transmitted, Q.B. 24
- After appeal against order of removal entered and respited, Sessions have power further to respite appeal, though no notice or grounds of appeal have been served upon respondents. Where Sessions refused to further respite appeal, but it appeared that in exercise of their discretion, they would have done so if they had considered they had power,—mandamus commanding the Justices to hear appeal granted, Q.B. 77
- Pariah apprentice was bound by indenture executed by A. B. churchwarden of L. and by C. D. one of overseers of L.:—Indenture sufficient under 54 Geo. 3. c. 107. s. 2. An indenture duly allowed by two Justices under 56 Geo. 3. c. 139. s. 1. reciting that it was made by virtue of an order under hands and seals of A. L. and J. N. C. Justices of the Peace in and for county, &c., made in pursuance of statute in such case made and provided, and bearing date, &c.—good primary evidence of order for binding. Allowance under 56 Geo. 3. c. 139. s. 1. need not appear on face of it to be made within jurisdiction of Justices, Q.B. 89
- By Licensing Act, 9 Geo. 4. c. 61. s. 27, every person who thinks himself aggrieved, may appeal to next General or Quarter Sessions, unless holden within twelve days, and in that case to next subsequent sessions, and not afterwards, and such Sessions are to hear and determine matter of such appeal, and make such order therein, with or without costs, as to Court shall seem meet; judgment to be final and conclusive. Order of Sessions, under this act, purported to be made at General Sessions, holden, &c. on 5th of May, and continued by successive adjournments, until 22nd, and recited that, at General Quarter Sessions in April last, W. B. exhibited his petition of appeal against refusal of certain Justices to grant him a licence, at which said Quarter Sessions appeal, and hearing and determination thereof, was adjourned unto "this present General Sessions," and proceeded to adjudge that, "upon hearing, &c., Court did dismiss appeal, and affirm judgment of Justices, and order and adjudge that said W. B. should pay to Justices 16l. 19s. 2d., for costs, &c." In fact appeal was heard, judgment of Justices affirmed, and licence refused at April sessions:—Held, that act of parliament confined power of adjudicating on appeal to April sessions; and that order made at May sessions without jurisdiction.—*Semble*, that, at April sessions, appeal had been in point of fact disposed of, and order bad on that ground, Q.B. 108
- An order of removal purporting to be made by B. C. "one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell Police Court, within the metropolitan police district," sufficiently shews that Clerkenwell Police Court appointed under 3 & 4 Vict. c. 84. Examinations stated that pauper's father resided in H. up to 1826, when he removed to another parish; that pauper resided with his parents in H. as part of their family, and was then under twenty-one; and that in 1816 the father acquired a settlement in H.—Nothing appearing to the contrary, it was to

be presumed that pauper was unemancipated in 1816, and took his father's settlement, Q.B. 109

— Order of Justices adjudicating settlement of pauper lunatic and an order for costs of maintenance under 8 & 9 Vict. c. 126. valid though proceedings before Justices taken *ex parte*, and without notice to parish sought to be affected. *Semble*—That upon appeal against an order of maintenance made under that statute, settlement of pauper may be put in issue, Q.B. 112

— Under 8 & 9 Vict. c. 10. s. 6. mother of bastard a competent witness to prove she had due notice of appeal under 7 & 8 Vict. c. 101. s. 4. Sunday excluded in computing the twenty-four hours within which putative father must give notice of appeal against order of affiliation, under 7 & 8 Vict. c. 101. s. 4. The 7 & 8 Vict. c. 71. s. 2, which empowers Justices of Middlesex to try appeals at General Sessions as at General Quarter Sessions,—only confers an optional jurisdiction, and appellant may proceed, as before, to Quarter Sessions, Q.B. 181

— Examinations on which order of removal made stated that T. G. was employed by overseers of respondent parish to remove paupers to appellat parish, under prior order of 1826; and after he had removed them signed this indorsement on order:—"Delivered to Mr. W, overseer of D, by T. G;" that T. G. was dead, and handwriting was proved: On trial of appeal, it appeared that T. G. was not an overseer, but employed by the overseers who had been seen on morning in question leaving the parish with T. G, and had returned with 4s.: there also appeared to have been a prior order of removal in 1844, which was quashed, "by reason of informality and insufficiency of examinations:" The Sessions held this decision not conclusive.—Examinations contained evidence of the removal under prior order of 1826. *Semble*—That the indorsement was evidence, as made by a person deceased, in the course of duty. Also, that Sessions having decided on effect of quashing of order of 1844, the Court could not interfere, Q.B. 183

— Notice of chargeability, signed by three overseers as such—*prima facie* a good notice, though it does not purport to come from a majority of the parish officers. It is matter of evidence whether parish officers sending such notice do or do not constitute majority, Q.B. 209

— Where putative father appears before Justices in pursuance of summons, issued under 7 & 8 Vict. c. 101, upon application of mother, it must appear upon order that the evidence upon which it was made was given in presence and hearing of putative father, or excuse for omission alleged, Q.B. 219

— Adjudication of settlement of pauper lunatic under 8 & 9 Vict. c. 126. ss. 58, 62, may be comprehended in order for payment of costs of maintenance. Such order may be made on overseers of parish where he is adjudged to be settled, though it form part of a union, Q.B. 224

— Extracts from rate-books produced before removing Justices by vestry clerk of appellat parish need not be sent by respondents with copies of the examinations, it being a document belonging to the appellat parish. It is to be presumed the Justices inspected and decided on the accuracy of the rate-book, Q.B. 271

— It is not an objection to an order of removal that the place at which it is made is not stated in it. Nor that it does not appear on face of order or on the examinations, that pauper did not become chargeable in respect of relief made necessary by sickness or accident. Pauper, after residing thirteen years in H, was, by order unappealed against,

on 1st of March 1845, removed to A, where she remained, receiving relief there until 19th of March, when, on being promised 7s. 6d. a week by guardians of A, she returned to H, where her friends lived, and where she had always been desirous of returning: on her return to H. she took possession of a house she had rented before her removal to A. and of which she had kept the key, and in which she had left her furniture whilst she remained at A: guardians of A. discontinuing allowance, she again became chargeable to H. on 4th of November 1846, and another order was made for her removal to A.—Held, that she was properly removable under 9 & 10 Vict. c. 66, as first removal to A. entirely put an end to the residence at H, Q.B. 277

— Caption of examinations, on which an order of removal is founded, which shews they are taken touching settlement of pauper and on complaint of overseers, is insufficient; it should also shew what the complaint is, Q.B. 288

— Where examinations shew only a birth settlement and grounds of appeal contain only general denial, respondents must give evidence of birth in appellat parish, Q.B. 296

— Under 9 & 10 Vict. c. 66, s. 1. period during which pauper received relief to be excluded only from computation of five years, and does not defeat effect of previous residence, Q.B. 304

— Distinct caption to each examination not necessary, if first caption states name of each witness, Q.B. 312

— Caption of examination upon complaint of overseer, "touching the place of residence, chargeability, and last place of lawful settlement of the pauper" insufficient; notice of chargeability itself must state names of paupers, Q.B. 329

— Parish S. appealed against order, which was quashed by Sessions, and order made that parish C. should pay to parish S. costs of appeal: Sessions had power to make order on C, as that parish was substantially respondent, and payment directed to be made to treasurer of union by prior order was merely on behalf of parish of C. Order shewed on face of it that parish directed to pay costs a party to the appeal, Q.B. 331

— Caption of examinations "upon the complaint of the churchwardens and overseers of the parish of A." insufficient. Removability of wife of marine who had resided in parish A. from February 1841 to October 1846, when she became chargeable, and her husband, who had only occasionally resided with her during above period, had been absent for six months serving at sea, Q.B. 336

— Caption of examination that it was taken "touching the legal settlement" of pauper (not stating any complaint), insufficient, Q.B. 339

— Irremovability of widows whose husbands died before 9 & 10 Vict. c. 66. s. 2. Order of removal prior to, but pauper removed subsequent to, 9 & 10 Vict. c. 66. Irremovability good ground of appeal against order, Q.B. 341

— Order of maintenance on putative father of bastard of married woman, Q.B. 342

— Caption sufficient which states complaint that pauper came to inhabit and actually chargeable, and need not state that pauper had not gained settlement, Q.B. 350

— The 9 & 10 Vict. c. 66. s. 1. does not apply to case of residence out of parish at any time during five years preceding order of removal. *Quare*—If it applies to order unappealed against, or confirmed on appeal, before passing of statute, Q.B. 357

— Residence for five years next before application for order partly as wife and partly as widow, suffi-

- cient to render her irremovable, under 9 & 10 Vict. c. 66. That act does not give appeal against order made prior to its passing, on ground of five years' residence, where there has been no actual removal of pauper, Q.B. 359
- Election of Guardians. See Vestry.
- Power*.—A lease was granted in 1831 under a power to make leases for years, determinable on lives, of premises usually so leased, reserving usual rents and heriots, and so as there should be contained usual and reasonable covenants: in the pattern lease, executed in 1749, there was a demise of C, with all waters, watercourses, &c., excepting to the lessor a watercourse flowing from the head weir, through Little Moor Meadow, and from thence by a trough into another meadow, for watering the same and other lands of lessor; and there was a covenant to pay fines, &c., as well as to do suit and service; but from a date prior to 1749, there had been no courts baron or customary courts held for the manor, and no evidence was given of existence of any freehold or copyhold tenants.—Covenant to pay fines, &c. not a usual or reasonable covenant, omission of which avoided the lease. Also, that effect of pattern lease was to pass the channel of the watercourse, reserving only the water itself. Also, that it was a question for the jury, whether quantity of water granted was in excess of that formerly granted, Q.B. 154
- See Lease.
- Power of Attorney*.—to empower party to apply to Court to change custody of infant, Q.B. 21
- Proper custody of. See Evidence.
- Practice*.—Notice of trial may be given after cause set down for trial. No particular form is necessary to make a good notice of trial; and notice, correct in other respects, but incorrectly stating that cause made a remanet, a good notice, Q.B. 182
- Order for commission to examine witnesses, (see Witness), Q.B. 14, 209
- A rule obtained in name of plaintiff, to set aside an order, had been discharged on affidavit of plaintiff that application was made without his authority or consent. A second application on same affidavits in name of party on whose behalf action was brought, was allowed, C.P. 61
- As to right to begin in ejectment, and granting new trial when wrong party has begun (see Trial), C.P. 127
- In Common Pleas party who enlarges a rule should serve the enlarged rule on opposite party. If it is enlarged by consent, party whose interest it is to keep it alive should serve enlarged rule on his adversary, C.P. 140
- The Court will not hear a special case which empowers Court to draw such inferences from facts as a jury might draw, and reserves to either party liberty to turn it into a special verdict, C.P. 142
- A replication commenced "And plaintiff as to forty-sixth plea"—it then traversed an allegation in that plea, and went on—"and this the plaintiff prays may be inquired of by the country; and as a further answer in this behalf to the said forty-sixth plea,"—it then alleged new matter by way of answer, and went on—"and this the said plaintiff is ready to verify; and further as to the forty-sixth plea,"—alleging new matter, and concluded—"and this the plaintiff is ready to verify."—This so irregular in form that Court set it aside with costs, upon summary application, C.P. 195
- A count in trespass for breaking and entering plaintiff's rooms, will not be allowed with a count, under 2 Will. & M. sess. 1. c. 5. s. 5, for distraining goods for rent pretended to be due, and selling them, and claiming their double value, &c., there being only one act of trespass. Under second count plaintiff could recover damages, upon proof of a simple act of trespass only, C.P. 196
- After issue and notice of trial, defendant allowed to add a plea, that plaintiff not a sworn broker of city of London, it appearing that trial would not be thereby delayed, C.P. 211
- The Court will not give judgment in a special case stated under 3 & 4 Will. 4. c. 42. s. 25, if action is not *bond fide* brought to try a question really in contest between parties to cause, C.P. 220
- Jurisdiction of Judge at chambers to set aside rule to change venue obtained in common affidavit, C.P. 326
- As to moving on last day of term (see Attorney), Ex. 20
- Application on last day of Trinity term 1847, to rescind Judge's order made on 6th July 1846, too late, Ex. 52
- The rule that whereoyer has been demanded, defendant has as much time for pleading after it is granted as he had when he demanded it, applies to a plea in abatement, Ex. 203
- A rule to plead described a plea thus: "that as to sum of 100*l.*, parcel, &c. the defendant, before the commencement of the action, indorsed and delivered to plaintiff a certain bill of exchange for 100*l.*, which plaintiff received in satisfaction of the said sum of 100*l.*" The plea pleaded alleged that plaintiff took and received the bill of exchange "for and on account" of said sum, parcel, &c.—This a variance, and plaintiff entitled to sign judgment, Ex. 206
- Assumpsit for work done by plaintiff as carpenter and bricklayer, and for bell-hanging, painting, and papering done to defendant's house.—Held, by *Parker, B.*, not a case for a view. *Scumble*.—That a side-bar rule for a view was irregular, which did not contain names of both shewers, and time and place of the meeting of jurors, Ex. 215
- "Rejoining gratis" means rejoining within four days from delivery of replication without a rule for that purpose, and not rejoining within twenty-four hours. Defendant delivered rejoinder shortly before nine o'clock in evening of last day for rejoining, which was also commission day of the assizes: as the practice required record to be passed before three o'clock, plaintiff, without waiting for defendant's rejoinder (the Statute of Limitations), on that morning inserted in issue a rejoinder similar in substance to defendant's, and delivered issue with notice of trial: defendant did not appear at trial, and plaintiff had a verdict.—The issue, *Nisi Prius* record, and trial were set aside, Ex. 217
- In action against several defendants, who appear by different counsel, it is for the discretion of the Judge whether more than one counsel shall address the jury. *Scumble*.—That if, at close of plaintiff's case there is only one point for the jury, only one speech should be made, Ex. 229
- Defendant obtained two Judge's summonses for time to plead, neither of which were attended by plaintiff: on non-attendance on second summons, defendant made affidavit of service, and left it with Judge's clerk for signature: the Judge having left chambers without signing it, defendant took out a third summons, returnable on following day, when, on default of attendance, he obtained an order, previously to which, at expiration of time for attending second summons, plaintiff had signed judgment.—Judgment held regular, Ex. 230
- which prevents party moving matter twice not apply to motions for leave to issue *sci. fa.*, Ex. 321
- as to application on fresh affidavits. See Costs.
- Changing Venue. See Venue.

— Service of Declaration. See Ejectment.  
 — Service of Summons from County Court. See Prohibition.

— See Amendment. Demurrer. Execution. Pleading. Process. Trial. Variance.

**Prerogative**—Vessel having fire-arms on board, was seized by officers of Board of Customs, and after some time, delivered up, unconditionally, to owners. Action of trespass in Court of Common Pleas, for such seizure and detention, removed into Court of Exchequer by rule absolute in first instance, upon application of Attorney General, Ex. 312

**Prescription**—Case for widening a channel: Plea, that H. and previous occupiers of a mill as such occupiers had for twenty years enjoyed a watercourse, and had for twenty years as such occupiers of right scoured and widened the channel as often as was required: Replication, traversing enjoyment of watercourse and scouring and widening of right for twenty years.—On special demurrer, replication good, *quasi* prescription in plea not being severable. And, *semble*—The plea would have been bad if it had stated the right to scour and widen, without shewing for what purpose it was enjoyed, C.P. 177

— Life estate. See Pleading.

— See Common *pur cause de voisinage*.

**Presumption**—of ownership of waste by side of highway (see Waste), C.P. 225

— See Ejectment.

**Principal and Agent**—Liability of party who has cohabited with a female not his wife, and allowed goods to be supplied at her residence on his credit, continues until notice to parties supplying goods that such connexion has ceased, Q.B. 271

— A review was established by an association of shareholders, a committee of whom was appointed "to assist editor in promoting prosperity and circulation of Review, and to obtain, as far as possible without expense, literary contributions, and to aid editor as he might require in all matters connected with his department:"—Held, that this resolution did not empower one of committee to contract for supply of literary articles, or bind shareholders to pay for them when supplied and inserted in Review, C.P. 57

— See Bill of Exchange. Contract. Fraud. Money had and received. Railway. Ship and Shipping.

**Principal and Factor**—Factor for sale cannot sell goods of his principal, in exercise of a sound discretion contrary to principal's orders, to reimburse himself for advances made to principal, after consignment. There is not, in such a case, an authority coupled with an interest which is irrevocable, although the advances made subsequently to consignment might be a good consideration for an agreement that the original revocable authority to sell should become irrevocable, C.P. 258

**Principal and Surety**—Debt on joint and several bond for 500*l*. Condition, set out on oyer by defendant, recited that one S. had been appointed collector of taxes, and that plaintiff had become surety for payment of such sums as S. should receive; that plaintiff consented to become surety on condition that defendant and S. would indemnify him from all charges, &c. which he should incur as surety. Plea, that plaintiff had not at any time since been in any wise damaged by reason of anything in condition specified. Replication, that S. received, as collector, divers sums of money, amounting in whole to a large sum exceeding 500*l*, to wit, 2,000*l*; that S. did not duly pay said sums so received, nor any of them, but made default, by reason of which plaintiff afterwards was forced to pay to receiver-general a large

sum, to wit, 500*l*, and thereby sustained damage to a large amount, to wit, 500*l*. Rejoinder, that plaintiff was not forced to pay said sum in replication mentioned, or any part thereof. No proof of receipt of any money by S. as collector; but that S. had not paid any over to receiver-general, and that plaintiff had been called on as surety to pay the 500*l*, and, having been sued, had submitted to a judgment. Receipt of 500*l*. by S. not admitted on pleadings, and plaintiff, in default of proof of receipt, only entitled to nominal damages. Defendant, having been no party to judgment obtained against plaintiff, judgment only evidence to shew that plaintiff had been sued, or had been subjected to a *bond fide* pressure, but not evidence that he was legally liable to extent for which judgment was signed, C.P. 23

— See Bond.

**Prisoner**—It is not necessary that the gaol in which a party committed under 8 & 9 Vict. c. 127. is imprisoned should be locally situate within the county of Middlesex, if it is the common gaol in which debtors resident within that county are confined. Period of imprisonment is to be calculated from time when party taken into custody, and not from date of order. Order need not be under seal. The committal being in absence of party does not vitiate it, Q.B. 243

— Detainer of, on warrant of detainer issued on Saturday, served on gaoler on Sunday, where order from creditor for discharge on Saturday, Ex. 54

— If defendant in prison under writ of extent be taken out of precincts of prison for a time, by order of Commissioners of Excise, but without a writ, for the purpose of giving evidence, and be afterwards brought back and detained in same custody, such custody is lawful, Ex. 204

— See Extent.

**Privilege**—of attorney to sue in county court (see Attorney, Q.B. 172, 290), Ex. 163

**Privileged Communication**. See Slander.

**Privilege of Parliament**. See Parliament.

**Process**—After declaration and plea the Court will not amend writ of summons by adding a new defendant, though Statute of Limitations has become a bar after action brought, Ex. 90

— See Amendment. Inferior Court.

**Production and Inspection of Documents**—Action by allottee of railway shares against a member of committee of management, for recovery of plaintiff's deposit; subscribers' agreement and parliamentary contract had been signed by plaintiff and defendant, and was in hands of solicitors to defendant and company; plaintiff's affidavit stated, that an inspection and copy thereof were necessary for framing his case, and that he could not safely proceed to trial without them:—Rule for liberty to plaintiff or his attorney to inspect and take copies of those documents was made absolute, Ex. 105

— Title-deeds. See Evidence.

— Custody of. See Evidence.

**Prohibition**—H. being brought before magistrates on a charge of unlawful fishing in a private fishery, under 7 & 8 Geo. 4. c. 39. s. 4, claimed a right to fish in water in question, first, as being a public fishery; secondly, as having a right to fish there, as being a copyholder. The magistrates proceeded to hear the case, and fined him in 30*s*., and costs, refusing to go into evidence as to right claimed by him, and not requiring E. B. to produce his title-deeds, but proceeding on general statements of witnesses as to his right to fishery.—Prohibition refused because magistrates had jurisdiction, and to grant a prohibition would be in effect to repeal clause of the statute which takes away *certiorari*, Q.B. note (3) 63

— See Compensation. County Court. Tithe.

**Promissory Note**—Note made by several persons payable to "our and each of our order," and indorsed by one of these persons, a good promissory note within 3 & 4 Anne, c. 9, Q.B. 7

— A note payable to the maker's own order is not a promissory note negotiable under 3 & 4 Anne, c. 9, s. 1; but the maker may, by indorsing it, give the holder a right of action on it against him. A declaration describing such a note as a "promissory note" is good after plea. And an allegation that defendant indorsed such a note is sufficient after plea, C.P. 281

— Declaration that defendant made a promissory note payable to his own order, and indorsed it to Smith & Co., who indorsed it to plaintiff.—This, as against maker and indorser, a valid promissory note payable to Smith & Co. or order; before indorsement it was a note in the nature of a promise to pay to the person to whom the maker should afterwards indorse it; and declaration would be bad on special demurrer for not stating its legal effect, C.P. 286

— Construction of terms of promissory note, whether payable at a particular place; and where declaration bad for want of an averment of presentment for payment there, Ex. 6

— An instrument whereby maker promises to pay to his own order, not a promissory note at all, and, therefore, not transferable as such within 3 & 4 Anne, c. 9. Effect of indorsement is to perfect the incomplete instrument, making it binding between maker and indorsee, and it then becomes an assignable note; if indorsement be in blank it is a note payable to bearer, and properly declared upon as such. Indorsement, in such case, not a new drawing, so as to make fresh stamp necessary, Ex. 315

— Suspension of right of action on. See Contract. And see Bill of Exchange. Pleading.

**Public Officer.** See Contract.

**Quo Warranto**—Upon *quo warranto* information for exercising office of coroner of a borough (appointed under 3 & 6 Will. 4. c. 76,) and judgment for the Crown, relator not entitled to costs by 9 Anne, c. 20, Q.B. 19

**Railway**—Where by act of parliament incorporating railway company, directors have power to "appoint and displace any of officers of company,"—the appointment of an attorney under the power need not be under seal, Q.B. 162

— Promoters not compellable to take whole of building, though owner cannot be compelled to sell part of it only. Therefore, when company have given notice requiring part of manufactory, mandamus directing them to summon jury to assess compensation for the whole cannot be sustained. Where mandamus requires company to take whole manufactory, prosecutors cannot have the writ for part only, Q.B. 326

— Where plaintiff, a share-broker, bought by order of defendant railway shares, to be paid for on delivery, and shares were delivered, and had fallen in price between time of sale and delivery, and plaintiff not being able to pay at time of delivery vendor demanded shares back from plaintiff, who gave them back to vendor, who sold them, and called upon plaintiff, according to usage of Stock Exchange, to pay difference, which he did,—plaintiff entitled to recover sum paid from defendant as money paid to his use, Q.B. 353

— An award under Lands Clauses Consolidation Act need not assess price of land taken and damage separately. Award of sum for fee simple in possession of claimant's land—unobjectionable, though there was an existing lease of part of land, claimant having used the same terms in his notice

of claim. Objection that award contrary to evidence not entertained. Where two arbitrators appointed by parties, appointment of umpire by Board of Trade, more than twenty-one days after appointment of last arbitrator, is valid. The three months within which umpire bound to make award are to be calculated from time when duty devolves upon him, Q.B. 362

— Right of allottee to recover back his deposit though he has signed parliamentary deed and subscribers' agreement empowering directors to pay expenses out of deposits. Where application for allotment of shares do not constitute a contract binding upon plaintiff to take and pay for shares in a concern consisting of 58,000 shares only, instead of 120,000. If application unconditional, and form of allotment conditional, contract not binding upon plaintiff. Where jury warranted in saying that advertisement, stating that the committee had completed the allotment of shares, was a fraudulent misrepresentation, and a material inducement to plaintiff to pay his money, and plaintiff therefore entitled to recover it back in an action for money had and received. Payment of deposit having been obtained from plaintiff by misrepresentation, deed executed by him under same belief forms no answer to action. Plaintiff's subsequent attendance at a meeting does not preclude him from bringing action, C.P. 38

— Action for not accepting railway shares; plea, that they were shares in a joint-stock company in England, exceeding, in number of partners, twenty-five persons, and formed for purpose of executing works which did not require authority of parliament; that company had not been "formed" or established "in any way whatsoever on or before 1st of November 1844; and that, at time of contract, company not completely registered, according to 7 & 8 Vict. c. 110. At trial, it was shewn that S. went to India, at his own expense, in 1843, and examined the country; that he proposed a railway between M. and D, and spoke of it to persons who agreed to become connected with it; that he got a draft deed in July 1844, and brought it with him to England, where he arrived after 3rd of November 1844; and that company was provisionally registered in May 1845. Judge left it to jury to say whether company had been commenced to be formed before 1st of November 1844, and they found for plaintiff.—*Semble*—Plea bad on demurrer, for not stating that company had not been commenced to be formed before 1st of November 1844, but good after verdict. Whether plea good or bad, above facts not sufficient evidence for jury that formation of company was commenced before 1st of November 1844, C.P. 89

— Company, provisionally registered, required deposit of 2*l.* 12*s.* 6*d.* on each share allotted. Plaintiff had twenty shares allotted, on which he paid required deposit and received scrip certificates for shares. He signed subscribers' agreement, which gave provisional committee power to carry on undertaking, or any part of it, or to abandon whole, or any part of it, and, out of money which should come to their hands, by way of deposit or otherwise, to make such deposits or investments as might be required by standing orders of parliament, and to pay salaries, &c. and also towards costs of obtaining acts of parliament, &c., and, generally, to apply such monies in paying and satisfying all other costs, expenses, or liabilities, which they might incur in relation to the undertaking. Undertaking proved abortive, and company was dissolved under the 9 & 10 Vict. c. 28, but without fraud. Money had and received, to recover deposit from member of provisional committee, not sustainable, as plaintiff

was not entitled to recover either 2s. 6d. per share, paid as deposit of 10s. in every 100l., under 23rd section of 7 & 8 Vict. c. 110, or 2l. 10s. per share required to be deposited by standing orders, Ex. 29

— Plaintiff signed letter of application for shares in railway company, provisionally registered, therein undertaking to sign subscribers' agreement and parliamentary contract, when required. He never received any letter of allotment, but paid deposit on 500 shares, and received scrip certificates in form:—"The subscribers' agreement and parliamentary contract having been signed by the person to whom the certificate is issued." He never signed subscribers' agreement or parliamentary contract at all. Scheme having proved abortive, in action against one of managing committee for money had and received.—Held, that he had placed himself in same position as if he had signed parliamentary contract, and was not entitled to recover, Ex. 31

— Sufficiency of declaration of committee of management against allottee for non-payment of deposit upon question whether it discloses a contract between plaintiffs and defendant, on which they may sue him without joining other members of company; and though it does not allege that company was provisionally registered pursuant to the 7 & 8 Vict. c. 110, or that it was formed previously to date of that act. Declaration not bad for not alleging that company was continuing when shares were allotted to defendant; or for not shewing with sufficient certainty that defendant accepted allotment; nor for not shewing with certainty what the terms to be performed by plaintiffs were, Ex. 37

— Defendant employed plaintiff, a sharebroker at Liverpool, to sell twenty railway scrip for him; plaintiff sold them to F, another Liverpool sharebroker. Defendant not having delivered shares to purchaser, latter bought twenty other scrip at an advanced rate, and plaintiff paid difference between contract price and that at which he bought them. By usage of Liverpool share market, brokers are responsible to each other for fulfilment of contracts relating to sale and purchase of scrip:—Held, that defendant was liable to plaintiff in action for money paid; and, *semble*, per *Parke, B. and Rolfe, B.*, that defendant liable though not cognizant of such usage, Ex. 78

— In 1845 railway company, provisionally registered, issued prospectus, which stated capital to be 1,500,000l., in 60,000 shares of 25l. each. Plaintiff having paid deposit on forty shares allotted to him, on 4th of November signed subscribers' agreement, containing usual terms as to disposition of deposits. Of the whole amount of shares, about 35,000 were allotted, and out of this number deposits were paid up on 18,160 only. These facts were not communicated to plaintiff before he signed deed.—The withholding of above facts did not amount to fraud, so as to avoid subscribers' agreement, Ex. 97

— In action for calls, under 8 & 9 Vict. c. 16. s. 26, it appeared that defendant purchased scrip certificates of shares in question, and before call sent them to company, with a claim to be entered in their books as holder thereof. His name was entered in draft register of shares, but was not entered in *sealed* register until after call made.—Plaintiffs not entitled to recover; and, *semble*, in this respect there is no difference between an original subscriber and a transferee, Ex. 103

— Right to inspection and copy of subscribers' agreement and parliamentary contract (see Production and Inspection of Documents), Ex. 105

— A letter of allotment of shares in a projected railway company was indorsed, "The directors assume the right to carry out their intentions by

the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of," &c. "and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the *general powers vested in them* for the prosecution of the undertaking."—In an action for return of a deposit paid, held, that "general powers" meant general powers which directors assumed to carry undertaking into effect; and that if all deposits had been applied for that purpose in a reasonable and proper manner, and before it was clear that scheme must fail, plaintiff was not entitled to recover. Whether deposit-money has been reasonably expended is a question for the jury, Ex. 132

— In action against member of provisional committee of proposed railway company, upon a contract entered into by committee of management appointed by such provisional committee,—it is a question of fact for the jury whether defendant made committee of management his agents to pledge his individual credit, Ex. 196

— Defendant applied to a railway company for an allotment of 100 shares, undertaking to accept the same or any less number, and pay deposit thereon: he received an assignment of sixty shares by a letter of allotment, headed "*Not transferable*."

—Held, in action for deposit, that the contract was not binding on defendant, as his proposal was absolute, whereas acceptance in letter of allotment was conditional, Ex. 231

— Railway company requiring certain lands for purposes of their railway, gave notice thereof to L, H, and H, parties interested therein, and received from them a notice which stated that they had and claimed an estate and interest in certain copyhold lands and hereditaments, situate &c., and required to be taken by the company, and that they claimed compensation for said lands and hereditaments to amount of 3,344l. 17s. 6d.; that they desired to have the same compensation settled by arbitration, and appointed T. H. one of the arbitrators. Another arbitrator having been appointed by the company, and an umpire nominated by arbitrators, a claim for compensation was made by one T. W., who alleged that he had a leasehold interest in land proposed to be taken by company. Umpire awarded that sum of 1,861l. 2s. 6d. should be paid by company to T. L, R. H, and R. H, as such trustees for purchase of fee simple in possession, free from all incumbrances of and in said copyhold lands, &c. required to be taken by company, but omitted to adjudicate upon T. W's interest. Company took possession of land in question. Award insufficient on ground of umpire not having found value of interest of T. L, R. H, and R. H, and awarded distinct compensation. But Court refused to set it aside; and *quære*, whether it was not binding on the parties by reason of their conduct. *Semble*—That notice of T. L, R. H, and R. H, which constituted submission, was not conformable to statute, and therefore award could not be enforced by attachment, Ex. 350

— Award of one gross sum for land required by company and land required to be taken by parties, company not having agreed to submit to arbitration last-mentioned land,—is bad; but Court would not set it aside. *Quære*—if it could be sustained by reference to the conduct of the parties, Ex. 354

— See Attorney. Carrier. Money had and received. Pleading. Set-off.

*Railways Clauses Consolidation Act*—The word "town" in the Railways Clauses Consolidation Act means the space on which the inhabitants have permanently collected their dwellings so near to each other that

- they may be reasonably said to be contiguous. It includes all open spaces surrounded by a continuous line of houses; and, *semble*, all open spaces occupied as mere accessories to the congregated dwelling-houses, although not so surrounded, Ex. 262
- Rate**—Certificate of barrister appointed to certify rules of friendly societies, obtained under 6 & 7 Vict. c. 36, is not made conclusive proof of other requisites of statute having been complied with; but is merely one of several conditions precedent, which must all concur to give right of exemption. Birmingham News-room, possession of which is vested in subscribers, and to which newspapers and periodicals are supplied; also share lists, advertisements of sales, and topographical works and directories; and to which library is attached, where, with 300 other volumes, two testaments are kept, which are occasionally used by professional men, who are subscribers, in administering oaths to persons swearing affidavits before them; but no surplus of receipts over expenditure had ever arisen—not a society instituted for purposes of science or literature exclusively, nor one which might not by its laws make a dividend or gift among its members, and therefore not exempt from liability to be rated, by 5 & 6 Vict. c. 36, Q.B. 165
- Before Municipal Corporation Act, 5 & 6 Will. 4. c. 76, borough of Marlborough had separate jurisdiction, derived from charter, and before 55 Geo. 3. c. 51, was subject to rates in nature of county rates, imposed by its own Justices, and therefore, by section 1. of that statute, exempt from county rates: after passing of 5 & 6 Will. 4. c. 76, borough, which was in Schedule B, had no grant of a separate Court of Quarter Sessions; but borough Justices had acted in some criminal matters concurrently with county Justices, and town council had maintained a gaol, repaired a bridge, and contracted with county for maintenance of prisoners.—Borough liable to be assessed to county rate under 5 & 6 Will. 4. c. 76, Q.B. 206
- Court will not grant mandamus to compel Justices to convene party before them for non-payment of rate, bad or very questionable on face of it.
- Semble*—Church-rate, which purports in heading of it to be made "for and towards the repairs of the church, and other incidental charges of the said parish and hamlet," is bad on face of it, Q.B. 326
- An inclosure act enacted, that an annual rent or sum of 90*l.* be vested in rector of parish of N. and his successors for ever, issuing out of and charged upon lands and grounds intended to be inclosed, as well such as should be allotted to rector in lieu of glebe lands lying in common fields, &c. as lands of other landowners in said common fields, &c., "and should be paid and contributed free and clear of and from all deductions, defalcations, or abatements for or in respect of reprises and *outgoings* whatsoever, other than and except such proportion of the tax charged upon land by authority of parliament as the said annual rent of 90*l.* shall bear to the yearly value of the lands thereby charged with or made liable to the payment of the same rent:" it was declared that yearly rent of 90*l.* should be in lieu and satisfaction of all tithes, &c. arising and renewing in said common fields, &c. and payable by inhabitants of N. with certain exceptions; but rights of rector to tithes of other parts of parish of N. were reserved as before: for tithes of these last-mentioned portions of parish, rector had always since acted been rated to poor.—Held, that he was not rateable in respect of yearly sum of 90*l.*, Q.B. 232
- See Commitment.
- Record**—and all subsequent proceedings set aside

where in 'action on bill of exchange word "two" written on erasure, and plaintiff not allowed to retain his verdict on other counts, Ex. 56

**Rejoining Gratis.** See Practice.

**Release**—Setting aside release, executed by pauper plaintiff after action without attorney's consent, discretionary with Court, and if executed *bona fide*, not set aside though attorney thereby deprived of costs, Ex. 343

**Rent-charge.** See Grant.

**Rent Service.** See Distress.

**Repleader.** See Bill of Exchange.

**Replevin**—Declaration in debt on a replevin bond stated a removal of plaint into superior court, on 2nd of November, and a declaration in replevin on 30th of April; an avowry, 9th of July; and death of plaintiff in replevin 16th of November; and charged as a breach that J. S. (plaintiff in replevin) did not prosecute his suit without delay; but on contrary, delayed prosecution of said action for unreasonable time, and until said J. S. long after reasonable time had elapsed for trial, died before issue joined. Breach traversed *modo et forma*. Plaintiff was at liberty, under this issue, to shew delay in proceedings prior to delivery of declaration. Condition to prosecute without delay may be broken by a delay which does not exceed time for proceeding allowed by practice of superior courts, Q.B. 55

— See Sheriff.

**Revenue**—Sweet spirits of nitre not "spirits" within 6 Geo. 4. c. 80. s. 101, 6 & 7 Will. 4. c. 72, and 5 Vict. c. 25. Party buying sweet spirits of nitre from one not a licensed distiller, and without permit, and removing, and receiving them after their removal, knowing that no duty has been paid, and that they have been illegally distilled, not liable to be convicted under 6 Geo. 4. c. 80. s. 133, 7 & 8 Geo. 4. c. 53. s. 32, and 2 Will. 4. c. 16. s. 10. Term "spirits" within 6 Geo. 4. c. 80. signifies an inflammable liquid produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under generic appellation of spirits, Ex. 9

— Under 43 Geo. 3. c. 99, and 43 Geo. 3. c. 161. the assessment is final, subject to a right of appeal, by party charged, to Commissioners, and from their decision to the Judges. Therefore, upon replevin for goods taken under a distress for assessed taxes, such assessment is an answer to the action; and an allegation in an avowry that plaintiff did in fact "exercise the trade and business of a horse-dealer," was held immaterial. *Quare*—As to what constitutes "a horse-dealer" within the meaning of assessed tax acts, Ex. 209

— See Prerogative.

**Right to begin.** See Trial.

**Rule**—Service of enlarged rule (see Practice), C.P. 140

— Form of, in cases of extortion by sheriff's officer (see Sheriff), Q.B. 216.

— See Writ of Error.

**Sale**—of unwholesome food (see Vendor and Purchaser), Ex. 190

— See Contract. Principal and Factor. Trover.

**Scienter.** See Action.

**Scire Facias.** See Banking Company.

**Sequestration**—Where, in 1834, a writ of sequestration sued out by plaintiffs, indorsed to levy amount of judgment debt recovered; in 1838, statute 1 & 2 Vict. c. 110. passed, by 66th section of which judgments are to carry interest; and in 1839 other execution creditors of defendants lodged writs of sequestration with Bishop,—Court refused to grant application of plaintiffs, that their writ of seques-

tration should be amended by claim for interest since 1838 being indorsed thereon. *Quare*—Whether, under writ as it stood, Bishop would be bound to satisfy plaintiffs this interest, Q.B. 47

— See Insolvent Debtor.

*Sessions*—At the hearing of respited appeal against a poor-rate, appellants not appearing, the Sessions made this order: "Surrey, to wit.—At the General Quarter Sessions of the Peace, holden at St. Mary, Newington, on &c. Whereas, at the last General Quarter Sessions of the Peace, holden in and for the county of Surrey, appeal was then made at this court." It then recited an entry and respite "until the next General Quarter Sessions to be holden in and for the county of Surrey;" and it ordered that the appeal be dismissed, and "that the said appellants do forthwith pay to the said respondent the sum of 115*l.* costs."—On motion for *certiorari* order good, though no notice had been given that more than nominal costs would be asked for. Order sufficiently shewed that it was made at Quarter Sessions holden in and for county of Surrey. Term "costs" shewed sufficiently that they were costs of appeal, Q.B. 215

— See Appeal.

*Set-off*—A plea of set-off to the further maintenance of the action, of a debt due from plaintiff to defendant after commencement of suit and before plea, is bad, Ex. 277

— See Broker.

*Sheriff*—Replevin bond assigned by sheriff, is admissible in action against him for taking insufficient pledges, without proof of its execution, though there is an attesting witness. Acts and declarations of person who acted as replevin clerk admissible against sheriff. Writ of *fi. fa.*, in action on promise for rent admissible against sheriff, to shew proceedings against plaintiff in replevin had proved fruitless. Costs of action against sureties recoverable as damages against sheriff. Declaration sufficient which alleges that sureties were insufficient in fact, without noticing tenant or shewing due inquiry or reasonable caution by sheriff. Whether he used due caution is for the jury, Q.B. 153

— After delivery to sheriff of plaintiff's writ, another writ (which was void) was delivered at suit of J. S. and sheriff granted a warrant on this last-mentioned writ to officer who arrested A. B. under it, having at the time no other warrant in his possession, and detained him in custody under that writ until he was discharged by Judge's order: After that order sheriff still detained A. B. in custody under plaintiff's writ, until a second order for his discharge from that writ was made.—Held, (in error,) that there had been no arrest at plaintiff's suit; and that Judge's order was no justification; but that it was a question of fact for the jury, whether sheriff guilty of negligence in arresting A. B. on supposed writ at suit of J. S. instead of plaintiff, Q.B. 189

— In cases of extortion by a sheriff's officer, the injured party may, by one and the same rule, call on sheriff to pay over excess, and for attachment against officer, Q.B. 216

— Attachment against sheriff for not returning *fi. fa.*, issued on 21st of July; goods were seized on the 22nd; sheriff was ordered on the 24th to return writ; goods were claimed on the 27th: sheriff applied under Interpleader Act, on the 30th; plaintiff attended the summons and adjournments thereof, and declined to contest the claim, which was allowed on the 12th of August; on the 14th of September sheriff returned *nulla bona*.—The delay having

caused no damage to plaintiff, attachment set aside on payment of all costs by sheriff, C.P. 116

— Right of, to reasonable time to search his office for writs after he receives order for prisoner's discharge, Ex. 54

— Action by execution creditor against sheriff, for not levying debt of 60*l.* under *fi. fa.* At the trial landlord of debtor stated that 46*l.* was due from debtor for rent. The sheriff had withdrawn execution upon notice from landlord, who subsequently distrained and realized less than rent due. Landlord admitted that debtor held under a lease, which was not produced.—Plaintiff entitled to recover amount realized under distress, Ex. 73

— The 1 Vict. c. 55. does not repeal 29 Eliz. c. 4; its only effect is to exempt from the penalties of statute of Elizabeth those cases in which sheriff takes no larger fees than shall be allowed by Judges. Therefore declaration in case for extortion on statute of Elizabeth, need not negative defendant's authority under statute of Victoria to take the fees complained of; that should come by way of defence. The Court will not take judicial notice that an order of the Judges, allowing a scale of fees under 1 Vict. c. 55, was made before alleged extortion. Declaration against sheriff, for extortion, on statute of Elizabeth, that defendant levied under *fi. fa.* upon goods of plaintiff's debtor a certain sum, to wit, 18*l.* 10*s.*; that he wrongfully took of plaintiff, for serving and executing the execution, a large sum of money, to wit, 16*l.*, being a larger recompence than in statute is limited of and for the sum so levied, that is to say, a large sum, to wit, 15*l.*:—*Semble*—That this allegation was bad in form, inasmuch as poundage upon the levy allowed by the statute being 1*l.* 8*s.*, the allegation that defendant took 16*l.* which was excessive by 15*l.*, was repugnant; and if "to wit, the sum of 15*l.*" were rejected as surplusage, there would be no sufficient allegation of damage, Ex. 141

— Escape. See Attorney.

— See Landlord and Tenant.

*Sheriff's Bailiff*. See Attorney and Client.

*Ship and Shipping*—Assignee of bill of lading, who claims goods under it, is liable to pay not only the freight, but also demurrage, according to terms of bill of lading, Q.B. 166

— Liability of consignee or indorsee of bill of lading for freight a new contract, consideration for which is delivery of goods to him at his request, and not the carriage of them. Therefore declaration in inferior court containing common *indebitatus* count for freight, and alleging delivery of goods, at request of defendant, to have been within jurisdiction, sufficiently shews cause of action arose within jurisdiction, Q.B. 305

— In action on charter-party purporting to be made by A. B. "owner of ship *Ann*," parol evidence that A. B. acted as agent for real owner not admissible, Q.B. 350

— Declaration that before happening of damage complained of, to wit, &c., a certain barge of defendant, of which he was then in possession and then had the management, sank in a navigable river in England, same being a public highway; that it lay concealed under water, so that vessels passing over would be in danger of striking against it, of which defendant had notice; that it thereupon became and was the duty of the defendant while the barge continued so sunk to use due care to prevent danger to vessels, by notice by a buoy or otherwise to persons navigating; that defendant omitted to give such notice, &c.—Held, insufficient for not shewing with sufficient directness any obligation on



defendant to give notice; that word "thereupon" in the allegation "it thereupon became and was the duty," was not to be understood as shewing that the proposition following the word was a consequence deducible from what preceded it, but only as shewing time or occasion upon which proposition was averred to have taken place; that allegation in question was an averment of matter of law only, without any sufficient allegation of facts from which it could be inferred; that as declaration did not shew either a continuing possession and controul of defendant at time of collision, nor other special circumstances shewing that he was bound to prevent other vessels being injured, it was insufficient in substance; that mere fact of defendant having possession and controul of barge at time it sank, was not sufficient to render him liable, C.P. 227

*Ship and Shipping* (continued)—If a ship be so damaged during her voyage that she cannot prosecute it, master has authority to sell her and receive the proceeds. Payment thereof, by person employed to sell, to master or any person he may direct, is good, in absence of notice not to do so from some party interested, C.P. 241

— Declaration on charter-party between plaintiffs and defendant, alleging as a breach, that defendant did not ship a full cargo of linseed according to terms of charter-party. Plea, setting forth charter-party, which stated that it was mutually agreed between plaintiffs, as original charterers of vessel "now at sea, having sailed three weeks ago," and defendant, that said ship should sail to Marseilles, and there load a full cargo of linseed, and should then proceed to one safe port in United Kingdom, and deliver same on being paid freight. Averment, that upon making of charter-party time was an essential part of contract, and that probable situation of vessel, with reference to date of her sailing, was also a material and necessary part of contract; that at making of charter-party, vessel had not sailed three weeks before, but, on contrary, had sailed at a materially and unreasonably later time, to wit, one week later, which plaintiffs at time of making of charter-party knew, wherefore defendant declined to load any cargo. Replication *de injuria*.—On motion for judgment *non obstante veredicto*, fact of vessel having sailed three weeks a condition precedent to defendant's liability to load, and defendant entitled to judgment. *Semle—per Parke, B.*, averment of plaintiffs' knowledge an immaterial averment, Ex. 21

— What commissions payable on following letter addressed to a captain and supercargo by his employers:—"Your commissions are 6l. per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., 4l. per ton from the gross sales of the oil when taken from the quay, and 4l. 15s. when warehoused," Ex. 25

— In cases of necessity affecting interest of shipper, and where sale or pledge of cargo is directly or indirectly for his benefit, master becomes his agent for purpose of selling or pledging cargo. Vessel of defendant, the ship-owner, requiring repairs in foreign port, master by one bottomry bond hypothecated for necessary repairs, the vessel, freight and cargo, including goods of plaintiff, the shipper: vessel and freight proving insufficient to defray expenses, plaintiff was compelled to contribute towards the difference, and was forced to pay costs incurred in an Admiralty suit instituted by obligee of bottomry bond.—Held, that ship-owner was responsible to shipper for costs of Admiralty suit,

and also for value of goods on a contract of indemnity; and it made no difference that goods were liable by one instrument of hypothecation. To action on such contract defendant pleaded that bottomry bond executed by master, without any express authority from him, defendant, and before same was executed, costs and expenses exceeded value of ship, when repaired, and freight; that defendant upon notice of premises, abandoned ship and all right to her and to all freight, and refused to ratify, and never did ratify act of master in executing bond.—Held bad, on general demurrer, Ex. 238

— Effect of delivery on board under bill of lading (see Contract), Ex. 307

— Deviation. See Insurance.

— See Case.

*Slander*—A vestry, pursuant to 5 & 6 Vict. c. 108, made out a list of persons qualified and liable to serve office of constable, and returned it to Justices, with a resolution to have a paid constable: plaintiff being named in the list was about to be sworn in as a paid constable by Justices, when defendant, a parishioner, made a statement to them, in presence of a number of persons, affecting plaintiff's character. In action for slander it being objected that statement ought to have been made to vestry, and not to Justices, who could only hear objections as to qualification and liability to serve,—held, that plaintiff was not entitled to recover, if statement made *bona fide* in furtherance of ends of justice, Ex. 129

— Declaration that plaintiff was a surgeon and accoucheur, that he had attended R. in her confinement, that defendant, in her discourse with R. of and concerning plaintiff in relation to his said profession, falsely, &c. spoke and published,—“I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. There have been many inquests had upon persons who have died because he had attended them. The words proved as to the inquests were “several have died that the plaintiff has attended, and there have been inquests held upon them.”—Held, that the declaration might be amended, by inserting those words. Also, that if amended words could have been answered by a plea of justification, and words originally inserted could not, defendant should have applied to postpone trial. Also, that words as amended were actionable; and, *semle*, that words “he is a bad character; none of the medical men here will meet him,” were also actionable, Ex. 151

*Special Case*—Refusal of Court to give judgment on (see Practice), C.P. 220

*Stamp*—By deed between E. B. (mortgagee) of first part, M. G. (devisee for life under will of mortgagor) of second part, and J. G. (devisee in remainder in fee) of third part, recting an original mortgage for 1,000 years, to secure 150l. and interest, in consideration of 350l. (being 165l. due for principal and interest due on original mortgage, and 185l. further advance), paid by lessor of plaintiff, all parties assigned premises comprised in original mortgage to her for residue of term of 1,000 years, subject to proviso for redemption on payment of the 350l. at a different day from that named in original mortgage. and M. G. and J. G. entered into fresh covenant to pay the whole 350l. at time mentioned in proviso.—Deed required an *ad valorem* stamp, as upon a new mortgage for 185l., and also a deed stamp, as the covenant by devisees for payment of old as well as new advance created a fresh security, Q. B. 99

— Indenture between and executed by vendors, trustee, plaintiff and defendant. It recited title of vendors to certain copyholds, an agreement for sale to defendant, that he had taken possession and built a house thereon, an agreement by plaintiff with defendant to lend him some money by way of mortgage, and that for purpose of carrying agreements for mortgage and purchase simultaneously into effect, a surrender was to be made of copyholds by vendors, to a trustee, to secure money advanced by plaintiff. Vendors then covenanted with plaintiff, his heirs, &c. and separately with defendant, his heirs, &c., that they had good title, &c.—Indenture single in its nature and object, though treating of several matters, and not within 12 Anne, c. 9. s. 24; therefore, liable only to a 35s. stamp. Another indenture between and executed by plaintiff and defendant, recited former deed, default in payment of sum thereby secured, and further loan by plaintiff; and defendant thereby covenanted to pay whole sum, with interest, and that copyholds should remain further charged with entire sum—This a deed constituting a further charge, and liable only to *ad valorem* stamp duty of 30s. under 55 Geo. 3. c. 184, C.P. 58

— An agreement, which amounted to a lease, stated that A. agrees to let certain premises to B. for two years, at rent of 50*l.* a year; that B. shall have right of purchasing premises at any time during the term, it being understood that A. is possessed of same premises for his own life, and life of M, and survivor of them.—A 30s. stamp was sufficient. Also, that by agreement A. was bound to make out title to premises for lives of A. and M, and the survivor of them, C.P. 117

— In an action for money had and received, defendant put in evidence following document, written by plaintiff, on back of an unstamped receipt: "Balanced up to this day, as per cash-book, 19th of November 1845."—Admissible without a stamp. Also, that it was good *prima facie* evidence to shew that, up to its date, there was no debt existing between the parties, C.P. 158

— An agreement, made when 55 Geo. 3. c. 184, schedule, part 1, 'Agreement,' was in force, under which it required a stamp of 1*l.* was, subsequently to 7 Vict. c. 21, stamped, under a penalty, with the stamp of 2s. 6*d.*, as required by the 2nd section and schedule of the latter act.—Agreement held admissible in evidence, Ex. 217

— A written instrument, operating as record of transfer of property, is a conveyance within meaning of Stamp Act; and if it be "a memorandum, letter, or agreement relating to the sale of goods, wares and merchandise," it is exempted from all stamp duty; but if it operate as a transfer of anything else, it must be stamped as a conveyance. A transfer of "fixtures" is at least a transfer of the right of severance; and is therefore a conveyance within words of Stamp Act, which include "transfer of any right; and as fixtures are not goods, wares and merchandise, it is not within the exemption. Therefore, a "memorandum that A. B. has sold goods and fixtures in a shop to C. D." signed by both parties, requires an *ad valorem* stamp as a conveyance, Ex. 266

— See Promissory Note.

*Stakeholder.* See Gaming.

*Statutable Right.* See Action.

*Statute*—25 Hen. 3. c. 22, Q.B. 81

— 25 Hen. 8. c. 20, Q.B. 252

— 28 Hen. 8. c. 7, Q.B. 81

— 32 Hen. 8. c. 28, C.P. 268

— 32 Hen. 8. c. 34, C.P. 192

— 32 Hen. 8. c. 38, Q.B. 81

— 13 Eliz. c. 5, Ex. 234

— 29 Eliz. c. 4, Ex. 141

— 17 Car. 2. c. 7, Q.B. 291

— 29 Car. 2. c. 7. s. 6, Ex. 54

— 3 & 4 Anne, c. 9, Q.B. 7, Ex. 315

— 3 & 4 Anne, c. 9. s. 1, C.P. 281, 286

— 4 & 5 Anne, c. 16. ss. 4, 5, Ex. 32

— 4 & 5 Anne, c. 16. s. 4, Ex. 121

— 6 Anne, c. 31, Q.B. 89

— 9 Anne, c. 20, Q.B. 19

— 12 Anne, c. 9. s. 24, C.P. 58

— 2 Geo. 2. c. 22. s. 13, Ex. 277

— 11 Geo. 2. c. 19. s. 1, Q.B. 25

— 14 Geo. 3. c. 78, Q.B. 89

— 42 Geo. 3. c. 116, Q.B. 273, Ex. 1

— 46 Geo. 3. c. 43, Q.B. 299

— 46 Geo. 3. c. 128, Ex. 13

— 53 Geo. 3. c. 127, Q.B. 328

— 54 Geo. 3. c. 107, Q.B. 89

— 55 Geo. 3. c. 51, Q.B. 206

— 55 Geo. 3. c. 141, Ex. c. 43

— 55 Geo. 3. c. 184, C.P. 58, 158, Ex. 217

— 56 Geo. 3. c. 189, Q.B. 89

— 59 Geo. 3. c. 12, Q.B. 59

— 3 Geo. 4. c. 117, Q.B. 99

— 4 Geo. 4. c. 34, Q.B. 111, 132

— 6 Geo. 4. c. 16. s. 3, Ex. 234

— 6 Geo. 4. c. 16. s. 6, C.P. 76

— 6 Geo. 4. c. 16. s. 52, Ex. 169

— 6 Geo. 4. c. 16. s. 72, Ex. 219

— 6 Geo. 4. c. 80. ss. 101, 133, Ex. 9

— 7 Geo. 4. c. 46, Q.B. 9

— 7 Geo. 4. c. 46. s. 13, C.P. 98, Ex. 92, 321

— 7 Geo. 4. c. 64. s. 20, Q.B. 286

— 7 & 8 Geo. 4. c. 30. ss. 24, 28, Ex. 219

— 7 & 8 Geo. 4. c. 53, Q.B. 319

— 7 & 8 Geo. 4. c. 64. s. 21, Q.B. 347

— 9 Geo. 4. c. 81. s. 27, C.P. 176

— 9 Geo. 4. c. 61, Q.B. 108

— 11 Geo. 4. & 1 Will. 4. c. 68, Ex. 271

— 1 Will. 4. c. 22. s. 4, Q.B. 14, 55

— 2 Will. 4. c. 16. s. 10, Ex. 9

— 2 Will. 4. c. 45. s. 20, C.P. 253

— 2 & 3 Will. 4. c. 45. s. 27, C.P. 27, 68

— 2 & 3 Will. 4. c. 71. ss. 5, 7, Q.B. 138

— 3 Will. 4. c. 15, Q.B. 225

— 3 & 4 Will. 4. c. 27, Q.B. 202

— 3 & 4 Will. 4. c. 27. s. 36, Ex. 289

— 3 & 4 Will. 4. c. 42, Ex. 151

— 3 & 4 Will. 4. c. 42. s. 5, Q.B. 298

— 3 & 4 Will. 4. c. 42. s. 25, C.P. 142, 220

— 3 & 4 Will. 4. c. 42. s. 39, C.P. 324

— 3 & 4 Will. 4. c. 74, C.P. 1

— 3 & 4 Will. 4. c. 74. s. 83, C.P. 111

— 5 & 6 Will. 4. c. 50. ss. 85, 88, Q.B. 217

— 5 & 6 Will. 4. c. 54, Q.B. 81

— 5 & 6 Will. 4. c. 76, Q.B. 136, 206

— 6 & 7 Will. 4. c. 32. s. 2, Ex. 177

— 6 & 7 Will. 4. c. 71, Q.B. 59

— 6 & 7 Will. 4. c. 71. s. 46, Ex. 235

— 1 Vict. c. 55, Ex. 141

— 1 & 2 Vict. c. 110. s. 8, Q.B. 186

— 1 & 2 Vict. c. 110. s. 3, Ex. 53

— 1 & 2 Vict. c. 110. s. 3, Ex. 201

— 1 & 2 Vict. c. 110. s. 17, Q.B. 47, C.P. 288

— 1 & 2 Vict. c. 110. s. 18, Q.B. 68

— 1 & 2 Vict. c. 110. s. 18, C.P. 147

— 1 & 2 Vict. c. 110. s. 19, C.P. 15

— 1 & 2 Vict. c. 110. ss. 37, 55, Q.B. 57

— 1 & 2 Vict. c. 110. s. 91, C.P. 185

— 2 & 3 Vict. c. 29, C.P. 76

— 2 & 3 Vict. c. 29. s. 1, Q.B. 282

- 2 & 3 Vict. c. 29. s. 1, Ex. 61
- 2 & 3 Vict. c. 41. s. 13, Ex. 201
- 2 & 3 Vict. c. 41. s. 18, Q.B. 186
- 3 & 4 Vict. c. 24, Ex. 32
- 3 & 4 Vict. c. 26, Q.B. 208
- 3 & 4 Vict. c. 84, Q.B. 109
- 5 & 6 Vict. c. 45, Q.B. 225
- 5 & 6 Vict. c. 45, C.P. 137
- 5 & 6 Vict. c. 45. ss. 2, 3, C.P. 273
- 5 & 6 Vict. c. 94, Ex. 126
- 5 & 6 Vict. c. 98, 110, Q.B. 85
- 5 & 6 Vict. c. 109, Ex. 129
- 5 & 6 Vict. c. 116, Q.B. 50, 129, 348
- 5 & 6 Vict. c. 116. s. 10, Ex. 249
- 5 & 6 Vict. c. 122. ss. 11, 19, Q.B. 184
- 5 & 6 Vict. c. 122. s. 22, C.P. 76
- 5 & 6 Vict. s. 122. s. 22, Ex. 61
- 6 Vict. c. 18. s. 17, C.P. 143
- 6 Vict. c. 18. s. 40, C.P. 70
- 6 Vict. c. 18. s. 44, C.P. 73
- 6 Vict. c. 18. s. 60, C.P. 65
- 6 Vict. c. 18. s. 64, C.P. 142
- 6 Vict. c. 18. s. 76, C.P. 66
- 6 & 7 Vict. c. 38, Q.B. 165
- 6 & 7 Vict. c. 71. s. 46, Ex. 235
- 6 & 7 Vict. c. 73, C.P. 293
- 6 & 7 Vict. c. 73. s. 27, Q.B. 380
- 6 & 7 Vict. c. 73. s. 37, Q.B. 168, Ex. 24, 165
- 6 & 7 Vict. c. 73. s. 43, C.P. 222
- 6 & 7 Vict. c. 85, C.P. 113
- 7 Vict. c. 21, Ex. 217
- 7 & 8 Vict. c. 96, C.B. 45, Ex. 249
- 7 & 8 Vict. c. 96. s. 57, C.P. 200, 238
- 7 & 8 Vict. c. 101, Q.B. 219
- 7 & 8 Vict. c. 110, C.P. 166
- 7 & 8 Vict. c. 110, Ex. 37
- 7 & 8 Vict. c. 110. s. 45, Ex. 118
- 7 & 8 Vict. c. 110. s. 68, C.P. 305
- 7 & 8 Vict. c. 110. s. 63, C.P. 264
- 8 Vict. c. 18, Q.B. 362
- 8 & 9 Vict. c. 10, Q.B. 219
- 8 & 9 Vict. c. 20. s. 11, Ex. 263
- 8 & 9 Vict. c. 66, Q.B. 336
- 8 & 9 Vict. c. 68. s. 5, Q.B. 208
- 8 & 9 Vict. c. 109. s. 13, C.P. 102, 215
- 8 & 9 Vict. c. 126, Q.B. 381
- 8 & 9 Vict. c. 126. ss. 68, 62, 80, Q.B. 112, 224
- 8 & 9 Vict. c. 126. s. 65, Q.B. 224
- 8 & 9 Vict. c. 127, Q.B. 243
- 9 & 10 Vict. c. 28, C.P. 266
- 9 & 10 Vict. c. 38, Q.B. 336, 341
- 9 & 10 Vict. c. 66, Q.B. 277, 304, 341
- 9 & 10 Vict. c. 95, C.P. 304
- 9 & 10 Vict. c. 95, Ex. 131
- 9 & 10 Vict. c. 95. s. 53, C.P. 206, Ex. 168
- 9 & 10 Vict. c. 95. ss. 53, 63, Ex. 157
- 9 & 10 Vict. c. 95. ss. 67, 129, Ex. 163, Q.B. 172
- 9 & 10 Vict. c. 95. ss. 60, 128, 129, C.P. 212, 221
- 9 & 10 Vict. c. 95. s. 80, Ex. 174
- 9 & 10 Vict. c. 95. s. 90, Ex. 247
- 9 & 10 Vict. c. 95. s. 122, Q.B. 161
- 9 & 10 Vict. c. 95. s. 129, Q.B. 179, C.P. 248, Ex. 101, 265
- 10 & 11 Vict. c. 71, C.P. 290
- 10 & 11 Vict. c. lxxi. s. 49, Q.B. 290
- Where a statute, to protect buyers, prescribes regulations to be followed in sale and delivery of an article, price thereof not recoverable in action for goods sold and delivered, without observing regulations, C.P. 311
- Construction of Whitechapel Paving Acts as to meaning of words "within any of streets" within district, Ex. 63

— Construction of Local Act. See Prohibition.

— See Ordinance Act.

*Statute of Uses.* See Deed. Pleading.

*Subpoena*—Attachment against a party for disobeying Crown Office subpoena, requiring him to appear before Justices, to testify, &c. concerning place of last legal settlement of A. B. &c.,—granted, though subpoena did not state nor was it shown by affidavit that one of Justices was of the quorum, Q.B. 208

*Suggestion on the Roll.* See Costs.

*Sureties.* See Bankruptcy.

*Surrender.* See Lease.

*Taxes.* See Revenue.

*Tender*—Sufficiency of, where plaintiff being tenant to defendant at yearly rent of 52*l.* sent a person to him with letter:—"I have sent by the bearer 26*l.* 5*s.* 7*d.* to settle one year's rent," and defendant refused to take it, saying that more was due, Q.B. 5

— In debt for detention of a horse, defendant pleaded a lien of 10*s.* for trying the horse in harness: Plaintiff replied a tender: At time horse demanded of defendant he claimed 1*l.* 7*s.* for keep, &c., including 10*s.* for trial, whereupon defendant tendered 19*s.* 6*d.*—Tender not proved, C.P. 198

*Tithes*—In a parish where there were marsh and other ancient pasture lands, arable lands, and woodlands, there was a modus of 1*s.* per acre, payable to vicar, for all tithes except those of corn and grain, woodland being exempt from tithe by custom. Tithe Commissioner awarded a rent-charge to rector and vicar, in respect of tithe and moduses, which was confirmed under 6 & 7 Will. 4. c. 71. s. 52. Valuer, appointed under section 53, in his apportionment, charged certain of ancient pasture lands not only with amount payable in respect of modus, but with a further payment of 1*s.* per acre to rector, in part of rent-charge awarded to him in lieu of tithes of corn and grain, on ground that there was probability of such pasture lands being, at future period, converted into tillage. Commissioners decided, both on principle and on facts, that they would confirm apportionment, if they were not forbidden by a superior court:—Held, that prohibition did not lie, Commissioners having acted within their jurisdiction. Also that apportionment was correct in principle, Q.B. 59

— See Rate. Writ of Error.

*Trade*—Action for fraudulently using a tradesman's mark, though no actual damage proved, C.P. 52

— Contract in restraint of. See Master and Servant.

*Trespass*—Sufficiency of plea under 11 Geo. 2. c. 19. s. 1. as to statement of defendant's right to dis-train, Q.B. 25

— Declaration that defendant, with force and arms, &c., and with a strong hand, and against form of statute, broke and entered dwelling-house of plaintiff, and broke open doors, windows, &c., and in a forcible manner and with a strong hand dispossessed and expelled plaintiff: Plea as to breaking and entering, &c. *liberum tenementum*.—Held, that defendant might confine his justification to breaking and entering, and that plea was good; entering *manu fortis* being matter of aggravation, which defendant need not justify in a civil action, Q.B. 196

— No legal obligation on trespasser to replace what he has pulled down upon another's land, though liable in action of trespass to damages for the loss, Q.B. 233

— against a partner for entering partnership premises, C.P. 50

— Where defendant drove against plaintiff's chaise, and collision threw a person in it to the front of chaise, which caused horse to kick and break the chaise; and declaration stated, that defendant drove his chaise against plaintiff's chaise, and thereby greatly crushed, &c.—Held, a continuing trespass; and that plaintiff had properly alleged, and was entitled to recover all damage occasioned by collision, C.P. 112

— for seizing and taking goods. Plea, a seizure of goods for rent in arrear. New assignment that after seizure, and after payment of arrears of rent and costs of distress, and after defendant had received same in full satisfaction and discharge, and ought to have restored goods, defendant retained possession, and afterwards sold and disposed of them.—On special demurrer, held, that new assignment did not sufficiently allege an act of trespass; that as it did not state that the acceptance of rent took place before impounding, it must be considered to have taken place afterwards; and that where a landlord after a lawful distress and impounding accepts rent in arrear and costs of distress, he is not liable as a trespasser for retaining possession of goods distrained, and selling and disposing of them. The declaration was against two defendants, who severed in their pleadings; new assignment against one only.—Objection to new assignment as being a departure ground of special demurrer only. The plea alleged under a *videlicet* 4*l.* 1*6s.* to be rent in arrear; new assignment alleged, also under a *videlicet*, a payment of 4*l.* 1*5s.*, which was averred to be a sufficient sum to discharge arrears and costs, and to have been received in full satisfaction, &c.—A sufficient averment of payment of rent in arrear and costs, C.P. 150

— Plaintiffs were seised in fee of a close, but other persons had right to exclusive possession of surface during part of year. — Plaintiffs might maintain trespass against persons who had dug holes into subsoil during that part of year; but not for an injury committed during such portion of year which affected surface only. "Close" in a declaration in trespass includes subsoil as well as the surface, C.P. 162

— Allegation of conversion matter of aggravation only (see Pleading), Ex. 399

— See Case. False Imprisonment. Practice.

*Trial*—In ejectment lessor of plaintiff claimed under a will, dated 23rd of September 1844. Defendant claimed under subsequent will of same testator, dated 30th of December 1844. Defendant admitted that will of 23rd of September was a perfect will in every respect, and claimed right, and was allowed by Judge, to begin at trial.—Such admission not an admission of the whole of plaintiff's case, and right to begin improperly conceded to defendant. If it appear that party entitled to begin at trial has been deprived of that right, and his cause has been thereby substantially prejudiced, a new trial will be granted, C.P. 127

— See Practice.

*Trover*—Under "not possessed" evidence admissible, that goods delivered to defendant by plaintiff's wife, with his authority, Q.B. 289

— After act of bankruptcy by A, plaintiffs, who were appointed assignees on 24th of March, directed A's shop to be kept open as usual: defendants, with notice of act of bankruptcy, purchased goods at shop, which were delivered to them on 28th of February: on 9th and 23rd of April defendants, by direction of plaintiffs, as assignees, were applied to for payment, and on 14th of May there was a demand and refusal.—Held, no evi-

dence of affirmation by assignees of a contract of sale, and defendants liable in trover, C.P. 249

— Innkeeper's lien. See Lien.

— See Pleading.

*Usage*. See Railway.

*User*. See Highway.

*Variance*—Where plea stated that a material alteration had been made in contract declared on, and proceeded to specify alteration under a *videlicet*; and at trial, a different alteration, which was also material, was proved, and no objection taken on ground of variance, plaintiff cannot take advantage of variance in shewing cause against a rule nisi for leave to enter a verdict for defendants. *Semble*—That it is not necessary under such a plea to prove specific alteration alleged; and, at all events, Judge could amend plea at trial, C.P. 47

— Writ of summons in debt; commencement of declaration in form usual in debt: first count good either in debt or in assumpsit, and second and only other count good in assumpsit.—This a good declaration in assumpsit, and set aside for irregularity, as varying from the process. Plaintiff could not insist that declaration demurrable for misjoinder as an answer to application to set it aside, C.P. 101

— between rule to plead and plea pleaded. See Practice.

— See Master and Servant.

*Vendor and Purchaser*—Plaintiff contracted for purchase of estate from defendant; upon objections to the title, defendant affirmed it to be good, and threatened to resell estate; plaintiff afterwards filed bill for specific performance, and defendant, by his answer, contended that title was good; Master reported that defendant could not make a good title according to terms of contract, and plaintiff's bill was dismissed, without costs.—In action on contract for damages, by reason of defendant failing to make good title, held, that plaintiff could not recover his costs of the Chancery suit, Q.B. 85

— In action by purchaser against vendor of leasehold premises, for breach of contract in failing to make out good title, it appeared that premises were demised by A, B, and C. to J. S, who assigned to defendant. The lease contained a covenant by lessee to insure in joint names of lessors, with proviso for re-entry on breach of covenant by lessee. Premises were insured in joint names of A, B, C, and defendant.—Not a good performance of the covenant to insure, and defendant being bound to shew a good lease, liability to have lease avoided by landlord a valid objection to the title, Q.B. 94

— A person who, not dealing in the way of a common trader, sells victuals to be used for man's consumption, which afterwards prove to be unfit for human food, without warranty or fraud on his part, is not liable to the vendee, Ex. 190

— See Copyhold. Money had and received. Railway. Set-off.

*Venue de novo*—A *venire de novo* may be awarded in a criminal case where there has been a mis-awarding of jury process. But *Quare*—Whether it can issue in a case of felony on account of a defective verdict only. It may be awarded after judgment on an indictment for felony, and may issue to Quarter Sessions, Q.B. 162

*Venue*—In action on a banker's cheque cannot be changed on the common affidavit, C.P. 137

— The Court will not entertain an application to change the venue till the issues to be tried are ascertained, C.P. 175

**Venus** (continued)—Application to change, after issue and notice of trial, must shew at least that plaintiff will not be injured or delayed thereby, and that it will be more convenient to defendant, C.P. 210

—Proof of anything directly affecting the amount of damages is material evidence within meaning of ordinary undertaking on bringing back venue, Ex. 255

—Judge at chambers has jurisdiction to set aside rule to change venue, obtained on common affidavit. Where time for pleading expired on 22nd February, and defendant on 23rd took out summons for further time to plead, and on 24th order made for further time on usual terms, and defendant did not draw up order, but in afternoon of 24th (plaintiff not having signed judgment) delivered plea, with rule to change venue, obtained on common affidavit; and Judge at chambers set aside the rule.—Court (*Cresswell, J., dubitante*) rescinded the Judge's order, C.P. 326

**Vestry**—A local act empowered "the governors and guardians to call a vestry meeting of the inhabitants of the said parish on Easter Tuesday in every year; at which said vestry meeting all the vacancies in the list of governors and guardians shall be filled up by poll or ballot, or in such way of election as shall be deemed most proper and convenient."—Held, that the meeting must adopt some method of election which secures the expression of will of inhabitants in vestry assembled, as to each candidate; that on a poll being properly demanded, vestry may be adjourned for purpose of enabling all, who are entitled, to give their votes, and that election not confined to those then present. The act, after providing for appointment of governors and guardians, and for filling up of vacancies by remaining governors and guardians, enacts, that after first year, "the inhabitants of the parish in vestry assembled," are to nominate and choose twelve persons, &c.—Held, upon motion for mandamus, that meeting was to be called by, and therefore writ directed to the governor and guardians, Q.B. 220

**View**—by jurors. See Practice.

**Wager.** See Gaming.

**Wages**—not recoverable under *indebitatus* counts by servant discharged without cause, Ex. 18

**Waiver.** See County Court.

**Warrant of Attorney**—Upon motion to enter up judgment upon warrant of attorney more than a year old, not necessary to shew to Court that defendant is now alive, if defendant has agreed to dispense with so doing, Q.B. 19

—Where warrant of attorney, bearing date 24th of February, 1847, executed by defendant 20th of March in same year, given to secure payment of money "on 20th day of March next," payment does not become due until 20th of March, 1848, and execution having issued previous to that time, set aside. Upon motion, by assignees, to set aside warrant of attorney given by bankrupt, Court will not enter upon question whether same was given by way of fraudulent preference, Q.B. 49

—See Bankrupt.

**Warranty**—When implied on sale of provisions (see Vendor and Purchaser), Ex. 190

**Waste**—Though a strip of waste land between an old inclosure and a highway belongs by presumption of law to the owner of the old inclosure, yet that presumption may be rebutted by shewing there is other land adjoining strip, to which it may have formerly belonged, C.P. 225

**Way.** See Devise.

**Wharfinger**—Duty of, in mooring vessels. See Case. **Will**—is to be construed so as to reconcile words *prima facie* repugnant, Q.B. 119

—Testator, by will of November 1845, devised estate to his "dear wife Caroline." He had been twice married, in 1834 to Mary, in 1840 to Caroline; they both survived him, and he lived with the latter till his death in November 1845:—The words "dear wife" not inapplicable to Caroline, and she entitled as devisee, C.P. 108

—Case in which testator having died, leaving other instruments of prior date to his will duly executed and uncanceled, by which he devised the whole legal and beneficial interest in his estate, the will alone valid as a disposition of legal estate. What devise gives a legal estate, C.P. 316

—Testatrix, in 1786, devised real estate to her brother-in-law T. K. and her sister A. K., his wife, for their lives, and from and after their decease to her nephew, J. G. K., son of said T. K. and A. K., his heirs and assigns for ever: but in case J. G. K. should not survive T. K. and A. K., and should die without an heir lawfully begotten, then and in such case testatrix devised same to *next heir* of said T. and A. K., *their* heirs and assigns for ever: J. G. K. died an infant in lifetime of his parents; but soon after his death, another son of T. and A. K. was born, who was also called J. G. K. A. K. died in 1795. The second J. G. K. married, and had issue a son, J. K., and died in 1823: T. K. died in 1842.—Held, that "next heir" meant the *true heir* of T. and A. K.; and executory devise over took effect only on death of T. K., surviving devisee for life, when estate vested in J. K., the heir of T. and A. K., Ex. 154

—See Devise.

**Witness**—Where commission to examine witnesses abroad issues under 1 Will. 4. c. 22. s. 4, names of Commissioners and place at which it is to be executed must be specified in order authorizing commission, or in some subsequent order. To commission authorizing swearing of interpreter on examination of French witnesses,—return shewing that interpreter had been sworn, need not state that he interpreted evidence of any of the witnesses. Whether return to commission directing witnesses to be examined apart must expressly state that they were so examined, Q.B. 14

—Criminal information not an action depending within 1 Will. 4. c. 42, and order for examination of witness on interrogatories not made in such a matter, Q.B. 55

—Commission to examine witnesses directed Commissioners to summon witnesses at certain place, to be appointed by them for that purpose, in Newfoundland, and then and there examine them apart, *visd voce*, and commission and depositions to be returned sealed up: it was proved that papers in handwriting of Commissioners, and sealed up, purporting to be return of commission, were delivered at Master's office: commission returned was identified as that issued: examinations did not on face of them purport to be taken apart.—The commission sufficiently provided for time, place, and manner of examining witnesses: that there was due proof of return; and that it must be presumed that witnesses were examined apart, Q.B. 209

—Defendant who suffers judgment by default a competent witness for plaintiff in action for malicious prosecution, Q.B. 313

—Judge's order for commission to examine, need not contain commissioners' names. Commission

not a writ, nor has it incidents of one, and need not be tested in term, Q.B. 355

— Where a witness volunteered a statement which was not evidence, held that it was the duty of Judge not to notice it, and that he was right in refusing to recall witness to correct mistake of jury as to what statement was, C.P. 62

— In action of tort, evidence of a co-defendant who has suffered judgment to go by default, not admissible; and being a party to record, interested in event of the suit, his evidence is not made admissible by 6 & 7 Vict. c. 85, C.P. 113

— Attesting Witness. See Evidence.

— See Poor Law. Trial.

*Words*—"Appropriation," Ex. 307

— "Cause of Action," Ex. 157

— "Close," C.P. 162

— "Commit suicide," in life policy, C.P. 2

— "Estate," "Who have issue," Ex. 327

— "Horse-dealer," Ex. 309

— "Next heir," Ex. 154

— "Nominate," Q.B. 1

— "Spirits" and "sweet spirits of nitre," Ex. 9

— "Survivors or survivor," Ex. 331

— "Town," Ex. 262

*Writ of Error*—Court of Requests Act provided that plaintiff suing in any of courts at Westminster for cause of action recoverable in court of requests,

should not be entitled to any costs: upon error *coram nobis*, error assigned was, that judgment had been entered for debt and costs, whereas defendant, when action was brought, resided within jurisdiction of court of requests, and was liable to be sued in that court: plea, *in nullo est erratum*.—Judgment, so far as regarded costs, reversed, Q.B. 137

— A rule to assign errors, before moving to quash writ for delay, under 8 & 9 Vict. c. 68. s. 5. is not necessary. Affidavit that since filing writ of error "no process or other proceeding has been had or taken by or on behalf of the said defendants to prosecute the same,"—is a sufficient statement that error not assigned, Q.B. 208

— does not lie upon a judgment of a superior court upon a feigned issue, under 6 & 7 Will. 4. c. 71, s. 46. (the Tithe Commutation Act.) The Court of Exchequer Chamber quashed a writ of error on such a judgment, Ex. 235

— See Habeas Corpus. Arrest.

*Writ of Trial*—may be tested in vacation, Q.B. 216

— The plaintiff having obtained a verdict on writ of trial, a Judge at chambers, instead of staying execution of writ, made an order, 6th of July 1846, for setting *verdict* aside for irregularity of the notice of trial. This not a nullity, but an irregularity; and an application to rescind order made on last day of Trinity term 1847 too late, Ex. 52



# TABLE OF THE CASES

IN

## COMMON LAW.

VOL. XXVI.—XVII. NEW SERIES.

### QUEEN'S BENCH.

- |   |   |                                       |
|---|---|---------------------------------------|
| Absolon v. Marks, 7                     | East and West India Docks and             | M'Dowall v. Boyd, 295                 |
| Angell v. Harrison, 25                  | Birmingham Junction Railway               | M'Ewen v. Woods, 206                  |
| Appledore Tithe Commutation,            | Company and Bradshaw, in re,              | M'Gregor v. Fiaken, 186               |
| in re, 59                               | 362                                       | Malden v. Fyson, 85                   |
| Barber v. Lemon, 69                     | Fearon v. Nowall, in re, 161              | Mason v. Lambert, 366                 |
| Batley v. Ashton-under-Lyne, 77         | Filliter v. Phippard, 89                  | Mills v. Blackall, 31                 |
| Bell v. Lord Ingestrie, ( <i>Law J.</i> | Flanders v. Bunbury, ( <i>Law J. Rep.</i> | Monkleigh, ex parte the parish of,    |
| <i>Rep.</i> 1849)                       | 1849)                                     | 112                                   |
| Bird v. Smith, 309                      | Ford v. Beech, 114                        | Newton v. Banks, 137                  |
| Blake v. Newburn, 216                   | Foster v. Temple, 230                     | Nichol v. Alison, 355                 |
| Bowdler, in re, 243                     | Friar v. Grey, 301                        | Nind v. Rhodes, 179                   |
| Bowen v. Owen, 5                        | Gent v. Cutts, 55                         | Normansell v. Creft, 297              |
| Bowers v. Nixon, ( <i>Law J. Rep.</i>   | Giles v. Groves, 323                      | Padwick v. Turner, 7                  |
| 1849)                                   | Ginger v. Pycroft, 182                    | Palk v. Force, 299                    |
| Broome v. the Queen, 286                | Greville v. Stulz, 14                     | Parker v. Bayley, 45                  |
| Browne v. Burton, 49                    | Hadrick v. Heslop, 313                    | Penniall v. Harborne, 94              |
| Campbell v. the Queen, 162              | Hall v. Bainbridge, 317                   | Pike v. Stephens, 282                 |
| Carruthers v. West, 4                   | Harvey v. Scott, 9                        | Plumer v. Briscoe, 158                |
| Chabot, in re, 336                      | Henderson v. Henderson, 209               | Politt v. Forrest, 291                |
| Christopherson v. Bare, 109             | Hilton v. Lord Granville, ( <i>Law</i>    | Pollock v. Stables, 352               |
| Clegg v. Dearden, 233                   | <i>J. Rep.</i> 1849)                      | Preston, in re, 21                    |
| Collett v. Curling, 216                 | Hoare v. Silverlocke, 306                 | Pye v. Mumford, 138                   |
| Connop v. Levy, 125                     | Hooper v. Lane, 189                       | Randall, ex parte, in re —, 232       |
| Cornewall v. Ives, 103                  | Horner v. Denham, 29                      | Regina v. Aldborough, ( <i>Law J.</i> |
| Cousens v. Harris, 273                  | Humble v. Hunter, 350                     | <i>Rep.</i> 1849)                     |
| Cummings v. Ince, 105                   | Jackson v. Collins, 142                   | — v. Belton, 108                      |
| Cutler v. Bower, 217                    | Jacobs v. Tarleton, 194                   | — v. Birmingham, the Mayor,           |
| Dails v. Lloyd, 247                     | Jefferies v. Beart, 290                   | &c. of, 85                            |
| Davison v. Wilson, 196                  | Jones v. Jones, in re, 170                | — v. Broome, 208                      |
| De Medina v. Grove, 321                 | — v. Robin, 121                           | — v. Byron, 326                       |
| Doe d. Basto v. Cox, 3                  | Kemp v. Clark, 305                        | — v. Canterbury, the Arch-            |
| — Biddulph v. Poole, 143                | Kempe v. Gibbon, 298                      | bishop of, 262                        |
| — Buddle v. Lines, 108                  | Laurie v. Bendall, 348                    | — v. Chadwick, 81                     |
| — Crawley v. Gutteridge, 99             | Lewis v. Hance, 172                       | — v. Collingwood, 342                 |
| — Egremont v. Courtney, 151             | — v. Harris, 129                          | — v. Crispin, 214                     |
| — v. Williams, 154                      | Lilley v. Elwin, 132                      | — v. Dover, the Mayor of, 136         |
| — v. Langdon, ( <i>Law J.</i>           | — v. Harvey, 367                          | — v. East Mark, the Tything           |
| <i>Rep.</i> 1849)                       | Lindsay v. Leigh, 111                     | of, 177                               |
| — Millett v. Millett, 202               | London and Brighton Railway               | — v. Fontaine Moreau, 187             |
| — Shrewsbury v. Keeling, 199            | Company v. London, Brighton               | — v. Gillyard, 319                    |
| — Snape v. Nevell, 119                  | and South Coast Railway                   | — v. Grafton, the Duke of, 219        |
| Doughty v. Bowman, 111                  | Company, ex parte, 215                    | — v. Grimshaw, 19                     |
| Douglas v. the Queen, 347               | London, Mayor, &c. of, v. the             | — v. Hammeramith, 109                 |
| Dyer v. Cowley, 360                     | Queen (re Ashurst), 330                   | — v. Hayward, 223                     |



## TABLE OF THE CASES.

- |  |  |   |
|--|--|---|
| <p>Regina v. Higgins, 63<br/>         — v. Hunt, 50<br/>         — v. Kensington, 332<br/>         — v. the Inhabitants of Ad-<br/>         dingham, 350<br/>         — v. — Chatham, 331<br/>         — v. — Colerne, 209<br/>         — v. — Dukinfield, 183<br/>         — v. — East Stonehouse,<br/>         336<br/>         — v. — Glossop, 359<br/>         — v. — Gomersal, 329<br/>         — v. — Halifax (Halifax<br/>         and Alnwick), 277<br/>         — v. — Harrow-on-the-<br/>         Hill, 304<br/>         — v. — Leeds, 8<br/>         — v. — Mylor, 24<br/>         — v. — St. Giles's, Col-<br/>         chester, 296<br/>         — v. — St. Mary, White-<br/>         chapel, 341<br/>         — v. — St. Michael's, Co-<br/>         ventry, 312<br/>         — v. — St. Thomas, New<br/>         Sarum, 339<br/>         — v. — Salford, 357<br/>         — v. — Sheffield, 288<br/>         — v. — Stainforth, 89<br/>         — v. — Upton St. Leo-<br/>         nard's, 55</p> | <p>Regina v. the Justices of Cum-<br/>         berland, 102, 272<br/>         — v. — Lancashire, 77,<br/>         272<br/>         — v. — Middlesex, 181<br/>         — v. — Suffolk, 217<br/>         — v. — Wilts, 206<br/>         — v. London and South West-<br/>         ern Railway Company, 326<br/>         — v. Lord, 352<br/>         — v. Phillips, 165<br/>         — v. St. Mary, Newington, 220<br/>         — v. St. Pancras, 271<br/>         — v. Schlesinger, 72<br/>         — v. Shaw, 232<br/>         — v. Tyrwhitt, 224<br/>         — v. Vickery, 208<br/>         — v. the Commissioners of<br/>         Woods and Forests (re<br/>         Budge), 341<br/>         Rex v. Higgins, 63, n.<br/>         Ringham v. Clements, 289<br/>         Robbins v. Fennell, 77<br/>         Robertson v. Norris, 201<br/>         Rogers v. Brenton, 34<br/>         Rowlands v. Samuel, 65<br/>         Russell v. Smith, 225<br/>         Ryalls v. the Queen, 168<br/>         Ryan v. Sams, 271<br/>         Sayer v. Dufaur, 50<br/>         Simms v. Henderson, 209</p> | <p>Simpson v. Margetson, 81<br/>         — v. Robinson, (<i>Law J. Rep.</i><br/>         1849)<br/>         Sleeman v. the Governors and Com-<br/>         pany of the Copper Mines of<br/>         England, 113<br/>         Smith v. Wetherell, 57<br/>         Sparrow v. Reed, 183<br/>         Spooner v. Payne, 68<br/>         St. Nicholas, Deptford, v. Sketch-<br/>         ley, 59<br/>         Stevens v. Jeacocke, 163<br/>         Stindt v. Roberts, 166<br/>         Tassie v. Kennedy, 215<br/>         Tew v. Harris, 1<br/>         Thame v. Boast, 339<br/>         Tolhurst v. Notley, 97<br/>         Tripp v. Stanley, 19<br/>         Walker v. Mellor, 103<br/>         Watkins v. Tarpley, 47<br/>         Webster v. Watts, 73<br/>         Westaway v. Frost, 286<br/>         Wharton v. Naylor, 278<br/>         Whitaker v. Harrold, 342<br/>         Wickham v. Lee, in re, (<i>Law J.</i><br/> <i>Rep.</i> 1849)<br/>         Wilding v. Temperley, 184<br/>         Wilkins v. Wood, 319<br/>         Winsor v. Dunford, in re, (<i>Law</i><br/> <i>J. Rep.</i> 1849)<br/>         Wray v. Toke, 355<br/>         Zohrab v. Smith, in re, 174</p> |
|--|--|---|

## COMMON PLEAS.

- |  |   |  |
|--|---|--|
| <p>Allworth v. Dore, 142<br/>         Armstrong v. Christiani, 181<br/>         Autey v. Hutchinson, 304<br/>         Bailey v. Robson, 248<br/>         Baker v. Plaskitt, 89<br/>         Batty v. Marriott, 140, 215<br/>         Benham v. Gray, 50<br/>         Bickford v. Parson, 192<br/>         Birch v. Edwards, 32<br/>         Boozey v. Tolkien, 137<br/>         Brown v. Chapman, 329<br/>         — v. De Winton, 281<br/>         — v. Mallet, 227<br/>         Brunswick, Duke of, v. Sloman, 81<br/>         Burton v. Gery, 66<br/>         — v. Langham, 253<br/>         Campbell v. Smart, 63<br/>         Card v. Case, 124<br/>         Carr, ex parte, 107<br/>         Cattlin v. Barker, 62<br/>         Chaddock v. Wilbraham, 176<br/>         Clift v. Schwabe, 2<br/>         Cocks v. Purday, 273<br/>         Coles v. Bulman, 302<br/>         Corder v. Universal Gas-Light<br/>         Company, 305<br/>         Cox v. Glue, 162</p> | <p>Cox v. Saint, 162<br/>         — v. Mousley, 162<br/>         Cundell v. Dawson, 311<br/>         Daly, in re, 1<br/>         Darrington v. Price, 326<br/>         Dicker v. Jackson, 234<br/>         Doe d. Bather v. Brayne, 127<br/>         — Bloomfield v. Eyre (<i>Law</i><br/> <i>J. Rep.</i> 1849)<br/>         — Duntze v. Duntze, 220<br/>         — Gains v. Roast, 108<br/>         — Harrison v. Hampson, 147,<br/>         225<br/>         — Love v. Roe, 176<br/>         — Lord v. Crago, 263<br/>         — Phillips v. Rollings, 268<br/>         Downing v. Luckett, 31<br/>         Dunn, in re, 97<br/>         Edwards v. Lawless, 293<br/>         Elderton v. Emmens, 277<br/>         — v. — (in error), 307<br/>         Engstrom v. Brightman, 142<br/>         Eyre v. Scovell, 182<br/>         Field v. McKensie, 98<br/>         — v. Sawyer, 211<br/>         Finney v. Tootel, 158<br/>         Follett v. Hoppe, 76</p> | <p>Francis v. Dodsworth, 185<br/>         Gay v. Lander, 286<br/>         Gilbertson v. Richardson, 112<br/>         Hams v. Pawlett, 210<br/>         Hardingham v. Allen, 198<br/>         Hartley v. Cummings, 84<br/>         Harvey v. Johnston, 298<br/>         Hayward v. Bennett, 182<br/>         Heraud v. Leaf, 57<br/>         Hitchin v. Groom, 145<br/>         Hoare v. Lee, 196<br/>         Hodge v. Churchyard, 175<br/>         Humphries v. Longmore, 328<br/>         Hutchinson ex parte, 111<br/>         In re —, 110<br/>         Ireland v. Thompson, 241<br/>         Jones v. Sawkins, 92<br/>         Kepp v. Wiggott, 295<br/>         King v. Norman, 23<br/>         Kingdom v. Cox, 155<br/>         Leslie v. Richardson, 324<br/>         Lindus v. Bradwell, 121<br/>         Linegar v. Hodd, 106<br/>         Lloyd v. Jones, 206<br/>         Lowless, in re, 223<br/>         Matthew v. Broughall, 221<br/>         Maybury v. Mudie, 95</p> |
|--|---|--|

## TABLE OF THE CASES.

- |  |   |  |
|--|---|--|
| <p>Meeten v. Nicholls, 212<br/> Mollett v. Wackerbarth, 47<br/> Moore v. Foster, 101<br/> Nash v. Collier, 91<br/> Nathan v. Elworthy, 116<br/> Ness, ex parte, 15<br/> Newton v. Conyngham, 200<br/> — v. — (in error), 288<br/> Onions v. Bowdler, 70<br/> Owen v. Challis, 266<br/> Palmer v. Allen, 65<br/> Peter v. Daniel, 177<br/> Peterson v. Davis, 290<br/> Pilbrow v. Pilbrow's Atmospheric<br/> Railway and Canal Propulsion<br/> Company, 166<br/> Pinkus v. Sturch, 120<br/> Plenty v. West, 316</p> | <p>Prior v. Waring, 73<br/> Rayner, ex parte, 16<br/> Regina v. the Sheriff of Devon,<br/> 116<br/> Richardson v. Leslie, 324<br/> Ricketts v. Bennett, 17<br/> Rizzi v. Foletti, 213<br/> Rodgers v. Nowill, 52<br/> Rushbrook v. Hood, 58<br/> Sheldon v. Fletcher, 34<br/> Smart v. Sanders, 258<br/> Smith v. Dearlove, 219<br/> — v. Thompson, 159<br/> Stead v. Williams, 109<br/> Streeter v. Bartlett, 140<br/> Thorpe v. Barber, 113<br/> Tilt v. Dixon, 61<br/> Toby v. Lovibond, 201</p> | <p>Tolson v. the Bishop of Carlisle,<br/> 195<br/> Toms v. Luckett, 27<br/> Tubby v. Fisher, 190<br/> — v. Stanhope, 190<br/> Tunncliffe v. Tedd, 176<br/> Valpy v. Sanders, 249<br/> Varney v. Hickman, 102<br/> Watson v. Cotton, 68<br/> — v. Pitt, 143<br/> Webb v. Inwards, 157<br/> West v. Nibbs, 150<br/> White v. Woodward, 209<br/> Whitehouse v. Liverpool Gas Com-<br/> pany, 287<br/> Williams v. Archer, 82<br/> Wontner v. Shairp, 38<br/> Worthington v. Warrington, 117</p> |
|--|---|--|

## EXCHEQUER OF PLEAS.

- |  |  |   |
|--|--|---|
| <p>Ackland v. Buller, (<i>Law J. Rep.</i><br/> 1849)<br/> Adams v. Freemantle, 312<br/> Allen v. Edmundson, 291<br/> — v. Sharp, 209<br/> Anonymous (Attorney), 20<br/> Ashley v. Pratt, 135<br/> Attorney General v. Bailey, 9<br/> Augustin v. Challis, 73<br/> Baddeley v. Gingell, 63<br/> Baldon v. Walton, 357<br/> Bank of Scotland v. Fenwick, 92<br/> Barber v. Grace, 122<br/> Bates v. Townley, (<i>Law J. Rep.</i><br/> 1849)<br/> Bayliffe v. Butterworth, 78<br/> Belcher v. Bellamy, 219<br/> Black v. Baxendale, 50<br/> Blackburn v. Smith (<i>Law J. Rep.</i><br/> 1849)<br/> Brymer v. Thames Haven Dock<br/> and Railway Company (<i>Law J.</i><br/> <i>Rep.</i> 1849)<br/> Boulcott v. Woolcott, 149<br/> Bousfield v. Edge, 169<br/> Brown v. Hartill, 278<br/> Burnby v. Bollitt, 190<br/> Butler v. Corney, 265<br/> Caine v. Horsfall, 25<br/> Chamberlain v. Birkenhead and<br/> Chester Railway (<i>Law J. Rep.</i><br/> 1849)<br/> Cherry v. Heming, 306<br/> Clark v. Woods, 349<br/> Clement v. Todd, 31<br/> Connop v. Challis, 319<br/> Cooke v. Blake, 370<br/> — v. Seeley, 286<br/> — v. Turner, 106<br/> Curling v. Wood, 301<br/> Cutbill v. Kingdon, 177</p> | <p>Deakin v. Penniall, 217<br/> Dodgson v. Scott, 321<br/> Doe d. Burton v. White, 327<br/> — Knight v. Chaffey, 154<br/> — Roberts v. Williams, 51<br/> — Strickland v. Woodward, 1<br/> — v. Roe, 176<br/> Done v. Whalley, 225<br/> Duke v. Andrews, 231<br/> — v. Forbes, 37<br/> — v. Tucker, 18<br/> Duncan v. Benson, 238<br/> Edmonds v. Bland (<i>Law J. Rep.</i><br/> 1849)<br/> Egginton v. Cumberledge, 24<br/> Elliott v. South Devon Railway<br/> Company, 262<br/> Entwistle v. Dent, (<i>Law J. Rep.</i><br/> 1849)<br/> Esdaile v. Trustwell, 13, 294<br/> Faviell v. Eastern Counties Rail-<br/> way Company, 223, 297<br/> Fewings v. Tindal, 18<br/> Freeman v. Cooke, (<i>Law J. Rep.</i><br/> 1849)<br/> — v. Edwards, 258<br/> Fryer v. Andrews, 25<br/> Galsworthy v. Strutt, 226<br/> Garwood v. Ede, 29<br/> Gawler v. Chaplin, (<i>Law J. Rep.</i><br/> 1849)<br/> Giles v. Hutt, 121<br/> Goodchild v. Leadham, 90<br/> Goudy v. Duncombe, 76<br/> Graham v. Ingleby, 313<br/> Green v. Laurie, 61<br/> Grimbly v. Aykroyd, in re, 157,<br/> Grout v. Enthoven, 70<br/> Gwynne v. Knight, in re, 168<br/> Hague v. Dandeson, 269<br/> Haigh v. Jagger, 110</p> | <p>Haigh v. Jagger, (<i>Law J. Rep.</i><br/> 1849)<br/> Hall v. Lack, 43<br/> Harries v. Lawrence, 101<br/> Harrison v. Clifton, 233<br/> — v. Watt, 74<br/> Hawkins v. Wilkinson, 230<br/> Heseltine v. Siggers, (<i>Law J. Rep.</i><br/> 1849)<br/> Hibberd v. Knight, 119<br/> Hills v. Haymen, 206<br/> Hooper v. Williams, 316<br/> Horsfall v. Key, 266<br/> Innes v. Munro, 71<br/> Ivimey v. Marks, 165<br/> Jacobs v. Hyde, 249<br/> Jones v. Bonner, 343<br/> — v. Brown, 163<br/> — v. Harrison, 132<br/> — v. Robinson, 36<br/> — v. Smith, 255<br/> — v. — ( <i>Law J. Rep.</i><br/> 1849)<br/> Jowett v. Spencer, 367<br/> Judson v. Bowden, 172<br/> Kerfoot v. Edwards, 203<br/> Kershaw v. Bailey, 129<br/> King v. Cole, 283<br/> Kingsbridge Mill Company v.<br/> Plymouth, Devon and Stone-<br/> house Baking and Grinding<br/> Company, 252<br/> Lander, in re, 350<br/> Lattimore v. Garrard, 100<br/> Law v. Dodd, 117<br/> Laws, in re, 126<br/> Lee v. Stone, 331<br/> Ley v. Barlow, 105<br/> Lockett v. Nicklin (<i>Law J. Rep.</i><br/> 1849)<br/> M'Gregor v. Fiskien, 201</p> |
|--|--|---|

## TABLE OF THE CASES.

Machin v. London and South-Western Railway Company, 271	Pratt v. Ashley, 135	Stones v. Menhem, 215
Mailè v. Mann, 336	Pratt v. Pratt, 299	Suker v. Neal, 56
Marsh v. Davies, 94	Price v. Groom, 346	Symonds v. Dimsdale, 247
Massey v. Johnson, 182	Regina v. Renton, 204	Tattersall v. Parkinson, 208
Mayew v. Blofeld, 28	— v. Speller, 69	Thomas v. Hudson, 365
Middleditch v. Ellis, 365	Richards v. James, 277	Thompson v. Langridge, 4
Monypenny v. Dering, 81	— v. Suffield, 362	— v. Universal Salvage Company, 118
Moulton v. Camroux, ( <i>Law J. Rep.</i> 1849)	Ridley v. the Plymouth, Devon and Stonehouse Baking and Grinding Company, 252	Thorpe v. Plowden, 235
Mounsey v. Perrott, 281	Riley v. Warden ( <i>Law J. Rep.</i> 1849)	Turner v. Metropolitan Live Stock Company, 264
Murray v. Mann, 256	Robinson v. Harman ( <i>Law J. Rep.</i> 1849)	Turnbull v. Pell, ( <i>Law J. Rep.</i> 1849)
Newry and Enniskillen Railway Company v. Edmunds, 102	— v. Lenaghan, in re, 174	Vane v. Cobbold, 97
Newry and Enniskillen Railway Company v. Edmunds, ( <i>Law J. Rep.</i> 1849)	Rogers v. Chilton, 8, 345	Van Casteel v. Booker, ( <i>Law J. Rep.</i> 1849)
Nicholson v. Brooke, 229	Roret v. Lewis, 99	Varley v. Leigh, 289
North Staffordshire Railway Company and Landon, in re, 350	Salkeld v. Johnson, ( <i>Law J. Rep.</i> 1849)	Venables v. East India Company, ( <i>Law J. Rep.</i> 1849)
— and Wood, in re, 354	Samuel v. Buller, 54	Wait v. Baker, 307
Ollive v. Booker, 21	Sanson v. Price, 205	Walker v. Macdonald, 373
Ordnance Officers, The, and Laws, in re, 126	Sayer v. Glossop, 300	Wallis v. Swinburne, 169
Orgill v. Bell, 52	Serrell v. Allen, 246	Webster v. Crouch, 303
Oswald v. Thompson, 234	Sharland v. Loaring, 32	Wetherell v. Langston, 338
Parker v. Crouch, 131	Shaw v. Key, 17	Watson v. Pearson, ( <i>Law J. Rep.</i> 1849)
Parrington v. Moore, 219	Simpson v. Rand, 146	Whitwell v. Harrison, ( <i>Law J. Rep.</i> 1849)
Pegler v. Hislop, 53	Smeeton v. Collier, 57	Williams v. Pigott, 196
Pilkington v. Cooke, 141	Smith v. Tateham, 198	Winterbottom v. Lees, 217
Platell v. Bevill, 249	— v. Wilson, in re, ( <i>Law J. Rep.</i> 1849)	Witham v. Lynch, 13
Pontifex v. De Maltzoff, 55	Southee v. Denny, 151	Wood, in re, 354
	Spindler v. Grellett, 6	Wright, in re, 128
	Spotswood v. Barrow, 98	

### APPEAL CASES IN THE HOUSE OF LORDS

Will be found at the end of the Reports of Cases in the Exchequer of Pleas.

### MAGISTRATES' CASES.

[The Names of these Cases have been embodied in the foregoing Table, referring to the *placita*, but they will also be found in a Table at the end of the Index to the Magistrates' Cases.]

*Erratum.*—Exchequer of Pleas, page 336, second line of the head note, for "issue," read *serve*.













